ORIGINAL

In The Supreme Court of Ohio

State of Ohio,	:	
Appellee,	:	Case No. 2010-2198
-vs-	:	Appeal taken from Butler County Court of Common Pleas
Calvin McKelton,	:	Case No. 2010-02-0189
Appellant.	:	**Capital Case**

APPELLANT MCKELTON'S UNOPPOSED MOTION FOR THE COURT TO STRIKE ITS JANUARY 28, 2011 NOTICE OF FILING OF THE RECORD AND TO ISSUE A NOTICE OF THE RECORD BEING FILED ON JULY 1, 2011

AN EXPEDITED RULING ON THIS MOTION IS REQUESTED

Office of the Ohio Public Defender

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AN EXPEDITED RULING ON THIS MOTION IS REQUESTED

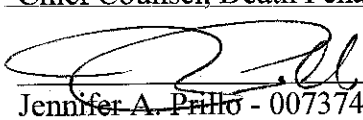
Appellant Calvin McKelton, through counsel, requests that this Court strike its January 28, 2011 notice of the filing of the record and issue a notice that the record was filed on July 1, 2011. Because Appellant's Merit Brief is currently due on July 27, 2011, Appellant seeks an expedited resolution to his motion. The State is not opposed to this motion.

The reasons in support of this motion are set forth in the accompanying Memorandum.

Respectfully submitted,

Office of the
Ohio Public Defender

Pamela J. Prude-Smithers-0062206
Chief Counsel, Death Penalty Division



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MEMORANDUM

Appellant Calvin McKelton was convicted of capital murder and sentenced to death in the Court of Common Pleas of Butler County. He timely filed his notice of appeal on December 17, 2010. The record was due to be filed by Appellant on March 21, 2010. *See* Sup. Ct. Prac. R. 19.5(A)(1).

The Butler County Clerk of Courts transmitted part of the record from the trial court on January 28, 2011, certifying that "the attached is the record in this case, consisting of the original papers and exhibits to those papers; the transcript, if available; and certified copies of the journal entries and the docket of the case." Pursuant to Sup. Ct.R. Prac. 19.5(B)(3), on January 28, 2011 this Court issued a notice to counsel that the record had been filed.

Upon review of the record, counsel for Appellant learned that the transcript had not been filed. What was filed with this Court were eight packets of transcriptions of individual witnesses, each one stating "partial transcript of trial testimony" on its cover page; and one packet entitled "Motion." The record did not include transcripts of crucial events such as opening and closing arguments, sidebars, voir dire, motions hearings (except for the August 6, 2010 hearing), pretrial and status conferences, and the sentencing hearing. Also missing from the record were all of the trial exhibits.

On March 17, 2011, prior to the date on which the record was due, Appellant moved for an extension of sixty days to file the record. This Court granted the motion, and Appellant's record was then due to be filed on May 20, 2011. Shortly before that date, the court reporter informed Appellant's counsel that she would need additional time to complete the transcript. Appellant then moved for an extension of time until July 1, 2011 to file the transcript with the clerk of this Court. That motion was likewise granted.

The transcript and exhibits were filed with the clerk of this Court on July 1, 2011. On that same day, this Court issued a letter to Appellant's counsel indicating that "the filing of these additional portions of the record does not affect the time frame for filing merit briefs under the Supreme Court Rule of Practice."

Appellant requests that this Court strike its January 28, 2011 notice that the record had been filed and issue a new notice indicating that the record was filed on July 1, 2011 (making Appellant's merit brief due on December 28, 2011). It is simply not possible for Appellant's counsel to read and digest the transcript for a capital jury trial and then prepare a merit brief by July 27, 2011.

Appellant's prior two motions for extensions of time were not motions to supplement the record, they were motions for extensions of time in which to file the transcript. Additionally, the March 18, 2011 motion also sought a stay of briefing pending the completion of the record. Supreme Court Practice Rule 19.5(A)(2) provides that the "appellant shall take any action necessary to enable the clerk to assemble and transmit the record, including, if required, filing a motion for an extension of time for transmission of the record . . . " Appellant filed two such motions, and one of those was filed after the record was accepted by the clerk of this Court but prior to the date on which the record was due.

This is not a case in which the record was supplemented with a few motions or the transcript of a pretrial hearing. A mere 385 pages of testimony was transcribed and fifty pages of a motion hearing. Yet, the court reporter, Jennifer Olivier, affied that the transcript would be in excess of 2,500 pages. *See* Appellant's May 18, 2011 Motion for Extension of Time to File Transcript. Put another way, over eighty percent of the transcript and all of the trial exhibits were missing from this Court's record until July 1, 2011.

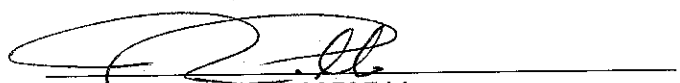
Appellant's counsel cannot fulfill their duties to their client without the time necessary to review and digest the entire record in this case—a record which was not even substantially complete until July 1, 2011. This Court has stated that it "cannot countenance a situation where a person engaged in a contest with the state for his life should be placed in the untenable position of having to present his case before an appellate court without a comprehensive record to assist him." *State ex rel. Spirko v. Court of Appeals*, 27 Ohio St. 3d 13, 18 (1986). While Appellant now has the comprehensive record available to him, that is meaningless if he is not given adequate time to make use of that record.

Accordingly, Appellant requests that this Court issue a new notice of the filing of the record, indicating that the record was filed on July 1, 2011, so that Appellant's brief will be due on December 28, 2011. Alternatively, Appellant requests that this Court stay the briefing and order that his brief be filed by December 28, 2011. On July 11, 2011 undersigned counsel spoke to Butler County Assistant Prosecutor David Kash who indicated that he is not opposed to this motion.

Respectfully submitted,

Office of the Ohio Public Defender

Pamela J. Prude-Smithers - 0062206
Chief Counsel, Death Penalty Division



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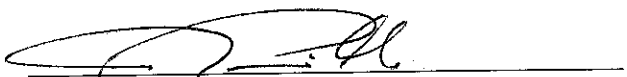
Counsel For Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT MCKELTON'S MOTION APPELLANT MCKELTON'S MOTION FOR THE COURT TO STRIKE ITS JANUARY 28, 2011 NOTICE OF FILING OF THE RECORD AND TO ISSUE A NOTICE OF THE RECORD BEING FILED ON JULY 1, 2011 was forwarded by regular U.S. Mail to Michael Gmoser, Butler County Prosecutor, 315 High Street, 11th Floor, Hamilton, Ohio 45011, this 12th day of July 2011.



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