

THE MEMORANDUM IN SUPPORT OF JURISDICTION
IN THE SUPREME COURT OF OHIO
by Darrell L. Heckman, Esq.

I. INTRODUCTION

The Supreme Court of Ohio has discretionary jurisdiction over most cases brought before it. Cases that involve a felony or cases of great public interest are expressly denominated as discretionary appeals. Cases that involve a "substantial constitutional question" in legal theory involve an appeal of right. Section 2(B)(1)(iii) Article IV of the Ohio Constitution. Since the Supreme Court makes the subjective determination of whether or not a constitutional claim is substantial, appeals on this basis have the effect of being discretionary appeals as well.

The purpose of this article is to help the practitioner who has lost a case in the Court of Appeals to maximize her chances of having her case heard in the Supreme Court.

II. SUPREME COURT RULES OF PRACTICE

The first thing a lawyer contemplating an appeal to the Supreme Court needs to do is to read and understand the Rules of Practice of the Supreme Court of Ohio, which are properly cited as S. Ct. Prac. R. These Rules, not the Ohio Rules of Appellate Procedure, control Supreme Court cases.

The Rules are straight-forward but contain many important provisions that are easily overlooked. S. Ct. Prac. R. II 2.A(1) requires the appellant to file the notice of appeal and 10 copies of the memorandum in support of jurisdiction within 45 days of the date of the final entry of the Court of Appeals in most cases. In cases involving termination of parental rights or adoption of a minor, the time limit is 20 days. There is no express provision authorizing extension of these time limits and the practitioner should assume he will not receive one. The 45 day notice of appeal requirement is jurisdictional. If the appellant is indigent, an affidavit of indigency signed not more than 1 year before the filing of the notice of appeal stating the reasons the appellant is unable to pay the \$40.00 filing fee must be filed with the notice of appeal and memorandum in support of jurisdiction. S. Ct. Prac. R. XV. A form affidavit acceptable to the Court, which is not the same as the Ohio Public Defender's standard indigency affidavit, is attached in the Appendix.

III. THE MEMORANDUM IN SUPPORT OF JURISDICTION

The memorandum in support of jurisdiction is similar to the Court of Appeals brief, but there are important distinctions. A table of authorities is not required. A table of contents is required and it must include propositions of law that the Court may use for a syllabus. These propositions of law must be based on the assignments of error in the Court of Appeals, but the appellant should be thoughtful in formulating the wording of the proposed syllabus. If the lawyer can't summarize the principle of the case in a proposition of law, it is doubtful that the Supreme Court will find that the case involves a substantial constitutional question.

Probably the most important part of the memorandum in support of jurisdiction is the statement of why the case involves a substantial constitutional question. The Court has hundreds of cases to review each year and the statement is the one thing the justices can look at to get a quick

impression of whether or not the case should be accepted for review. This statement should be brief but potent. It is crucial to delineate an issue of law that the court has not previously decided and to state why the issue is significant.

IV. CONCLUSION

The likelihood of the Court accepting any discretionary appeal is slight, but if the Court's Rules are not followed the likelihood is zero. With a good case and a properly filed memorandum with well-thought propositions of law, counsel can significantly increase the likelihood of having his case accepted for review by the Ohio Supreme Court.

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IN THE SUPREME COURT OF OHIO

Affidavit of Indigency

I, _____, do hereby state that I am without the necessary funds to pay the costs of this action for the following reason(s):

[Note: S. Ct. Prac. R. XV, Sec. 3, requires your affidavit of indigency to state the reason(s) you are unable to pay the docket fees and/or security deposit.]

Pursuant to Rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio,

I am requesting that the filing fee and security deposit, if applicable, be waived.

Affiant

Sworn to, or affirmed, and subscribed in my presence this _____ day of

_____, 20_____.

Notary Public

My Commission Expires: _____.

[Note: this affidavit must be executed not more than one year prior to being filed in the Supreme Court in order to comply with S. Ct. Prac. R. XV, Sec. 3.]

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PROPOSITION OF LAW NO. I: A confession of murder 4
minutes after the killing is an excited utterance.

PROPOSITION OF LAW NO. II: Where an auditor of a 5
confession of murder immediately relates the confession to a
third party, such relation is both an excited utterance and a
present sense impression and the third party may testify as
to the facts related to her.

PROPOSITION OF LAW NO. III: An appellate court's 5
standard of review for a trial court's determination of a hearsay
statement's admissibility is de novo.

PROPOSITION OF LAW NO. IV: An accused may offer 7
evidence of a confession of murder by another person, made
minutes after the killing, independently of state evidentiary
rulings under the Due Process and Compulsory Process clauses
of the United States Constitution and Article I section 10 of
the Ohio Constitution.

PROPOSITION OF LAW NO. V: Exclusion of a witness'' 8

testimony for an inadvertent discovery violation is not an appropriate sanction where there is no reasonable likelihood of prejudice to the State in admitting such testimony.

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case involves one of the weightiest and most basic questions in our criminal law: What are the limits a state is allowed to place on an accused's right to defend himself on a charge of murder?

In light of several recent rulings of this court, relaxing the standards for admitting hearsay statements against the accused, especially excited utterances, the court should examine the standards for admitting hearsay evidence in favor of the accused. This court has never fully reviewed the admissibility of such evidence from a constitutional Due Process and Compulsory Process standard as required in Chambers v. Mississippi (1973), 410 U.S. 284, 35 LEd 2d 297, nor has a ruling been made on the independent basis of Article I Section 10 of the Ohio Constitution.

Furthermore, while the court in Lakewood v. Papadelis (1987), 32 Ohio St. 3d 1, 511 NE2d 1138 held that sanctions for a discovery violation should be the least drastic sanction necessary, the court has never ruled on the standards for excluding a witness' testimony in a case of an inadvertent discovery violation in a serious case.

The last substantial constitutional issue presented in this case is when the abuse of discretion standard is to be applied and when it is not. Careless references to the abuse of discretion standard have failed to properly examine when that standard should be applied, and when de novo review is needed.

In addition to the constitutional issues, this case involves an aggravated murder and several other felonies. If the court does not accept the case, the defendant will spend the rest of his life in jail. The case is also of great public interest as it involves a well-publicized crime that has been in the court system for 5 years.