

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Case No. 12-1212

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

CARON E. MONTGOMERY,

Common Pleas Case
No. 10CR-12-7125

Defendant-Appellant.

DEATH PENALTY CASE

MOTION OF APPELLEE STATE OF OHIO FOR EXPEDITED CONSIDERATION

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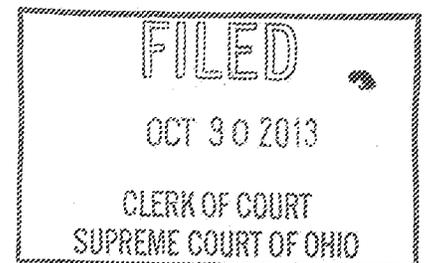
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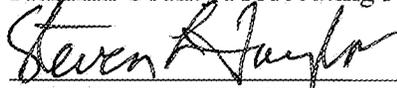
**MOTION OF APPELLEE STATE OF OHIO FOR EXPEDITED
CONSIDERATION**

For the reasons stated in the attached memorandum in support, and pursuant to R.C. 2929.05(B), which requires that this Court give priority to death-penalty appeals over other kinds of cases, appellee State of Ohio respectfully requests that this Court expedite the consideration of the present death-penalty appeal, including the setting of oral argument at the Court's earliest opportunity in a February or March 2014 sitting of the Court.

Respectfully submitted,



RON O'BRIEN 0017245
Franklin County Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellee

MEMORANDUM IN SUPPORT

This death-penalty appeal is now ready for review by this Court. Defendant has filed his merit brief in support of the appeal, the State has filed its merit brief opposing the appeal, and, most recently, defendant has filed his reply brief on October 25, 2013.

Given that the appeal is now ready for review, this Court should expedite its consideration of the present case over other cases. R.C. 2929.05(B) provides that "the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed * * *." (Emphasis added) This Court has held

that the use of the word “shall” in a statute is mandatory rather than directory, *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107-108, 271 N.E.2d 834 (1971), and imposes an obligatory duty on government officials, including courts, when used in connection with the performance of governmental duties. *In re Galloway*, 77 Ohio App.3d 61, 601 N.E.2d 83 (6th Dist. 1991). The General Assembly plainly adopted this provision requiring expeditious review in order to ensure that there was no undue delay in carrying out the death sentence. This provision requires this Court to give the present case a priority over every other kind of case on its docket. Setting any non-death-penalty case onto the oral-argument calendar in February or March 2013 ahead of the present case would deviate from this priority provision.¹

Other provisions also point toward the need for an expeditious review and disposition. R.C. 2503.37 provides that cases commenced in this Court shall be entered on the docket in the order in which they are commenced, received, or filed. The statute further provides that the cases “shall be disposed of in the same order * * *.” In keeping with this provision, this Court should schedule oral argument in the present case before any case that was docketed after it. For example, all but one of the non-death cases currently set for January 7 and 8 and February 4 and 5, 2014, have 2013 case numbers, showing that they were docketed after the present appeal. No further non-death cases docketed in 2013 should be heard before the present death-penalty appeal docketed in 2012.

To be sure, R.C. 2503.37 makes provision for the Court to advance certain cases

¹ This Court has already scheduled oral arguments for January 7 and 8 and February 4 and 5, 2014.

on the docket ahead of their usual order, see R.C. 2503.37(A) through (I), including cases involving convictions for felonies. See R.C. 2503.37(B). But these exceptions would be a reason for *advancing* the present case on the docket, since the present case involves convictions for felonies, and since R.C. 2929.05(B) calls for giving death-penalty cases priority.

Defendant very well might oppose expedition in the setting of oral argument and the expedited disposal of the present death-penalty case. Defendant very well may emphasize the need for a careful review of the record and a careful study of the briefs, etc.

The State does not oppose using care. The State is just as much entitled to careful consideration as defendant. But there is plenty of time to devote careful consideration to the present case in the time before a February or March 2014 oral argument date. At least three months will have passed before any February 2014 oral argument date. At least four months will have passed before any March 2014 oral argument date. A necessary part of giving priority to the present death-penalty case would include devoting the necessary resources to accomplishing a careful, prioritized review. With a Chief Justice, with numerous Justices, and with numerous law clerks and support staff, this Court can be more than ready to hear oral argument if the case is given prioritized review as required by law. The case is far from voluminous, having resulted from a guilty plea. This Court can give the present death-penalty case the priority called for by R.C. 2929.05(B).

Defendant could very well note that there are older death-penalty cases already

scheduled for oral argument. There are three death-penalty cases currently set for oral argument, i.e., *State v. Mammone* (No. 10-576 – set for 12-11-13), *State v. Osie* (No. 10-1105 – set for 1-8-14), and *State v. Jackson* (No. 10-944 – set for 2-4-14). From the point of final reply briefing, these cases will have been pending for over 25 months, 26 months, and 29 months by the time of their respective oral argument dates.

The State is not asking for this death-penalty case to be given priority over older death-penalty cases. But the fact that these other death-penalty cases have not received the prioritized review that they should have received over all other non-death cases should not delay the prioritized review that the present death-penalty case should receive as a matter of law. Delaying this case for over two years, as occurred in these older cases, simply would not comply with R.C. 2929.05(B)'s prioritization requirement. Careful, prioritized review cannot mean this kind of delay before oral argument.

This Court's Rules of Practice provide that the briefing (with extensions) will be completed within approximately 12.5 months of the record being completed. S.Ct.Prac.R. 11.05(B). Given the head start provided by the briefing, and given the narrowing of issues provided by such briefing, this Court's review should take much less time. Every death-penalty case in which briefing has been completed should be on the "top of the stack" in terms of the oral arguments next to be scheduled and in terms of cases to be disposed of.

The existence of older death-penalty cases at most would be a reason to delay this case behind those older death-penalty cases. It would not be a reason to delay the

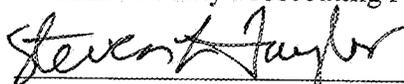
present case behind other non-death cases docketed well after the present case.

For the foregoing reasons, the State respectfully requests that this Court order expedited consideration of the present death-penalty case consistent with the priority requirement of R.C. 2929.05(B), including scheduling oral argument in this case in February or March 2014.²

Respectfully submitted,



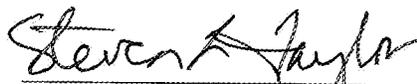
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Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 30th day of October, 2013, to Kathryn L. Sandford, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant-appellant.



STEVEN L. TAYLOR 0043876

² The State respectfully emphasizes that the present motion does not waive or forfeit its continuing objection to Justice O'Neill's participation in this case. See State's 5-8-13 Request for Recusal; see, also, Justice O'Neill's 5-14-13 denial of request.