

IN THE SUPREME COURT OF OHIO

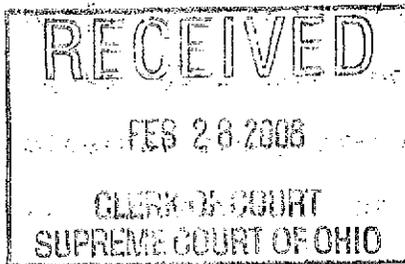
STATE OF OHIO

Appellee,

vs.

NAWAZ AHMED

Appellant.



871
CASE: 2001-0781

Common Pleas Case: 99-CR-192

THIS IS DEATH PENALTY CASE

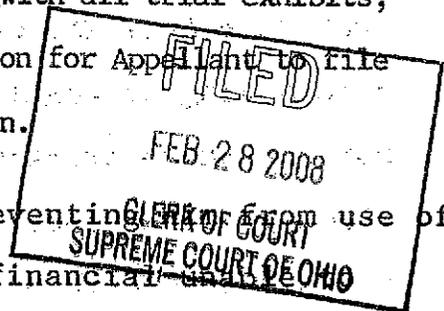
MOTION TO ORDER CLERK OF TRIAL COURT TO REFILE FULL TRIAL RECORD

Now Comes Appellant Nawaz Ahmed and request this honorable court to grant his motion and order the clerk of trial court, court of common pleas of Belmont county to refile the full trial record in this case along with all trial exhibits.

This court had granted the "Motion to Retain Record" in this court pending further proceedings about the Application For reopening " on November 16,2004. See Sate v. Ahmed, 103 Ohio St.3d 1530, 817 N.E.2d 891 (Ohio. November 16,2004).

However, due to the erroneous dismissal of his Application For reopening on 3/02/05 resulting in the Clerk of OH Supreme Court returning the record to the Clerk of trial Court on 03/10/2005. The Affidavits were prepared with the view that This Court already has access to full Trial record alongwith all trial exhibits, by citing transcript pages. Therefore, there was no reason for Appellant to file the full copy of record himself alongwith the Application.

Appellant is financial disadvantaged by State preventing appellants own funds. Wherefore, Appellant is financial copy the entire trial record and refile it himself as required by the rule. For this reason, appellant requests this court to either require the State of Ohio to file full copy of trial record or ask the Clerk



of trial Court to refile the entire record in this court.

3. A FULL REVIEW OF ALL PROPOSITIONS OF LAW IS REQUIRED, THUS NEEDING REFILEING OF RECORD, BECAUSE HAS "GOOD CAUSE" TO FILE THIS APPLICATION.

Unlike other appellants who simply want to plead new claims by filing a successive or second application for reopening, this appellant has challenged the "Patent and unambiguous jurisdiction" of this court to enter its order of 3/02/2005 in this case and is seeking "Vacation" of that order and reentering of a new appropriate order after full adjudication of his all Proposition of law filed.

4. Petitioner claims that OH Supreme Court lacks "collateral Post-
Jurisdiction Conviction"/to creat or adopt the "remedial law" as S.Ct.Prac.Rule 11(6) by its "rule making authority" under ORC 2503.36. Similarly OH Supreme Court lacks "Collatreal Postconviction Jurisdiction" to hear and decide the claims of ineffective-appellate-counsel. Appellants have Constitutional Right to on direct Appeal to the Court of Appeals and to Ohio Supreme Court in cases involving death penalty after Najuary 1,1995. Douglas v. California, 372 US 353, followed. State v. Catlina, 10 OS.2d 183 (Ohio. 1967). Where there is right to counsel, there is Constitutional right to effective counsel and effective assistance of counsel.

5. The Ohio Legislature has enacted App.Rule 26(B) under Ohio Appellate Procedure Act. The OH Supreme Court Rule-making Authority is for local rule making to regulate the practice of law before this court. It does not extend to creating "remedial Law" under OH Constitution Art.I(16), which provides that "There must a remedy in due course of law" and Justice administered without denial or delay. Such remedy must come from the OH Legislature as this Court rightly held in Murnaham, decision. But this court exceeded its Jurisdiction to create and adopt S.Ct.Prac.R.11 (6) and similar remedy under Appellate Procedure Act was created by the

Oh Legislature and not by the OH Supreme Court. The OH Supreme Court Rules are "discretionary Rules of Practice", where OH Sup.Ct. has full inherent power to suspend all or any or part of any Rule at sound discretion, at any time and in any given case. Appellate courts have no such inherent power to depart from Appellate Rule 26(B) provisions except where provided by the Laws.

6. The OH Supreme Court has only "Appellate Jurisdiction" to hear direct appeals under OH Constitution Art. IV(2)(B)(2)(c) in cases involving death sentence, from the common pleas courts. The statutory jurisdiction provided by ORC 2953.23(B) is appellate Jurisdiction to hear the appeal from lower Appellate Courts over claims filed under ORC 2953.21 et seq in the trial Court. Wherefore, OH Supreme Court has only "appellate jurisdiction" to hear and decide claims of ineffective-appellate-counsel on direct appeal. It follows that proceedings under S.Ct.Prac.Rule 11(6) are part of "Appellate Jurisdiction", thereby part of Ohio Direct Appeal process. Otherwise, OH Supreme Court lacks "Subject matter Jurisdiction" over claims of ineffective-assistance-of-appellate-counsel, "outside the direct appeal".

7. Because, OH Supreme Ct. lacks Subject-matter and also lacks Patent and unambiguous Jurisdiction if it treats the claims filed under Rule 11(6),/the court must follow all the provisions of direct appeal, for it to Jurisdictional/^{ly}act and decide these claims. The Court Rules do not grant Jurisdiction, the Statutes do. There exists no such statute in OHIO which grants a "Collatreal postconviction Jurisdiction" to OH Sup.Ct. over claims filed under S.Ct.Prac.Rule 11(6). Wherefore, Court lacked subject-matter and Patent and unambiguous Jurisdiction on 03/02/2005 to deny the claims of ineffective-appellate-counsel filed by this Petitioner. For these reasons, appellant requests this court to show its jurisdiction on 03/02/2005 and even now if it has any collatreal jurisdiction.

8. FACTUALLY WRONG FINDING OF "UNTIMELY FILING" OF APPLICATION

This court also totally ignored the strong body of law in OH and the holdings of US Supreme Court in its calculations of "time to file application for reopening" under S.Ct.Prac.Rule 11(6)(A). The error of calculation occurred at various levels and must be corrected. In *Morgan v. Eads*, 104 OS.3d 142 (November 22, 2004) this court held that "Time to file claims of ineffective-appellate-assistance does not begin until after the Direct review has ended." Id. at P18-19. This holding effectively over-turned all previous cases requiring that such claims be filed within 90-days of entry of Judgment on direct appeal. However, court's definition of "Appeal" differed from the OH Legislature definition of "Appeal" at ORC 2505.01(A)(1), which included "retrial of issues" and all proceedings related to "review" as part of "Appeal". See ORC 2505.01(A)(2-3); "Under *Morgan v. Eads*, the proceedings are "Appeal on question of law and fact", and mean, "a rehearing and retrial of a cause upon the question of law and facts." Similarly, "Motion for Rehearing" under S.Ct.Prac.Rule 11(2) is in fact "Appeal on question of law and fact", as an Appellant is required to "bring issues to the attention of court which it failed to consider" before. Any decision under S.Ct.Prac.Rule 11(2) is an "Appeal Decision" under ORC 2505.01. For this reason, S.Ct.Prac.Rule 11(4) Tolls the time of "effectiv date" of the previous decision of appeal if a timely "reconsideration is sought". The US Supreme Court Rule 13.3 also hold that "previsious decision on appeal" is tolled when an appellant files for "rehearing in any lower court" including the OH Supreme Court.

9. The OH Supreme Court Rule committee lost it way as it ignored the ORC 2505.01 when adopting the language of S.Ct.Prac.Rule 11(6)(A). Similarly, OH Supreme Court lacks Jurisdiction to Ignore the ORC 2505.01, in its Rule making under ORC 2503.36. The Statute do not overturn any

Rule of OH Supreme Court but deny "Appellate Jurisdiction" to OH Supreme Court if it violates the statute ORC 2505.01. It is a Jurisdictional Statute when read in the context of ORC 2953.02 et seq, because "context do not require a different meaning".

10. Appellant filed a timely Motion for Reconsideration on 9/2/04 thereby tolling the effect of judgment of 8/25/04 until after the court denied "reconsideration". ORC 2505.01. S.Ct.Prac.Rule 11(4). US Supreme Court Rule 13.3; See also Appellant was required to file for "reopening" within 90-days of "denial of Reconsideration" on 10/27/04 which is on or before 01/25/05. This court lacked Patent and unambiguous Jurisdiction to rule upon Application prematurely. The Application was filed on 12/21/04, thus was "Timely" filed.

11. However, Trial Court Judgment and the OH Supreme Court Judgment affirming the Trial Court Judgment of conviction and sentencing do not become final before the time for Direct Review by certiorari Petition before the U.S. Supreme Court does not end. See In re Pine (*1977, 3rd Dist.) 66 Cal. App.3d 593; United States v. Healy, 376 US 75 (1964); The Direct review by Cert.Petition is part of "Direct Review" of right. See 28 USC 1257. See also Hibbs v. Winn, 542 US 88 (2004). The period of direct review included the period for filing a certiorari petition. The "Direct review" has always included review by this [U.S. Supreme] court, Clay v. United States, 537 U.S. 522; See Lawrence v. Florida, 127 S.Ct.1079(2007). Wherefore, Morgan v. Eads, 104 OS.3d 142, Id at P18-19 must be read with this definition of "Direct review/Appeal of Right", and not some arbitrary definition presumed by the Rule Committee of S.Ct.Prac.Rule 11(6)(A).

In Appellant Ahmed case, the certiorari Petition was denied on March 28, 2005. See Ahmed v. Ohio, 544 U.S. 952(March 28, 2005) and

rehearing was denied on June 13, 2005. See Ahmed v. Ohio, 545 US 1124, 125 S.Ct. 2901 (June 13,2005).

Wherefore, time to file an "Application For reopening" stated from June 13, 2005 and ended 90-days after that date on September 2,2005. The OHIO Supreme Court lacked Jurisdiction to rule upon the prematurely filed application for reopening on 3/2/05.

Similarly, Oh Supreme Court could not refuse "right to file an amended Petition before June 13,2005 or infact before september 2, 2005. The court wrongly he-ld that Applicationwas untimely as filed on 12/21/04.

12. Appellant Ahmed also had "Good cause" to seek appointment of two Attorneys as of right under the 5th,6th,8th,9th,14th amendments to the US Constitution because he was not found to be an indigent by any court. An affluent Appellant has the same constitutional right to be represented by Attorney of his liking as the Cosporations have right to representation by counsels in any litigation, civil or criminal. Because sate prevented Ahmed from hiring his own Attorneys, by not returning his funds taken from the time of arrest and by other non-Jurisdictional orders of the trial Court and Judge Sargus in the abated Divorce case 99-DR-40. Ahmed had no alternative but to seek court appointment of two counsels he was already in touch as they filed motion on 9/14/04. It was Court which took 29 days to rule upon the Motions for counsels. Therefore, any delay is attributed to the satae and not to Ahmed, presuming there wass any delay. See Murray v. Carrier, 477 U.S. 478 (1986) (" some interference by officials", Brown v. Allen, 344 U.S. 443 (1953), made compliance impracticable, would constitute "cause" under this standard," [to excuse any procedural default]. Id.at HN4, 488.

13. The Lawrence v. Florida, 127 S.Ct.1097, 1085 and HN12 also holds that when "State prevented him from hiring his own attorneys or from representing himself", it constitute "good caude" to excuse any procedural default.

14. When Oh Supreme Court appointed two attorneys on 9/21/04, it failed to notify attorneys of their appointment until 9/24/04 by regular mail. The Court failed to provide "adequate time to attorneys to research and file a proper Application For reopening". See Lawrence v. Florida, supra, Id. at HN 12.

The "Prisoner can show that some objective factor external to the defense impeded counsels' efforts to comply with the satate's procedural rule". Murray v. Carrier, 477 US 478 (1986).

Because Ahmed had constitutional right to counsel as non-indigent the late appointment of counsel and failuer to give counsels full time allowed all other Appellants, constituted "good cause".

15. The fact that State prevented Ahmed from using his own funds to timely employ competent attorneys who are not burdoned with heavy work loads and do not have any conflicting schedules, is spread all over the trial and Appellate Record in this court. See many Motion pleadings in trial Court and in Ohio Supreme Court. The OH Supreme Court was told the same in pro se Motion for Appointment of Counsel filed on 8/27/04. Wherefore, State interference and state preventing Ahmed from hiring his own Attorneys is well established in records.

16. RAISING "GENUINE ISSUES" IN ALL NEW PROPOSITIONS OF LAW

It is well established that raising "genuine issues" excuses any procedural-default under S.Ct.Prac.Rule 11(6) and similar provisions of App.Rule 26(B). Ahmed raised numerous "genuine-issues" in his all New

propositions of law filed on 12/21/04 and again now on 01/17/08.

" An Application for reopening with merits should supersede any procedural deficiency of the application". See State v. Manos, 1994 Ohio App. LEXIS 435 (feb. 22, 1994), Cuyahoga App. No. 64616, unreported, reopening granted (september 13, 1996), Motion No. 72558, as cited in State v. Smiley, 1998 Ohio App. LEXIS 1886 (April 22, 1998). See also State v. Chu, 2002 Ohio App. LEXIS 4689 at P31.(same). Application granted despite being late filed, State v. Chu,(June 6, 2002);

Most of the Propositions raised by the Ahmed are "structural errors" in the Trial, which Appellate Counsels failed to raise on Appeal. No prejudice proof is required to prove the denial of fair Trial and fundamental constitutional rights when error is Structural as it infest the entire trial. See United States v. Gonzalez-Lopez, 548 U.S.140, (2006). The First proposition of Law "Denial of representation by selected counsel of choice" does not require any proof of Prejudice. There was no reason for Appellate counsels in not raising this issue of direct appeal, when OH Supreme Court established a finding that Attorney carpino was retained by Ahmed but was not allowed to represent Ahmed as the Court illegally refused to accept his services by false pretext that he was not Supp.R.20 qualified. No such qualification or certification is required under Supp.R.20 when Attorney is privately hired and defendant is not an indigent.

Similarly SECOND proposition of Law claim that Speedy trial Rights were violated is also proven from the facts in record and do not require any proof of prejudice when delay is over a year. However, over 60 witnesses could not be reached as they being new immigrants moved, changed jobs, homes, rented residences, changed states and even country. The list of 61 defense witnesses was filed in record as "joint Ext 1" to the trial. US census data show that new immigrants are most mobile section of the US population.

Similarly, Bussiness record and charge card record were lost for ever due to company being purchased and compouter systems changed. The alibi evidence was lost in this process as card usage could not be verified by the new companies. Ahmed' employer filed Bank ruptancy and was sold out thus destroying all usable bussiness record which Ahmed could use in his defense or counter the prosecution evidence. The Phone records of Ahmed's bussiness phone were lost for ever as no one p reserved those records and evidence contained in those records. Those phone records would disproven most of the Prosecution theories of the case.

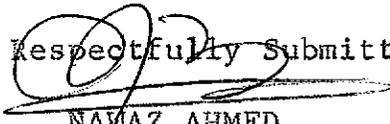
The childern were sent abroad to legal custodian and their passports lost or stolen or misplaced by Sheriff and Prosecutor who only discovered first page of both passports when Ahmed need full passport to prove that Prosecution theory of flight was false and prosecution witnesses falsely testified about childern's flight bookings.

The delay in trial severely and adversely effected Ahmed's defense denying his witnesses and records, thus ability to defend himself. Thus proposition of Law No.2 is proven and need no further show of Prejudice. The Public defender was illegally appointed to represent a non-indigent Ahmed agaionst the ORC 120.15(D) and 120.05(C), and crim. Rule 44 and against the 6th ,5thm,14th amendment to US Constitution of the United sates and other caselaw.

CONCLUSION

Appellant ask the court to allow filing of full trial record and an order must issue to this effect. After thge record is filed a Merit review of his 14 propositions of law be under taken.

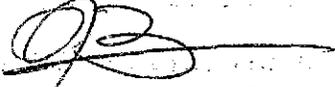
Respectfully Submitted,


NAWAZ AHMED

878 Coitsville-Hubbard Road
Youngstown,OH 44505.

PROOF OF SERVICE:

Certified that a copy of the foregoing was served upon Prosecutor Christopher Berhalter by regular mail at 147 West Main street, St.Clairsville,OH #45x 43950 on 02/25/08 .



NAWAZ AHMED