

IN THE SUPREME COURT OF OHIO
Case No. 2014-1174

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the Cuyahoga County
	:	Court of Appeals, Eighth Appellate
DELTA ROSARIO	:	District, Case No. 101558
Appellee	:	

APPELLEE'S AMENDED MOTION TO DISMISS

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Now comes Appellee Delta Rosario, by and through undersigned counsel, and respectfully requests that this Court dismiss the State's appeal as improvidently granted. The reasons for this motion are set forth in detail in the accompanying memorandum in support.

Respectfully submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY, ESQ.
Counsel for Appellee

MEMORANDUM IN SUPPORT¹

The State took the instant appeal from the Eighth District's denial of its request for leave to appeal the trial court's disposition of a Community Control Sanction ("CCS") violation. The Eighth District never issued a substantive ruling on the legal issue presented by the State and simply declined to exercise its discretion to hear the State's discretionary appeal. Despite the fact that there was no substantive ruling from the Eighth District to review, the State urged this Court to accept the appeal because it raised a recurring dispute between a Cuyahoga Common Pleas Judge and the Cuyahoga County Prosecutor regarding the County Prosecutor's role at a CCS violation hearing.

At the time this Court accepted the instant case (11/5/14), the Eighth District had not yet accepted a State's discretionary appeal on this issue. Thus, a decision by this Court could have made a difference by deciding whether the Eighth District should have exercised its discretion to accept the State's appeal and issue a substantive ruling.

A decision from this Court, on whether the Eighth District should have exercised its discretion to accept the State's appeal to address the dispute, is no longer necessary. The County Prosecutor has now achieved the outcome he sought by this appeal.² The Eighth District is going to decide the merits of the County Prosecutor's argument that he has a statutory right to be heard at a

¹ Contemporaneously filed with this motion to dismiss are motions to dismiss in five cases which were accepted and held for decision in *Rosario*. *State v. Jenkins*, Ohio Sup. Ct. Case No. 2014-1175, *State v. Harris*, Ohio Sup. Ct. Case No. 2014-1176, *State v. Scott*, Ohio Sup. Ct. Case No. 2014-1177, *State v. Washington*, Ohio Sup. Ct. Case No. 2014-1363 and 2014-1368. The memorandum in support attached to each motion to dismiss is identical with the exception of *State v. Washington* which includes an additional basis for dismissal.

² In its merits brief, the State asks this Court to address the merits of the trial court's order without the benefit of an intermediate appellate court decision *or* to "order the Eighth District to accept this

CCS violation hearing. *After* this Court accepted the instant case, the Eighth District exercised its discretion and accepted two appeals by the County Prosecutor raising, according to the State, “the identical issue as presented” in *Rosario*. (State’s Merit. Br. at 5) (citing *State v. Heinz*, 8th Dist. No. 102178, accepted 11/21/14, and *State v. Wheeler*, 8th Dist. No. 102182 and 102183, accepted 12/11/14). *Heinz* and *Wheeler* address the statutory role, if any, of the County Prosecutor at CCS violation hearings and the propriety of Judge John Sutula’s standing order related to that issue. This is the exact issue that the County Prosecutor complains should have been accepted and resolved by the Eighth District in the instant case.

Given that the substance of the issue will be resolved by the Eighth District in *Heinz* and *Wheeler*, this Court’s resources are no longer well spent on this case. Once the Eighth District issues a substantive ruling, it is possible that neither party will appeal or that this Court will find it unnecessary to accept the appeal. However, even if one of the parties’ appeals and this Court feels the issue is deserving of further review, this Court will then have the benefit of an intermediate appellate court ruling and the case can proceed in the normal course of appellate review.

In short, the County Prosecutor pursued this appeal—not because there was anything unique about this particular case—but because it served as a vehicle to get a substantive ruling on the rights of the County Prosecutor at CCS violation hearings and the propriety of the trial court’s standing order. Now that the County Prosecutor is going to get the substantive ruling he seeks in *Heinz* and *Wheeler*, this Court should dismiss the instant case as improvidently allowed.

Wherefore, this Court should grant Appellee’s motion and dismiss the appeal as improvidently allowed.

Respectfully submitted,

appeal to resolve this recurring issue.” (State’s Merit Br. at 10).

/s/ Cullen Sweeney
CULLEN SWEENEY, ESQ.

CERTIFICATE OF SERVICE

A copy of the foregoing Amended Motion to Dismiss was served via email upon Mary McGrath and Allan Regas, Counsel of Record for the State of Ohio, at aregas@prosecutor.cuyahogacounty.us and mmcgrath@prosecutor.cuyahogacounty.us on this 28th day of January, 2015.

/s/ Cullen Sweeney
CULLEN SWEENEY, ESQ.
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