

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|----------------------|---|---------------------------|
| State of Ohio, | : | |
| | : | |
| Plaintiff-Appellant, | : | |
| | : | |
| v. | : | No. 11AP-291 |
| | : | (C.P.C. No. 09CR-07-3935) |
| Al E. Forrest, | : | |
| | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on March 8, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

ON MOTION TO CERTIFY CONFLICT

TYACK, J.

{¶ 1} The State of Ohio has filed a second motion to certify a conflict in this case.

The issue to be certified is:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

{¶ 2} The State of Ohio is correct in its assertion that different courts of appeals handle motions for en banc consideration differently. Some submit the motion to the entire membership of the court. Some, as the Tenth District, submit the motions to the panel who decided the case originally to ascertain if there is arguable merit to the motions and only after that decision is made submit the issue to the full membership of the court.

{¶ 3} App.R. 26(A)(2)(a) reads:

Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

{¶ 4} The rule does not literally state who shall make an initial determination that two or more decisions in a district are in conflict. The procedure used by the Tenth District is more efficient, especially in the vast majority of cases where no arguable merit is present. Many prisoners initiated cases fall into this category. Also, cases where one of the parties simply wants to delay, routinely fit into this category.

{¶ 5} Since there is a conflict among the districts as to the correct interpretation of App.R. 26(A)(2), the conflict is best resolved by the Supreme Court of Ohio.

{¶ 6} The motion to certify a conflict is granted. The issue set forth above is certified to the Supreme Court of Ohio for review.

Motion to certify a conflict granted.

BROWN, P.J., and BRYANT, J., concur.
