

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	)	OSC CASE 2023-0334
	)	
Plaintiff-Appellee,	)	An Appeal from Summit County
	)	Court of Common Pleas
v.	)	CR 2012-01-0169 (A)
	)	
RICHARD BEASLEY,	)	
	)	This is a capital case.
Defendant-Appellant.	)	
	)	<b><u>AFFIDAVIT IN SUPPORT</u></b>
	)	<b><u>ATTACHED</u></b>

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DEFENDANT-APPELLANT'S MOTION FOR  
RECONSIDERATION OF DISMISSAL

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SUPREME COURT OF OHIO RULE OF PRACTICE 18.02

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**DEFENDANT-APPELLANT'S MOTION TO**  
**FOR RECONSIDERATION**

Defendant-Appellant Richard Beasley, by and through his appellate attorneys, now file this Motion for Reconsideration, pursuant to Ohio Supreme Court Rule of Practice 18.02, of the dismissal issued by Chief Justice Kennedy on January 31, 2024. This Court dismissed the appeal for want of prosecution, but counsel had recently traveled to Columbus to review this Court's appellate record, and there was a pending motion to settle the appellate record when this Supreme Court issued the dismissal for want of prosecution.

Further argument will be found in the Memorandum in Support and the Affidavit in Support.

Respectfully submitted,

LAW OFFICE OF DONALD  
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/s/ Donald Gallick

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**BRIEF IN SUPPORT OF APPELLANT'S**  
**MOTION FOR RECONSIDERATION**

1. Introduction.

This Supreme Court issued a dismissal of the direct capital appeal for lack of prosecution on January 31, 2024. This motion for reconsideration is being filed within ten days of that ruling pursuant to Ohio Supreme Court Rule of Practice 18.02.

Appellate counsel visited the Ohio Supreme Court's clerk's office and realized that multiple items were missing from the appellate record. In a direct, capital appeal, if the record is incomplete, the clerk is required to list all missing items and to identify the alleged custodian of the missing items or items pursuant to Ohio Supreme Court Rule of Practice 11.03(B)(5). This rule does not appear to have been followed.

Numerous items are missing from the appellate record and counsel should have noticed the erroneous record sooner, but did not visit the Ohio Supreme Court until January 12, 2024, but had the full record been transmitted, it would have allowed ample time to finish the merit brief in an appeal limited to sentencing issues before the expected briefing deadline of February 22, 2024.

2. Review of the Record.

On January 12, 2024, Attorney Don Hicks and Attorney Donald Gallick travelled separately to the Ohio Supreme Court to review the file at the clerk's office. After looking through all of the boxes and exhibit list, it was discovered that numerous exhibits were missing from the record. After leaving the clerk's office, both attorneys met elsewhere in Columbus to discuss how to proceed. It was decided to file a motion to supplement the record, which was then filed on January 16, 2024, asking this Court to order a "full appellate record." (See Affidavit of Support, attached as Exhibit A)

Counsel believed that this Court would grant the motion to supplement -- a motion that was unopposed by the State of Ohio -- and then counsel would file the stipulation to extend the briefing deadline to February 22, 2024 -- or later if the Supreme Court ruled on the motion after January 23, 2024. This would have followed the same pattern as other Ohio Supreme Court appeals, which will be discussed later in this Brief in Support. However, instead of ruling on the motion to supplement and Appellant filing the prepared stipulation to extend the briefing schedule, this Supreme Court dismissed the appeal for want of prosecution, despite the pending motion to supplement.

In hindsight, appellate counsel may have erred by not filing a motion to strike the notice of filing of the record. The record is missing numerous exhibits and it appears the resentencing transcript was not transmitted, despite the praecipe filed and delivered to the court reporter last year. Filing a motion to strike the erroneous notice of filing of the record would have been a wiser choice for appellate counsel, but counsel instead chose to file a motion to supplement the record.

The likely cause of the defective appellate record was the lengthy procedural history of this capital case, as well as appellate counsel's inability to travel to Columbus until January 12, 2024.

3. State v. Beasley I and State v. Beasley II.

This Supreme Court vacated the sentence and remanded this case on January 16, 2018, *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, but the decision was publicly released on February 9, 2018.

During the height of the COVID pandemic, a resentencing hearing occurred in Summit Common Pleas Court. That resentencing date was September 23, 2020. It was a "blended" hearing where one attorney was in the courtroom and a second attorney -- and Richard Beasley himself -- appeared via video from Chillicothe Correctional Institution.

A journal entry of that September 23, 2020 resentencing hearing was filed with the Summit County Clerk of Courts on January 18, 2023. That resentencing hearing did not find Beasley to be indigent, but stated that the court would declare him indigent upon the filing of a separate motion. A telephone conference was scheduled for February 15, 2023, but the court had to cancel the call and the status call was not rescheduled until April 12, 2023.

The gap in time between this Supreme Court's ruling in *Beasley I* and the Notice of Appeal and Praecipe filed in *Beasley II* was approximately five years. Attorney Gallick spoke to the Assistant Chief Court Reporter for Summit County and it is believed that the original court reporter has retired and the praecipe was not shared with the new court reporter; a resentencing transcript failed to transmit.

4. Reasonable Basis and Prior Procedure.

Attorney Gallick and Attorney Hicks believed they were acting with diligence by filing a motion to supplement and waiting on that ruling before filing the stipulation to extend the briefing schedule. They had received telephone consent for the stipulation on November 15, 2024, well-before the time to file the stipulation. (See Exhibit A, Affidavit of Gallick, lines 5-6). Attorney Gallick and Attorney Hicks acted to obtain consent in November for the stipulation to extend the briefing schedule, but chose to wait for a resolution of the incomplete record.

Ohio intermediate courts have reversed trial courts that have dismissed a case for want of prosecution because motions were pending for over a year. See *Ina v. George Fraam & Sons*, 619 N.E.2d 501, 85 Ohio App.3d 229 (Ohio App. 1993). To state the obvious, if one or motions had been pending in *Ina v. George Fraam* for more than a year, the lack of interest in prosecuting the case was on the part of the trial court, not the movant.

In *State v. Shawn Grate*, appellate counsel spent months attempting to compel the clerk of courts to prepare the full docket, and only after the full docket was assembled and transmitted did appellate counsel file a stipulation to extend time for a merit brief. See OSC Case 2018-0968.

This Supreme Court has granted numerous motions to supplement the appellate record in capital cases where the clerk did not have possession of exhibits. See e.g., *State v. Watson*, 61 Ohio St.3d 1, 15 (1991). This Supreme Court has also granted a motion for reconsideration and subsequently vacated the order denying a motion to supplement the appellate record in a non-capital felony appeals. *State v. Jones*, 162 Ohio St.3d 542 (2020). *State v. Jones* merely involved a felony drug trafficking case, but appellate counsel filed a stipulation to extend the briefing schedule before filing a motion to supplement.

In a recent criminal appeal pending before this Supreme Court -- a non-capital, jurisdictional appeal, this Supreme Court granted a motion to supplement the record filed by counsel for the defendant-appellant. This Supreme Court granted the motion to supplement after 11 days, and the defendant subsequently filed a stipulation to extend the briefing deadline pursuant to the Supreme Court Rules of Practice. See Supreme Court order granting motion to supplement the record, *State v Miller*, 167 Ohio St.3d 1494, 193 N.E.3d 569, August 23, 2022.

A review of the docket in *State v. Miller*, Ohio Supreme Court Case 2022-0321 and the docket in *State v. Beasley* -- side-by-side -- shows even more disparate treatment.

In *Miller*, an appeal was filed for a non-capital sentence and a motion for a new trial. After this Court allowed Miller to proceed in a discretionary and/or claimed appeal of right appeal, an issue arose regarding the complete appellate record. Five months after initiating the appeal, Miller filed a motion to supplement the record. The State of Ohio filed a brief opposing the motion to supplement. Despite it being a contested motion, this Supreme Court granted the motion 11 days after it was filed. One day after the motion was granted, Miller filed a stipulation to extend the briefing deadline by 20 days -- instead of 30 days -- as it was a non-capital case.



Just as it appears Miller's counsel waited for this Supreme Court to rule on the pending motion to supplement before filing the stipulation to extend the briefing deadline, Beasley's attorneys were waiting on this Supreme Court to act on the pending motion. This Court's January 31, 2023 declaration that counsel "\* \* \*has failed to prosecute this cause with the requisite diligence." is factually incorrect.

Beasley's appellate attorneys acted in the exact manner of the attorneys in *State v. Miller*, but this Supreme Court granted Miller's contested motion to supplement and then the very next day, Miller's attorney filed their stipulation to extend the briefing schedule.

In *Beasley*, appellate counsel traveled to Columbus to review the appellate record and discovered multiple items were missing from the Clerk's exhibit list. Appellate counsel filed a motion to supplement the appellate record. The State of Ohio did not oppose the motion. It would be unusual to deny a motion to supplement the record in a death penalty case as a federal court would be expected to see a full record if this matter leads to federal habeas corpus litigation.

Despite being an uncontested motion to supplement, this Supreme Court waited 15 days, dismissed the appeal for want of prosecution, and disregarded the pending motion to supplement the record as moot. Had this Supreme Court treated Beasley's death penalty appeal in the same way it treated *State v. Miller*,

it would have granted the motion to supplement and appellate counsel would have filed a stipulation to extend the briefing schedule by 30 days which would have rendered the brief due by the end of February 2024 -- or later depending on how long the Court considered the motion.

This Supreme Court should afford as much due process and discretion to a capital defendant as to a non-capital defendant. Counsel notes that a defendant facing a death sentence has a due process right per the Fifth and Fourteenth Amendments of the United States Constitution, as well as an independent right to due process pursuant to Section 16, Article I of the Ohio Constitution.

Appellate counsel asks this Supreme Court to reconsider the decision to dismiss the death penalty appeal for want of prosecution, to grant the motion to supplement the record to transmit a full record, and to afford Beasley's appellate counsel the same opportunity to file a stipulation to extend the briefing deadline in the same manner that occurred in *State v. Miller* in August of 2022.

5. Alternate Remedy.

In the event that this Supreme Court denies the remedy of reconsideration of the dismissal and allow counsel to file their stipulation to extend the briefing deadlines, Attorney Gallick and Attorney Hicks asks this Supreme Court,

in the alternative, to consider appointing new appellate counsel. If Beasley is denied a direct appeal in this capital case due to a fatal procedural error committed by his appellate attorneys, then he has been deprived of his Sixth Amendment right to effective assistance of counsel on appeal as explained by *United States v. Cronin*, 466 U.S. 648 (1984), as well as the right to procedural and substantive due process.

If this Supreme Court finds that Beasley's current appellate attorneys failed to understand proper procedure to effectuate this direct appeal, it should then find a Constitutional deprivation of the Ohio Constitution's right to due process, and also a deprivation of the Fifth and Fourteenth Amendments pursuant to *Evitts v. Lucey*, 469 U.S. 387 (1985), and allow this appeal to begin anew with replacement counsel to protect the Constitutional rights at issue in this direct, capital appeal.

Respectfully submitted,

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GALLICK, LLC

/s/ Donald Gallick

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Counsel for Appellant

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of this Defendant-Appellant's Motion for Reconsideration was sent by regular U.S. mail to the office of the Summit County Prosecutor, Appellate Division, at 53 University Avenue, Akron, Ohio 44308 on this ninth day of February, 2024.

/s/ Donald Gallick

DONALD GALLICK (#0073421)