

ORIGINAL

NO. 12-1580

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 98097

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STATE OF OHIO

Plaintiff-Appellee

-vs-

JOSHUA FRESHWATER

Defendant-Appellant

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**MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO**

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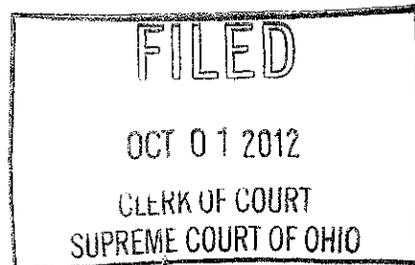
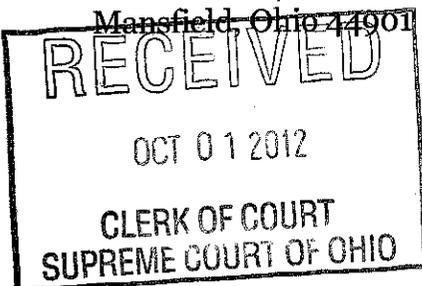
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**WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

The Eighth District Court of Appeals affirmed the trial court's order denying Joshua Freshwater's motion to dismiss execution of sentence, finding no abuse of discretion. *State v. Freshwater*, 8<sup>th</sup> Dist. No. 98097, 2012-Ohio-3468, ¶ 10. The Eighth District, relying on well-established precedent, held the delay in the execution of Freshwater's sentence was caused in part by his serving a federal prison sentence, and that the delay was not so unreasonable that society would derive no benefit from enforcing the sentence. *Id.* Freshwater's appeal to this Honorable Court consists of his claim the Eighth District reached the wrong decision.

No substantial constitutional question is involved, nor is this case one of public or great general interest. As such, this Honorable Court's discretionary jurisdiction is not warranted.

**STATEMENT OF THE CASE AND THE FACTS**

The Eighth District set forth a statement of the case and the facts, which the State adopts, as follows:

In February 2008, Freshwater was charged with one count of drug trafficking, two counts of possession of drugs, and one count of possession of criminal tools. At the time of the indictment, he was in federal custody awaiting trial on a federal case. In May, he was transferred to the Cuyahoga Common Pleas Court and pled guilty to one count of drug trafficking with forfeiture and schoolyard specifications, a second degree felony. The court sentenced him to a three-year prison term and three years' postrelease control.

Following sentencing, Freshwater was returned to federal custody. One month later, the federal court sentenced him to an 18-month prison term to be served consecutive to his state sentence. He served the sentence and was released from federal prison in June 2009, but had not yet served his state prison term.

In June 2011, the State filed a motion to enforce Freshwater's sentence. After a hearing, the trial court ordered Freshwater's sentence into execution beginning July 21, 2011, allowing credit for time served (475 days as of July 2011). Freshwater filed a notice of appeal on August 30, 2011, which this court dismissed as untimely. *State v. Freshwater*, 8th Dist. No. 97225 (Sept. 9, 2011).

In January 2012, Freshwater filed a motion to dismiss execution of his sentence, claiming the trial court lost jurisdiction to order execution of the sentence due to the delay between his release from federal custody and the trial court's ordering his sentence into execution. The court denied his motion to dismiss, and this appeal followed.

In his sole assignment of error, Freshwater argues the trial court lost jurisdiction to order execution of judgment after a three-year delay between the pronouncement of sentence and its execution. He also argues that because the three-year delay was unreasonable, the enforcement of his state sentence is unconstitutional.

*State v. Freshwater*, 8th Dist. No. 98097, 2012-Ohio-3468 at ¶¶ 2-6.

The Eighth District held the trial court did not abuse its discretion in denying Freshwater's motion "[b]ecause the delay in executing Freshwater's sentence was caused, in part, by his serving a federal prison sentence and because society would still benefit from his serving his state prison sentence on a serious felony[.]" *Id.* at ¶ 10.

## **LAW AND ARGUMENT**

### **PROPOSITION OF LAW NO. 1:**

**The Discretionary Jurisdiction of the Supreme Court of Ohio is Not Warranted Where A Reviewing Court Rejected Appellant's Claimed Error Upon the Application of Established Case Law.**

The Eighth District properly set forth and considered the applicable case law, as follows:

Crim.R. 32(A) states that a sentence "shall be imposed without unnecessary delay." In general, a reasonable delay in the execution of a sentence does not render the sentence unenforceable. *State v. James*, 179 Ohio App.3d 633, 2008-Ohio-6139, 903 N.E.2d 340, ¶ 12 (8th Dist.); *Neal v. Maxwell*, 175 Ohio St. 201, 202, 192 N.E.2d 782 (1963). However, it is possible for a delay in the execution of a sentence to become so unreasonable that it raises constitutional issues. *Id.*; *State v. Zucal*, 82

Ohio St.3d 215, 219, 1998–Ohio–377, 694 N.E.2d 1341. Whether a delay in execution violates due process is determined on a case-by-case basis. *State v. Lovell*, 12th Dist. Nos. CA2006–06–138 and CA2006–07–158, 2007–Ohio–4352, ¶ 17.

In determining whether the delay between the pronouncement of sentence and the execution of sentence is unreasonable, courts consider factors including, but not limited to: (1) whether society will derive a benefit from enforcing the sentence, *James* at ¶ 13; (2) whether the defendant contributed to the delay through his own wrongful actions, *United States v. Fisher*, 895 F.2d 208, 211 (5th Cir.1990); *United States v. Hill*, 719 F.2d 1402, 1405 (9th Cir.1983); and (3) the length of the sentence relative to the length of the delay. *State v. Moore*, 8th Dist. No. 47284, 1984 WL 5025, citing *Shotkin v. Buchanan*, 149 So.2d 574 (Fla.App.1963) (holding that five-year delay in imposing two sentences of 60 days and ten days was unreasonable).

*Id.* at ¶¶ 7-8.

The Eighth District continued, properly applying the applicable case law to the facts.

In the case at bar, there was a 35-month delay between the pronouncement of sentence and its execution. The delay was caused, in part, by Freshwater's first serving an 18-month sentence in federal prison during that time. Although there remained a two-year delay between Freshwater's release from federal prison and execution of his state sentence, the delay is still not unreasonable. The period of delay does not exceed the length of the prison term, and society will still derive a benefit from his serving his three-year sentence, which will punish him for committing a drug offense near a school, and hopefully deter future criminal behavior.

*Id.* at ¶ 9.

The Eighth District's opinion properly recognized that a delay in execution of a sentence must be analyzed to determine whether the delay is reasonable or unreasonable. The analysis consists of application of the statutes and case law to the facts of the particular case. Here, the Eighth District's application of established precedent demonstrates that the trial court did not abuse its discretion in denying Freshwater's motion to dismiss. The delay in execution of Freshwater's sentence was

caused, in part, by his conviction in federal court and sentence to federal prison. In state court, Freshwater pled guilty to a high level felony involving trafficking in marijuana within 1000 feet of a school. Society has an interest in having Freshwater deterred from future criminal behavior, and derives a benefit from having him serve his sentence for his crimes.

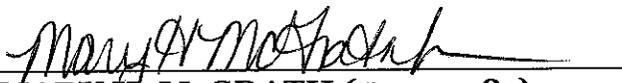
Finally, Freshwater claims for the first time that the State agreed to waive jurisdiction as part of the plea agreement. Freshwater may be referring to the fact that following his sentencing in state court, he was returned to federal custody, where he had been awaiting sentencing in a federal case. Freshwater's unsupported representation that his return to federal custody was an agreement by the State that he would not have to serve his state prison term is at best, a misinterpretation, at worst, an intentional misrepresentation. In any event, no such agreement was made.

### **CONCLUSION**

Freshwater has not alleged or demonstrated the existence of a substantial constitutional question or that this case is one of public or great general interest in order to warrant this Honorable Court's discretionary jurisdiction. The State of Ohio respectfully requests that Joshua Freshwater's request for leave to appeal be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Response of Appellee State of Ohio has been sent by regular U.S. Mail this 25<sup>th</sup> day of September, 2012, to Joshua Freshwater, Inmate No. 620-006, Richland Correctional Inst., P.O. Box 8107, Mansfield, Ohio 44901.

  
Assistant Prosecuting Attorney