Supreme Court of Ohio Clerk of Court - Filed May 12, 2015 - Case No. 2014-1035

# In the Supreme Court of Ohio

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| STATE OF OHIO, | Case № 2014-1035 |
| Appellee | On Appeal from the Mahoning County Court of Common Pleas |
| *-vs-* | |
| WILLIE G. WILKS, JR., | Case № 2013 CR 00540 |
| Appellant | |

## DEATH PENALTY CASE

APPELLANT WILLIE G. WILKS, JR.'S
EMERGENCY MOTION FOR EXPEDITED RULING

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COMES NOW THE APPELLANT, WILLIE G. WILKS, JR., through the undersigned counsel, and moves this Honorable Court for an expedited ruling on Appellant's Motion to Strike Court's Notice of filing and Motion to Complete the Record which was filed on April 20, 2015. Appellant seeks an expedited ruling because, as the record now stands, Appellant's brief would be due on May 23, 2015. However, as set forth in Appellant's April 20, 2015 Motion, there were two issues regarding the record which has been filed. The first issue was that this Court's order does not

accurately reflect the date when the complete record was transmitted by the Mahoning County Clerk of Court, a point with which the Appellee agrees. The record as it now is constituted was not filed until January 21, 2015 which would require Appellant's brief to be filed by July 20, 2015, not May 23, 2015. Appellee conceded this portion of Appellant's arguments and agreed that the docket should reflect that the record was not filed until January 21, 2015. However, Appellee now claims that the record is complete as of January 21, 2015. As Appellant set forth in his earlier motion, this is not the case, and brings us to the second issue.

The second issue addressed in Appellant's April 20, 2015 motion was the fact that, although the State had been ordered in the trial court to file a complete copy of the prosecutor and police department files under seal, Appellee did not file a complete copy of either file. Appellant requested an order directing that the entire prosecutor and police file be filed as previously ordered or, if the prosecutor disputes that their entire file was filed under seal, a remand for an evidentiary hearing. That remand is necessary as Appellee, though it originally agreed at a meeting between counsel that the record was not complete, has now taken the position with this Court that the record is complete as of the supplemental transmission in January.

A ruling addressing these two issues is critical for preparation of Appellant's brief. Given that May 23, 2015 deadline for filing the brief Appellant respectfully requests the Court expedite ruling upon Appellant's Motion filed April 20, 2015.

Because of the State's reply to Appellant's motion, a remand is clearly required. The trial judge ordered the entire files of the police and the prosecutor to be filed under seal. Once Appellant obtained an unsealing order from this Court of what was sent under seal, it became clear that the State had *not* fully complied with the trial court's order. As noted previously by Appellant, in *Cullen v. Pinholster*, __U.S.__, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the Supreme Court significantly limited the discretion of federal courts to hold evidentiary hearings and to consider new evidence in support of federal constitutional attacks on state court convictions. *Pinholster* places great emphasis on insuring that state courts find all pertinent facts and consider any evidence pertinent to the case, and that state courts insure that their records are complete.

The only way to accomplish that in a way that creates a proper evidentiary record as to what occurred below and whether the record is complete is to remand the matter so that the trial court can hold a hearing and determine what has been delivered to it previously under seal and what has not. There is virtually no question

that all that was to be placed under seal has not been placed under seal. The State may wish to argue that certain items should not be unsealed, but that is an entirely different question from whether the trial court's order has been honored and whether the record is complete. If Appellant's challenges in this and other state courts are denied, there must be a complete record for federal habeas. The *Miller-el* case cited in Appellant's earlier motion demonstrates this point convincingly. See, *Miller-el v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

Without this relief, Appellant will be forced to file a brief that may well be incomplete because the undisclosed portion of the record further supports arguments to be made or supports other arguments which Appellant cannot, but should make. This would deny Appellant the effective assistance of appellate counsel. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985); *Penson v. Ohio*, 488 U.S. 75, 85, 102 L.Ed.2d 300, 109 S. Ct. 346 (1988). Moreover, to be entitled to consideration for federal relief, a state appellant must "fairly present " a claim in "each *appropriate* state court." (Emphasis added.) See, *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). In fact, federal courts of appeals refuse to recognizance and address arguments that are made in passing or without proper development. See, e.g., *Reynolds v. Wagner*, 128 F.3d 166,

178 (3rd Cir. 1997); *United States v. Cloud*, 680 F.3d 396, 409, n. 7 (4th Cir. 2012); *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006); *United States v. Mitchell*, 502 F.3d 931, 953, n. 2 (9th Cir. 2007); *Carducci v. Regan*, 714 F. 2d 171, 177, 230 U.S. App. D.C. 80 (D.C. Cir. 1983).

WHEREFORE, Appellant prays for an expedited ruling from the Court on the issues raised in its April 20 Motion to Strike the Court's November 24, 2014 Notice of Filing of the Record, and Motion to Complete the Record.

Respectfully submitted,

*/s/ Lynn Maro*
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COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. mail on the 12th day of May, 2015 to: Mr. Ralph M. Rivera, Esq., 21 West Boardman Street, Youngstown, Ohio 44503.

*/s/ Lynn Maro*
LYNN MARO
COUNSEL FOR APPELLANT

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