

ORIGINAL

In The Supreme Court Of Ohio

State Of Ohio, :  
 Appellee, :  
 -Vs- : Case No.: 2010-2198  
 Calvin McKelton, :  
 Appellant. : **This Is A Capital Case.**

On Appeal From The Court Of  
 Common Pleas Of Butler County  
 Case No. CR 2010-02-0189

**MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION  
 TO STRIKE PROPOSITION OF LAW XV(A) OF APPELLANT'S REPLY BRIEF**

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 Butler County Prosecutor

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 SUPREME COURT OF OHIO

## MEMORANDUM IN SUPPORT

The State of Ohio has sought to strike arguments made in Proposition of Law No. XV(A), pages 57-60 of the Reply Brief of Defendant-Appellant because the reply brief raises issues not addressed in Appellant's brief. In the alternative, the State requests the this Court amend the Scheduling Order in this case and provide the State a reasonable time to file a sur-reply.

Appellant McKelton opposes the motion to strike by the State of Ohio.<sup>1</sup> On March 21, 2012, the United State Supreme Court held that the Sixth Amendment guarantees effective assistance of counsel during plea negotiations, including where counsel's deficient performance leads a defendant to reject a plea which would have resulted in a lesser sentence than what resulted from trial. *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399 (2012). These cases were decided after McKelton's merit brief was filed. Because this change in the law occurred while McKelton's appeal was still pending and at a time when briefing was not complete, McKelton discussed the issue in his reply brief. This Court should permit McKelton's discussion of the issue to remain in his reply brief. This would allow this Court to fully consider a significant legal development in McKelton's direct appeal. \ Appellant McKelton does not oppose allowing the State of Ohio to fully address the issue in a sur-reply. Appellant McKelton respectfully submits that as a matter of policy, allowing briefing in this unique situation would aid the full determination of legal issues in this cases. Based upon the reasons set forth in this memorandum in support, the State of Ohio's motion to strike should be considered improperly filed or in the alternative denied.

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<sup>1</sup> It is not clear whether the rules actually allow a motion to strike to be filed in this situation. To the extent that the rules do not contemplate such a motion, Appellant requests this Court to

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true copy of the foregoing **MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO STRIKE PROPOSITION OF LAW XV(A) OF APPELLANT'S REPLY BRIEF** of Appellant Calvin McKelton was forwarded by regular U.S. Mail to Michael Gmoser, Butler County Prosecutor, 315 High Street – 11<sup>th</sup> Floor, Hamilton, Ohio 45011, this 13th day of August, 2012.



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