

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 :
 Plaintiff-Appellee, : Case No. 2016-0092
 :
 :
 v. : On discretionary appeal from the
 : Hamilton County Court of Appeals,
 TRACIE M. HUNTER, : First Appellate District,
 : Case Nos. C140684, C140704, C140717
 :
 Defendant-Appellant. :

**AMICUS CURIAE THE OFFICE OF THE OHIO PUBLIC DEFENDER'S
MEMORANDUM IN SUPPORT OF DEFENDANT-APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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The First District Court of Appeals’ Local App.R. 11.1.1 grants the court of appeals unfettered discretion to place cases on the accelerated calendar, and violates the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution. The Court’s overuse of the accelerated-calendar rule is inconsistent with the rule’s purpose, and denies litigants in all but the simplest cases the ability to fairly present their arguments to the court of appeals.	7
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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Once a state chooses to provide a right to appeal, it must act in accordance with the United States Constitution. *See Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). And when a state provides a process of appellate review, it must comply with due process when implementing that procedure. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Every criminal defendant in Ohio has a right to appeal a conviction and sentence. Article IV, Section 3 of the Ohio Constitution; R.C. 2953.02. As such, every criminal defendant who files an appeal of right in Ohio must receive those protections.

The First District Court of Appeals' practice of placing all criminal appeals of right on its accelerated calendar, with little chance of having a given case removed from it, violates the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I, of the Ohio Constitution. Such a practice results in great numbers of defendants being deprived of due process and unfettered access to Ohio's courts, and the effective assistance of appellate counsel. That is, appellate counsel's failure to raise an assignment of error and/or fully present an argument is objectively deficient performance and results in prejudice to the appellant. Particularly in complex cases, but even in a "typical" felony case that has gone to trial, the First District's accelerated-calendar system is likely to cause such deficient and prejudicial representation.

Under App.R. 11.1, Ohio's appellate courts are authorized to implement an accelerated calendar. The purpose is "to provide a means to eliminate delay and unnecessary expense in effecting a just decision on appeal by the recognition that *some cases* do not require as extensive or time consuming procedures as others." (Emphasis added.) App.R. 11.1(A). Indeed, the First District has adopted an accelerated-calendar under Local App.R. 11.1.1. The accelerated

calendar shortens the briefing page limit to 15, and eliminates the opportunity to file a reply. A case can be removed from the calendar sua sponte or by motion for good cause, “which includes, but is not limited to, the unique, complex, or precedential nature of the issues presented.” *Id.* But the removal process is ineffective in practice.

Criminal appeals filed in the First District are placed on the accelerated calendar, and almost all stay there. Some cases are sua sponte removed from the calendar, but only *after* briefing and argument has concluded, allowing the court to release a published opinion. Thus, even in a complex case like that of former Judge Tracie M. Hunter, in which a public official faced a lengthy trial that generated more than 35 transcript volumes, the appellant has a mere 15 pages in which to brief the arguments, and no opportunity to submit a reply to the State’s arguments.

Obviously, the briefing portion of the appellate process is critical. It is the point at which counsel tells the court what went wrong and why the client deserves relief. And it is axiomatic that it is not the appellate court’s duty to search for errors that happened below. Thus, sufficient pages in which to argue on the client’s behalf are mandatory in a just system. The First District’s system is an abuse of the accelerated-calendar rule, and flies in the face of due process and proper access to courts and the right to the effective assistance of counsel. And in this case, like many others, requests for relief are summarily denied.

Research conducted by Ms. Hunter’s counsel revealed that from 2013–2015, over 1,200 criminal, non-writ cases were filed in the First District, with about 250 resulting in a published opinion. Of those, the research revealed that none were taken off of the accelerated calendar sua sponte *before* briefing. Thus, the court of appeals does not exercise discretion in that regard. And less than a dozen cases were removed from the accelerated calendar before briefing at the

litigant's request, with only about half of such requests being granted. All of the cases in which successful removal requests were made involved first-degree felonies.

In this case, Ms. Hunter was convicted of one fourth-degree-felony count of having an unlawful interest in a public contract. She was sentenced to 180 days in jail and one year of community control.

On direct appeal, Ms. Hunter's case was placed on the accelerated calendar under Local App.R. 11.1.1. Thus, she was initially allowed only 15 pages in which to present her case and she had no opportunity to reply to the State's response. Again, the transcript of her trial-court proceedings exceeded 35 volumes.

Ms. Hunter's request to remove her case from the accelerated calendar was denied. The appellate court eventually allowed her to submit a brief of no longer than 25 pages. But when she submitted a brief exceeding 25 pages with a request for leave to do so, the court of appeals denied that request and struck her brief. Ms. Hunter submitted a compliant brief, despite counsel's assertions that her case was complex, involved an issue of first impression, and that the prosecutor committed 51 specific instances of misconduct at trial. Thus, counsel was precluded from using the most critical tool in appellate advocacy—sufficient briefing.

On January 15, 2016, the court of appeals released its decision and removed the case from the accelerated calendar, thus allowing it to be a "published opinion." Ms. Hunter's three assignments of error were overruled. Regarding the prosecutorial misconduct claim, the court held: "The trial in this case was long and intense. The closing arguments of both sides were equally intense. And while some of the comments may have stretched the bounds of what is acceptable in closing arguments, the record does not support the conclusion that the arguments of

the state deprived Hunter of a fair trial.” *State v. Hunter*, 1st Dist. Hamilton Nos. C-140684, C-140704, C-140717, 2016-Ohio-123, ¶ 37.

Indeed, the review of a “long and intense” trial of a public official involving more than 35 transcript volumes with 51 alleged instances of prosecutorial misconduct is precisely the sort of “unique” and “complex” case that should *never* be placed on the accelerated calendar, let alone stay there. *See* Local App.R. 11.1.1(C)(2). But that is not the First District’s tendency. This Court should accept jurisdiction of this case and reject the First District’s unjust treatment of Ohio’s defendants.

**STATEMENT OF INTEREST
OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants and coordinate criminal-defense efforts throughout Ohio. The OPD plays a key role in the promulgation of Ohio statutory law and procedural rules, and in seeing that they are fairly applied. The primary focus of the OPD is on the post-trial phase of criminal cases, including direct appeals and collateral attacks. The OPD’s mission is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle complex criminal cases in Ohio’s appellate districts, including the First District Court of Appeals. The OPD has an interest in this case insofar as this Court has the opportunity to correct the First District’s systemic overuse of its accelerated-calendar rule.

Indeed, all criminal appeals filed in the First District are placed on the accelerated calendar, and nearly all of them stay on that track, at least until briefing and argument has concluded. That is, after the opportunity to fully present arguments has passed, the court of

appeals often removes the case from the accelerated calendar so that it can release a published opinion. As an office of experienced appellate practitioners, the OPD is not only concerned with that practice, but asserts that the briefing portion of the direct-appeal process is critical to advocacy and the appellate court's understanding of the issues. And in the First District, even in a complex case with dozens of transcript volumes, such as this one, the appellant typically has a mere 15 pages (unless the court grants more) in which to present her assignments of error, and no opportunity to submit a reply to the State's arguments. That is simply insufficient in most cases to fulfill the constitutional obligations that come with a state's having an appellate review system.

Such a system flies in the face of due process and access to courts, the right to the effective assistance of counsel, and is an abuse of the accelerated-calendar rule. And in this case, like many others, requests to remove the case from the accelerated calendar, for sufficient pages in which to present the arguments, and for the opportunity to file a reply, were summarily denied. That is fundamentally unfair and has no place in Ohio's appellate system. This Court should grant jurisdiction.

STATEMENT OF THE CASE AND FACTS

Ms. Hunter is a suspended Judge of the Hamilton County Juvenile Court. Allegations of misconduct led to an investigation that resulted in her being tried by a jury and convicted of one fourth-degree-felony count of having an unlawful interest in a public contract. She was sentenced to 180 days in jail and one year of community control. Her sentence has been stayed.

Ms. Hunter, with the assistance of counsel, appealed her conviction to the First District Court of Appeals. Her case was placed on the accelerated calendar under Local App.R. 11.1.1,

which calls for only 15 pages in which to brief the arguments and no opportunity to reply to the State's response. The transcript of her trial-court proceedings exceeded 35 volumes.

Ms. Hunter's request to remove her case from the accelerated calendar was denied. The appellate court did, however, allow her to submit a brief of no longer than 25 pages. Ms. Hunter submitted a brief in excess of 25 pages, along with a request for accommodation. That request was denied, the brief was struck, and Ms. Hunter submitted a truncated brief. After the State filed its response, Ms. Hunter requested the opportunity to file a reply. That request was denied.

On January 15, 2016, the court of appeals released its decision and noted that "this case has been removed from the accelerated calendar." That happened less than two weeks after oral argument. The court of appeals overruled Ms. Hunter's assignments of error, including that her acquittal motion was improperly denied, that the trial court committed reversible error when it failed to poll the jury at the end of the case, and that the prosecutor's pervasive misconduct necessitated a new trial. *See generally State v. Hunter*, 1st Dist. Hamilton Nos. C-140684, C-140704, C-140717, 2016-Ohio-123. Regarding the prosecutorial misconduct argument, Ms. Hunter identified 51 specific examples of misconduct during the trial and arguments. The court of appeals concluded: "The trial in this case was long and intense. The closing arguments of both sides were equally intense. And while some of the comments may have stretched the bounds of what is acceptable in closing arguments, the record does not support the conclusion that the arguments of the state deprived Hunter of a fair trial." *Id.* at ¶ 37.

Amicus Curiae otherwise adopts by reference the statement of the case and facts set forth in Ms. Hunter's memorandum in support of jurisdiction.

ARGUMENT

PROPOSITION OF LAW

The First District Court of Appeals' Local App.R. 11.1.1 grants the court of appeals unfettered discretion in placing cases on the accelerated calendar and violates the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution. The Court's overuse of the accelerated-calendar rule is inconsistent with the rule's purpose and denies litigants in all but the simplest cases the ability to fairly present their arguments to the court of appeals.

When a state provides a process of appellate review, as Ohio has, it must comply with due process when implementing that procedure. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Every criminal defendant in Ohio can appeal a conviction and sentence. Article IV, Section 3 of the Ohio Constitution; R.C. 2953.02. Thus, all convicted defendants in Ohio have the protections guaranteed by the United States and Ohio Constitutions.

Ms. Hunter is a suspended Judge of the Hamilton County Juvenile Court who was convicted of one fourth-degree-felony count of having an unlawful interest in a public contract. She was sentenced to 180 days in jail and one year of community control. The sentence has been stayed.

Ms. Hunter appealed her conviction to the First District Court of Appeals, where it was placed on the accelerated calendar under Local App.R. 11.1.1. That was despite the obvious complexity of her case, which was memorialized by more than three-dozen transcript volumes.

Ms. Hunter's request to remove her case from the accelerated calendar was denied, although she was eventually allowed to submit a brief no longer than 25 pages. Along with a request for permission to do so due to the complexity of her case, Ms. Hunter filed a brief in excess of 25 pages. That request was denied, the brief was struck, and Ms. Hunter submitted a

shortened brief. After the State filed its response, Ms. Hunter requested the opportunity to file a reply, which was denied.

After the case was argued, the court of appeals removed it from the accelerated calendar and issued a published opinion. It overruled Ms. Hunter's arguments that her acquittal motion was improperly denied, that the trial court committed reversible error when it failed to poll the jury at the end of the case, and that the prosecutor's pervasive misconduct necessitated a new trial. *See generally State v. Hunter*, 1st Dist. Hamilton Nos. C-140684, C-140704, C-140717, 2016-Ohio-123. Regarding the prosecutorial misconduct argument, in which Ms. Hunter identified *51 specific examples* of misconduct during the trial and arguments, the court concluded: "The trial in this case was long and intense. The closing arguments of both sides were equally intense. And while some of the comments may have stretched the bounds of what is acceptable in closing arguments, the record does not support the conclusion that the arguments of the state deprived Hunter of a fair trial." *Id.* at ¶ 37.

The First District's system of placing all criminal appeals of right on its accelerated calendar violates the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I, of the Ohio Constitution. It causes certain defendants to be deprived of due process and unfettered access to Ohio's courts, and likely the effective assistance of appellate counsel. Again, the ability to fully brief the issues in a criminal case is a fundamental component of appellate advocacy. It allows counsel (or in some cases, the defendant pro se) to explain the facts of the case and how they fit with the law. It is the point at which arguments are made and appropriate remedies are sought. It is, in most cases, far more significant than oral argument. And again, it is critical to counsel's duty to provide effective assistance. That is, appellate counsel's inability to fully present pertinent assignments of error is

objectively deficient and prejudicial. And here, it is a system adopted routinely by the appellate court.

Under App.R. 11.1, Ohio's appellate courts can create an accelerated calendar for simpler cases. The purpose is "to provide a means to eliminate delay and unnecessary expense in effecting a just decision on appeal by the recognition that *some cases* do not require as extensive or time consuming procedures as others." (Emphasis added.) App.R. 11.1(A). The First District's accelerated calendar shortens the briefing page limit to 15, and eliminates the opportunity to file a reply. That might not always be a problem, particularly in cases with a single issue and small trial-court record. But not all criminal appeals are the same, and many are complex, as was Ms. Hunter's. That is why the appellate court's system of placing criminal cases on the accelerated calendar and refusing to grant relief from it thwarts the purpose of App.R. 11.1.

Again, criminal appeals filed in the First District are placed on the accelerated calendar, where they usually stay. Cases are sometimes sua sponte removed from the calendar *after* briefing and argument has concluded. Thus, a published opinion can be released in a complex case without the benefit of sufficient briefing and advocacy. In Ms. Hunter's case, she was forced to make her arguments in only 25 pages, despite the complexity of her case and the 35 transcript volumes that evince that complexity. And that was despite the fact that Ms. Hunter needed to present three assignments of error, including an assertion that the prosecutor committed 51 specific instances of misconduct.

Research conducted by Ms. Hunter's counsel showed that from 2013–2015, over 1,200 criminal, non-writ cases were filed in the First District, with about 250 resulting in a published opinion. Of those, none were taken off of the accelerated calendar sua sponte *before* briefing.

Thus, the appellate court did not exercise discretion when appropriate. Further, research revealed that the process for having a case removed from the accelerated calendar is woefully deficient. Only about half of such requests were granted, and all of those were in cases involving a first-degree felony. Thus, criminal defendants are not sufficiently able to obtain relief from the accelerated calendar's strict requirements. And that is significant, because the accelerated calendar is supposed to be the exception to the standard briefing and argument provisions.

As described by the court of appeals, Ms. Hunter, a public official at the time, was subjected to a "long and intense" trial. *Hunter*, 1st Dist. Hamilton Nos. C-140684, C-140704, C-140717, 2016-Ohio-123, at ¶ 37. Her appeal should not have been placed on the accelerated calendar, and it certainly should not have stayed there. The First District's misuse of the accelerated-calendar rule is fundamentally unfair, and has no place in Ohio's appellate system. This Court should grant jurisdiction.

CONCLUSION

This case includes substantial constitutional questions and questions of public and great general interest. This Court should grant jurisdiction and assure that litigants in the First District Court of Appeals have a fair opportunity to present issues pertinent to their cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **AMICUS CURIAE THE OFFICE OF THE OHIO PUBLIC DEFENDER’S MEMORANDUM IN SUPPORT OF DEFENDANT-APPELLANT’S MEMORANDUM IN SUPPORT OF JURISDICTION** was forwarded by regular U.S. Mail, postage prepaid to David A. Singleton, Ohio Justice & Policy Center, 215 East 9th Street – Suite 601, Cincinnati, Ohio 45202, R. Scott Crosswell, III, Crosswell & Adams Co., LPA, 1208 Sycamore Street, Old Sycamore Square, Cincinnati, Ohio 45202, Merlyn D. Shiverdecker, 817 Main Street, Suite 200, Cincinnati, Ohio 45202, Mark R. Meterko, Maguire & Schneider, LLP, 1650 Lake Shore Drive – Suite 150, Columbus, Ohio 43204, and Karl H. Schneider, Maguire & Schneider, LLP, 1650 Lake Shore Drive – Suite 150, Columbus, Ohio 43204, on this 29th day of February, 2016.

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