

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 : CASE No. 2014-1295
 PLAINTIFF-APPELLANT, :
 : ON DISCRETIONARY APPEAL FROM THE
 V. : ASHTABULA COUNTY COURT OF APPEALS,
 : ELEVENTH APPELLATE DISTRICT,
 MICHAEL D. BAKER, : CASE No. 2013-A-0020
 :
 DEFENDANT-APPELLEE. :

**MOTION OF AMICUS CURIAE, THE OHIO PUBLIC DEFENDER, TO ORDER THE
STATE TO SERVE A COPY OF ITS NOTICE OF APPEAL ON THE OHIO PUBLIC
DEFENDER AND FOR LEAVE TO FILE A JURISDICTIONAL MEMORANDUM IN
RESPONSE PURSUANT TO S.CT.PRAC.R. 3.11(E)**

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I. Introduction

Because the Ashtabula County Prosecutor's Office failed to serve the Ohio Public Defender with a copy of the notice of appeal as required by S.Ct.Prac.R. 3.11(B)(3), this Court should stay briefing and grant the Ohio Public Defender thirty days to file a jurisdictional memorandum in response. The State's Notice of Appeal is attached.

One lawful remedy would be to strike the notice of appeal and to dismiss the appeal. S.Ct.Prac.R. 3.11(E)(2); *State v. Owens*, 123 Ohio St.3d 1204, 2009-Ohio-4086, 914 N.E.2d 407. But in this case, the Ohio Public Defender seeks only the alternative remedy this Court provided for a similar violation in *State v. Little*, 124 Ohio St.3d 1534, 2010-Ohio-1623, 924 N.E.2d 838—staying briefing and permitting this office to file a jurisdictional memorandum in response.

II. Discussion

A. Authority

Under S.Ct.Prac.R. 3.11(B)(3), when a county prosecuting attorney files a notice of appeal in a felony case, the State is required to serve a copy of the notice of appeal on the Ohio Public Defender. And if a party fails to properly serve a document, this Court may either strike the document or "order that the document be served and impose a new deadline for filing any responsive document." S.Ct.Prac.R. 3.11(E)(2).

B. The service requirement aids this Court in efficiently and fairly reviewing criminal appeals.

When the Office of the Ohio Public Defender receives a notice of appeal from a prosecuting attorney, a file is automatically opened for the case. An intake or supervising attorney then contacts the lawyer who won the case in the court of appeals to learn whether he or she plans to stay on the case. If the attorney plans to stay on the case, this Office may provide support. If the attorney no longer represents the defendant, a supervising attorney then reviews the case to determine whether a memorandum in response would be helpful to the defendant.

If this Court accepts a case in which the defendant's court of appeals' lawyer no longer represents the defendant, this Office, after consulting with the defendant, will generally file a prompt motion to appoint counsel. If this Court accepts a case where the defendant has other counsel, this Office may offer assistance to that lawyer and review the case to determine whether an amicus brief would be helpful.

After this Office began these efforts on 2002, a defendant has been left without counsel in this Court only one time, and that was because the winning court of appeals attorney said she thought that the Office's offer to help was a promise of representation. Because defendants are represented, this Court no longer has to wait until oral argument to discover that a defendant-appellee is without counsel.

C. A recurring problem with an escalating response.

Failure to comply with S.Ct.Prac.R. 3.11(B)(3) and its predecessor, S.Ct.Prac.R. 14.2(A)(3), was a recurring problem, and this Court's response was to slowly escalate the sanction for non-compliance. Initially, this Court granted only leave to file a brief, a memorandum in response, or additional oral argument. *State v. Martello*, 96 Ohio St.3d 1482, 2002-Ohio-4448, 774 N.E.2d 272 (counsel appointed and leave to file an appellee's brief allowed), 96 Ohio St.3d 1509, 2002-Ohio-4950, 775 N.E.2d 852 (second oral argument granted); *State v. Sanchez*, 118 Ohio St.3d 1528, 2008-Ohio-3627, 890 N.E.2d 919 (leave to file merit brief granted); *In re Poling*, 121 Ohio St.3d 1402, 2009-Ohio-793, 905 N.E.2d 1232 (motion to strike denied, but leave granted to file memorandum).

In January 2009, in the face of continued non-compliance, this Court warned:

County prosecuting attorneys and their staffs are on notice that failure to comply with the requirements of S.Ct.Prac.R. XIV(2)(A)(3) in the future may result in the dismissal of a notice of appeal or a notice of order certifying a conflict or other appropriate sanctions.

State v. Lester, 121 Ohio St.3d 1209, 2009-Ohio-478, 901 N.E.2d 1290, ¶4; *State v. Cargile*, 121 Ohio St.3d 1208, 2009-Ohio-477, 901 N.E.2d 1289, ¶4; *State v. Rohrbaugh*, 121 Ohio St.3d 1210, 2009-Ohio-479, 901 N.E.2d 1291, ¶4.

After yet another violation, in August 2009, this Court dismissed a State's appeal for failure to serve the Ohio Public Defender holding that "Compliance with those

requirements is not optional.” *State v. Owens*, 123 Ohio St.3d 1204, 2009-Ohio-4086, 914 N.E.2d 407.

D. The appropriate remedy is to stay briefing and permit the Ohio Public Defender to file an amicus memorandum in response.

The dismissal of *Owens* had the intended effect—failure to comply with the service requirement has become rare. Accordingly, the harsh remedy of dismissal is no longer a proportionate response. In a more recent case where, like this case, the Ohio Public Defender learned of the failure to serve only when this Court accepted the case, this Court stayed briefing and granted this Office thirty days to file a memorandum in response. *State v. Little*, 124 Ohio St.3d 1534, 2010-Ohio-1623, 924 N.E.2d 838. The *Little* decision reflected the consensus of this Court—the only two dissenting votes were to dismiss the State’s appeal entirely instead of to merely give the Ohio Public Defender the opportunity to file a memorandum in response. *Id.* (Pfiefer and O’Connor, JJ., dissenting).

Some relief is also required because this is not the Ashtabula County Prosecutor’s first error. On October 28, 2014, that office filed a notice of appeal with this Court but did not serve the Public Defender. *State v. Payne*, Case No. 2014-1865. As of today, that case is pending as a request for a jurisdictional appeal. The notice of appeal from that case is attached. However, this Office did not discover that error until January 20, 2015, when undersigned counsel researched other recent cases filed by the Ashtabula County Prosecutor’s Office.

Given the increased compliance with the service requirement, this Court should follow the *Little* precedent in this case. Permitting this Office to file an amicus brief would also put this case back where it would have been had the prosecutor properly served its notice of appeal. But failing to provide any sanction could send the message that complying with the service requirement is optional.

III. Conclusion

This Court should order the State to serve the notice of appeal on the Ohio Public Defender and give the Ohio Public Defender thirty days to file a memorandum in response.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Stephen P. Hardwick

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Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded via facsimile, (440) 576-3600, upon Shelly M. Pratt, Assistant Prosecuting Attorney, and via e-mail upon William P. Bobulsky, at wpbobulsky@bobulskylaw.com on this 20th day of January, 2015.

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