

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	Case No. 2001-1518
)	
Plaintiff,)	
)	
v.)	
)	
LARRY JAMES GAPEN,)	
)	
Defendant.)	<u>THIS IS A DEATH PENALTY CASE</u>

**MEMORANDUM IN OPPOSITION TO MOTION OF AMICUS CURIAE
FRANKLIN COUNTY PROSECUTOR RON O'BRIEN FOR LEAVE TO FILE
MEMORANDUM IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO'S
OPPOSITION TO DEFENDANT-APPELLANT LARRY GAPEN'S MOTION FOR
ORDER OR RELIEF**

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MEMORANDUM IN OPPOSITION

On May 11, 2016, Defendant-Appellant Larry Gapen filed a Motion for Order or Relief Pursuant to Supreme Court Rule of Practice 4.01. Plaintiff-Appellee State of Ohio filed a memorandum in opposition to Mr. Gapen's motion two days later. Then, on May 20, 2016, the Franklin County Prosecutor, Ron O'Brien, filed a motion for leave to file a memorandum in support of the State's opposition memorandum. He also filed a "memorandum in support" of the State's opposition memorandum as a separate docket entry. For the reasons that follow, this Court should deny Mr. O'Brien's motion, and strike his supporting memorandum.

First, an amicus memorandum in support of opposition to a motion under this Court's Rule 4.01 is not contemplated in that Rule. Rule 4.01 expressly allows filing of only two papers; a motion filed by "a party" to the case, and a response to that motion by "any other party." S.Ct.Prac.R. 4.01(B)(1). Thus, by its own terms, Rule 4 permits no other filings related to a motion filed under that Rule other than the opposition memorandum the State of Ohio filed two days after Mr. Gapen filed his motion. *See* S.Ct.Prac.R. 4.01(B)(2). Indeed, Rule 4 does not even permit a movant such as Mr. Gapen to file a reply to a party's responsive memorandum, and any motion for leave to file a further pleading is "prohibited and shall not be filed." *Id.* When Mr. Gapen is not permitted to respond to the Plaintiff-Appellee State's arguments, even by motion for leave to file a reply, it is inequitable and contrary to this

Court's Rules to permit an outside non-party to file a memorandum in support of the opposition memorandum filed by the State of Ohio, whether by motion or otherwise. This Court should reject and strike Mr. O'Brien's motion and his memorandum.

Second, Rule 4 does not permit any person other than a party to the case to file a paper pursuant to that rule. Nothing in Rule 4 permits amicus curiae to file supplemental or supporting memoranda, regardless of which party the additional memorandum supports. Both parties in this case have filed their applicable papers. Mr. O'Brien is not a party to this case. This Court's Rules do not permit, and this Court should deny, efforts of amicus curiae or any other non-party to inject themselves into this Court's consideration of Mr. Gapen's Rule 4.01 motion.

Third, no other provision of this Court's Rules of Practice permit Mr. O'Brien to file his motion or his supporting memorandum as amicus curiae. The Rules allow amicus curiae filing papers in this Court in only six specific contexts:

1. in a jurisdictional memorandum urging this Court "to accept or decline to accept a jurisdictional appeal" (S.Ct.Prac.R. 7.06(A)(1));
2. in a memorandum supporting either party and addressing questions of law when a question has been certified to this Court (S.Ct.Prac.R. 9.05(A)(2));
3. in a brief on the merits urging affirmance or reversal in a given merits appeal, subject to all the same requirements identified in Rule 16.02 through 16.05 and applicable to merit briefs filed by the parties (S.Ct.Prac.R. 16.06);
4. in a motion seeking leave from this Court to participate in oral argument in which the amicus curiae has filed an amicus curiae brief, when one side objects or when the amicus curiae does not expressly support the position of any parties to the case (S.Ct.Prac.R. 17.06(A)(2));
5. in a memorandum in support of a motion for reconsideration filed under Rule 18.02(A) (S.Ct.Prac.R. 18.02(C)); and
6. in a memorandum in response to a motion for reconsideration filed under Rule 18.02(A) (S.Ct.Prac.R. 18.03(B)).

None of those six situations apply here.

At issue is Mr. Gapen's motion filed under Rule 4.01, and Mr. O'Brien's motion and memorandum filed as amicus curiae in support of Plaintiff-Appellee State of Ohio's opposition memorandum. Mr. O'Brien's amicus filings are not briefs on the merits. Where amicus curiae is permitted to file a brief or memorandum, the Rules do not require leave. Indeed, no provision of the

Rules—other than Rule 17.06(A)(2), which does not apply here—permits Mr. O’Brien as an amicus curiae to file a *motion* in this case at all. Accordingly, there is no basis in the Rules for Mr. O’Brien’s amicus curiae motion.

This Court’s rules similarly prohibit Mr. O’Brien’s amicus curiae *memorandum*. It is not an amicus memorandum addressing jurisdiction, nor is it an amicus memorandum addressing a certified question. It is not an amicus curiae memorandum offered in support of a Rule 18.02(A) motion for reconsideration or in response to such a motion. Thus, Mr. O’Brien’s amicus curiae memorandum has no basis in this Court’s Rules. And again, Rule 4.01 does not permit a non-party like Mr. O’Brien to file either his motion or his memorandum in this case.

For each of these reasons, this Court should reject and strike Mr. O’Brien’s motion and his memorandum.

Respectfully submitted,

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/s/ Carol A. Wright

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2016 a copy of the foregoing was sent by e-mail to Kirsten A. Brandt, brandtk@mcoho.org, counsel for Plaintiff-Appellee State of Ohio, and to Steven L. Taylor, staylor@franklincountyohio.gov, counsel for amicus curiae Ron O'Brien.

/s/ Allen L. Bohnert _____

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