

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

SIMEON YISRAEL,

Defendant-Appellant.

Case No. 09-0022

On Appeal from the HAMILTON
County Court of Appeals
FIRST Appellate District

C.A. Case No. C080070

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SIMEON YISRAEL**

Simeon Yisrael #

NAME AND NUMBER

Northpoin Training Center

INSTITUTION

P.O. 479, Burgin KY 40310

ADDRESS

KY 40310

CITY, STATE & ZIP

PHONE

DEFENDANT-APPELLANT, PRO SE

Joseph H. Deters

PROSECUTOR NAME

230 E. 9th St. Suite 4000

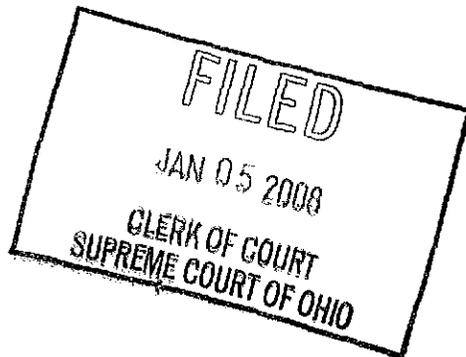
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Cincinnati OH 45202

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COUNSEL FOR APPELLEE, STATE OF OHIO



REASONS WHY THE SUPREME COURT
OF OHIO SHOULD REVIEW THIS CASE

REASON I

THE PARAMETERS OF THIS CASE
REVOLVE AROUND THE CONFLICTING
NATURE OF ADVICE GIVEN BY
MULTIPLE ATTORNEYS DURING THE
COURSE OF A SINGLE PROSECUTION
AND NUMEROUS DEFENDANTS ARE
ROUTINELY IN THIS POSITION AND
AS A MATTER OF INTERPRETATION
OF EFFECTIVE COUNSEL AND THE
VOLUNTARY NATURE OF PLEAS, THIS
COURT SHOULD REVIEW AND SET THE
STANDARD FOR CIRCUMSTANCES SUCH
AS THESE FOR ALL SIMILAR OR LIKE
DEFENDANTS

REASON II

THE CONSTITUTIONAL QUESTION OF LAW
IN THIS REQUEST FOR REVIEW REVOLVES
AROUND THE CONFLICT BETWEEN OHIO'S
INTERPRETATION OF THE INTERSTATE
AGREEMENT ON DETAINERS AND THE
RESPONSIBILITY OF THE DEFENDANT
IN HIS PRESERVATION OF A VIOLATION
OF SAME, OR THE INHERENT CONSTITUTIONAL
ERROR THAT ARISES FROM THIS SAME
ALLEGED VIOLATION

STATEMENT OF THE CASE AND FACTS

The Movant was incarcerated in Kentucky when Ohio determined that it would file and seek an indictment against him for a variety of charges. The Movant was being held in Kentucky in 2005 and the indictment arose in December of 2005 and the Gov., of Ohio issued it's warrant on Feb. 10, 2006.

On Feb., 23rd 2006, the Governor of Kentucky responded in kind and issued a warrant for the Movant's arrest and approximately 5 months later, the Movant was brought to a Kentucky Court in Northern Kentucky, and a hearing was held on July 7, 2006.

On July 31, 2006, the Movant was transported to Hamilton County Ohio and charged with the aforementioned charges. He was held in the Hamilton county jail from August of 2006, until December, 2006.

During this time frame, he was represented by several attorneys, most notably, Fred Hoefle and Timothy Cutcher. With both attorneys, the Movant asserted that he was inclined to go to trial because of what he considered to be the irregularities involved in the service and execution of the Ohio extradition warrant and the time frame in which it took the state to get him to trial for the Ohio charges.

Mr. Cutcher represented the Movant for his circuit court hearings on the predicate charges, and Mr. Hoefle represented the Movant on his appeal of same.

Later, during the appellate process, the Movant was represented by Ms. Brooke Burns, who in fact generated the Movant's appeal from his motion for post conviction relief pursuant to R.C. 2953.21.

The Movant's appeal was denied and this MISJ pleading is the result of the denial of same by the trial court and the Court of Appeals.

ARGUMENT IN SUPPORT
OF PROPOSITION OF LAW

THAT THE CIRCUMSTANCES UNDER WHICH THE MOVANT PLED GUILTY WERE IN FACT THE RESULT OF THE INEFFECTIVE REPRESENTATION BY HIS APPOINTED COUNSEL AND THAT ABSENT THIS REPRESENTATION, THE MOVANT WOULD NOT HAVE PLED GUILTY. FURTHER, THAT THE CONFLICTING NATURE OF COUNSEL'S ADVICE, COUPLED WITH THE AMBIGUOUS SEMANTICS OF THE PROFFERED LEGAL ADVICE COMBINED TO CREATE A CIRCUMSTANCE WHERE THE INTERPRETATION OF THE LAW WAS ILLUSORY, OR, THE STATE OF OHIO IS IN FACT IN VIOLATION OF THE CONSTITUTIONAL PARAMETERS OF FEDERAL LAW AS PER THE INTERSTATE AGREEMENT ON DETAINERS.

PROPOSITION OF LAW

THAT THE SUPREME COURT OF OHIO SHOULD MAKE THE LEGAL DETERMINATION THAT THE MOVANT'S COUNSEL WAS IN FACT INEFFECTIVE AND THAT HIS PLEA WAS BASED UPON INCORRECT LEGAL ADVICE AND THAT THE TRIAL COURT HAD NO JURISDICTION TO CHARGE THE MOVANT, ONCE THE TIME LIMITATIONS OF THE INTERSTATE AGREEMENT ON DETAINERS HAD BEEN VIOLATED

The Movant appeared in Court after having been transported to Ohio via the request of the state and pursuant to the I.A.D. His primary defense at trial was that the state was held to a time limitation in regards to their ability to prosecute.

When counsel told him that he in fact would be eligible to reverse and overturn his conviction upon appeal, this was a statement that indicated counsel's advice and the mens rea of counsel, in his intent to get the Movant to plead guilty.

The reality is that Ohio still holds to the standard of review as delineated in Tomalski v Maxwell, 175 Ohio St. 377(1963).

Tomalski asserts that the "[n]either the jurisdiction of the Court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction or irregular extradition proceedings."

In essence, Ohio does not recognize violations of due process if they are founded on violations inherent in the I.A.D. This legal attitude is or was predicated upon an interpretation of the law which was in effect long before the Interstate Agreement Upon Detainers was agreed to and signed by the majority of the states in the U.S., including Ohio. In essence, the legal principles of Tomalski are outdated and in violation of clear and established federal law.

For this reason alone, the Supreme Court should review and reverse the decision of the Court of Appeals.

Further, the claim at the appellate level was based upon the Movant's understanding of the advice of counsel. Attorneys routinely tell clients, "This conviction will never stand, the Court of Appeals will reverse this case, the judge has no legal authority to issue this decision, etc. etc."

The issue at law here, is whether or not this constitutes improper or ineffective assistance of counsel, to coerce a client to plead guilty based on this advice. The Movant asserts that it does, and that his plea was based upon this advice, and that absent this advice, he would not have pled guilty.

The trial court and the Court of Appeals both took the attitude that counsel's advice was a correct interpretation of the law, when in fact this was not the case. It is clear that while plea bargains generally waive all jurisdictional defects, the reality is that if your attorney is telling you that you **DO** have grounds for an appeal and that the conviction and sentence are illegal and will be reversed because of this same jurisdictional issue, then any plea predicated upon this would be void abnitiō.

In essence, the question of law is not whether or not counsel's advice was correct or not, but whether the Movant **THOUGHT** counsel's advice was correct, and if the Movant theought that, then is his plea voluntary or knowledgable if it based upon this assumption.

The more correct advice from counsel would have to have been, "I **think** that it is possible that a case like this, would in fact be eligible for reversal since your claim is based upon a violation of the I.A.D., and this is federal law, but I do not know for sure. Do you still want to take the plea knowing that it may or may not be reversible?" and then let the client determine his decision.

In the case at bar, the Movant asserted that this was NOT the language proffered by his attorney, and the trial Court did not hold a hearing to determine exactly what was said. Absent a hearing and a complete reiteration of the the conversat-ation as determined by the Movant's counsel, there is no rebuttal to the Movant's claims. Absnet any rebuttal, the trial court and the Court of Appeals were both in error to make any determ-

ination on the claims of the Movant.

The Movant asserts that the state was without jurisdiction to hold or charge him after the time limitations of the I.A.D. were violated. he further asserts that the advice of counsel, in asserting that the conviction would not stand upon appeal, was too outcome derivative specific to be called generically "advice", and that absent this counsel, the Movant would not have pled guilty.

CONCLUSION

The Movant asserts that numerous defendants are routinely told legal "advice" by counsel, in regards as to whether or not they should take the proffered plea which has been submitted by the state. The language of this advice, or the specific nature of it is a common complaint which arises in post conviction. In the case at bar, all the attorneys involved submitted affidavits which seem to support the Movant's contentions, yet no court wanted to hold a hearing to determine the Movant's state of mind when he accepted the plea.

This error alone constitutes a substantial question of law and would be of interest to the general public of persons who are charged with or convicted of crimes based upon pleas which arise in this manner.

Further, the attitude of the Ohio judiciary seems to be contrary to clearly established federal law, as it pertains to the application of the I.A.D. and the responsibility of the Court of Appeals and the trial court to abide by same.

Ohio's attitude seems to be that a plea bargain waives all jurisdictional defects, and while this may be so, it does not negate the fact that your attorney cannot advise you that you in fact **DO** have an appellate issue in this matter, when in fact you do not? Either the state is incorrect in it's interpretation of the federal law, or the state has determined that a violation of the I.A.D. can in fact be waived by a plea bargain. The Movant does not accept this premise, and he surely does not accept that it is procedurally correct for an attorney to advise his client that this jurisdictional issue **CAN** be raised on appeal, whn in fact it cannot.

Either the state is applying the incorrect application of the I.A.D., or, the attorney is misinforming his client when he says that the issue is appealable when it is not.

In this case, the prosecution and the reviewing courts are having their cake and eating it too. This is an untenable legal position to put any defendant in, and this is a substantial constitutional question that hs not been addressed or answered to this point.

For the foregoing reasons, the Movant asks the Supreme Court to review this case.

Respectfully submitted,

Simeon Yisrael
Simeon Yisrael
Northpoint Training center
P.O. 479, Burgin KY 40310

CERTIFICATE OF SERVICE

I hereby certify that I did send a true and correct copy of the foregoing, to the Clerk of the Supreme Court at 65 South Front St., 8th Floor, Columbus Ohio, 43215-3431, and to the prosecuting attorney of hamilton County at 230 E. 9th St., Suite 4000, Cinn. OH., 45202, all on this the 29 day of DDecember, 2008, via the U.S. Mail, postage prepaid.

Simeon Yisrael

Simeon Yisrael

121175

P.O. 479, Burgin KY 40310

ENTERED
DEC 28 2007

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

STATE OF OHIO	:	NO. B-0510122-I
Plaintiff-Respondent	:	(Judge Martin)
vs.	:	<u>FINDINGS OF FACTS AND</u>
SIMEON YISRAEL 121175	:	<u>CONCLUSIONS OF LAW AND</u>
Defendant-Petitioner	:	<u>ENTRY DENYING POST-</u>
	:	<u>CONVICTION PETITION AND</u>
	:	<u>MOTION FOR EVIDENTIARY</u>
	:	<u>HEARING</u>

After a review of the Petition to Vacate or Set Aside Sentence, the State of Ohio's Motion to Dismiss and a review of the record, docket pages, entries and filings in this case, the Court makes the following Findings of Fact:

- (1) Yisrael was found guilty of seven counts of Theft, two counts of Forgery, and one count of Engaging in a Corrupt Activity on January 2, 2007. He was sentenced to an aggregate term of six years in prison.
- (2) Yisrael filed a Pro Se Petition to Vacate or Set Aside Judgment of Conviction or Sentence on June 22, 2007 in which he claimed that the trial court had no jurisdiction over his case. He based this on an allegation that the State of Ohio extradited him five-and-a-half months after the governor of Kentucky signed a warrant against him.
- (3) Yisrael was also convicted of crimes in Kentucky and a prison sentence was imposed.
- (4) Yisrael provided no documentation or evidentiary material in support of his claim of lack of jurisdiction.
- (5) On September 7, 2007, through counsel, Yisrael filed an Amended Petition to Vacate or Set Aside Sentence.

A TRUE COPY OF THE ORIGINAL
 ENTERED 12/28/07
 ATTEST GREGORY HARTMANN,
 CLERK.
 BY [Signature]
 DATE 12/28/07



(6) In the amended petition, Yisrael claimed that his trial counsel was constitutionally ineffective because he advised him that even if he pled guilty to the charges set forth in the plea agreement, he could continue to pursue a jurisdictional claim in a direct appeal.

(7) Yisrael provided an affidavit of his trial counsel, Timothy R. Cutcher, in which Mr. Cutcher stated that he advised Yisrael that notwithstanding the plea agreement, he could raise a jurisdictional issue on appeal. This advice was given upon inquiry by Yisrael after the plea agreement had been reached between the state and Mr. Cutcher.

(8) Yisrael also filed an affidavit of his present counsel, Brooke M. Burns, in which Ms. Burns states her opinion regarding the merits of a post-conviction petition.

(9) Yisrael also submitted an affidavit of H. Fred Hoefle, an attorney that Yisrael consulted after he was sentenced by this Court. In the affidavit, Mr. Hoefle states his opinion regarding the jurisdiction of this Court. He also informed Yisrael that he could not continue to represent him due to his close personal and professional relationship with Mr. Cutcher.

Based on the above, the Court makes the following Conclusions of Law:

(1) Because Yisrael has not met the threshold requirements for an evidentiary hearing, the request for such a hearing is denied. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819; *State v. Pankey* (1981), 68 Ohio St.2d 58, 428 N.E.2d 413.

(2) Based on the authority of *Ker v. Illinois* (1886), 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 and *Frisbie v. Collins* (1952), 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541, Yisrael's allegation, had it been proven, would not demonstrate the violation of a constitutional right. (See also *State v. Powell* (1993), 90 Ohio App.3d 260, 629 N.E.2d 13.)

(3) A guilty plea waives all non-jurisdictional defects. *Ross v. Common Pleas Court of Auglaize County* (1972), 30 Ohio St.2d 323, 285 N.E.2d 25.

(4) Mr. Cutcher's advice to Yisrael regarding his ability to pursue a jurisdictional claim in a direct appeal, notwithstanding his plea agreement, was a correct statement of the law. *Ross v. Common Pleas Court of Auglaize County* (1972), 30 Ohio St.2d 323, 285 N.E.2d 25.

(5) As Mr. Cutcher's advice was a correct statement of the law, Yisrael has not shown that Mr. Cutcher's representation was deficient or that it prejudiced his case. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

The petition is hereby denied.

COURT OF COMMON PLEAS
CENTER
HON. STEVEN E. MARTIN
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 WHICH SHALL BE TAXED
AS COSTS HEREIN.

Steven E. Martin
Judge, Court of Common Pleas

COUNSEL FOR RESPONDENT:

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Assistant Prosecuting Attorney
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COUNSEL FOR PETITIONER

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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080070
Respondent-Appellee,	:	TRIAL NO. B-0510122-I
vs.	:	
SIMEON YISRAEL,	:	<i>JUDGMENT ENTRY.</i>
Petitioner-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Petitioner-appellant Simeon Yisrael presents on appeal a single assignment of error, challenging the Hamilton County Common Pleas Court's judgment overruling his postconviction petition. We affirm the court's judgment.

In January of 2007, Yisrael was convicted upon guilty pleas to seven counts of theft, two counts of forgery, and a single count of engaging in a pattern of corrupt activity. The trial court sentenced him to an agreed prison term of six years.

Yisrael took no direct appeal from his convictions. Instead, he filed with the common pleas court an R.C. 2953.21 petition for postconviction relief. The common pleas court denied his petition, and this appeal followed.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

In his petition as amended, Yisrael contended that his guilty pleas had been the unintelligent product of his trial counsel's ineffectiveness in advising him that he could challenge in his direct appeal alleged irregularities in his extradition from Kentucky. In support of his petition, Yisrael offered his trial counsel's affidavit and the affidavit of counsel appointed to represent him on his petition.

We hold that the common pleas court properly denied the petition. A challenge to the legality of an arrest warrant issued upon an extradition demand must be made before trial, in an application for a writ of habeas corpus; therefore, Yisrael could not challenge his extradition in a direct appeal.² And while Yisrael, by his guilty pleas, did not waive any jurisdictional defects in the proceedings against him,³ extradition irregularities do not affect a trial court's jurisdiction.⁴

The evidence offered in support of Yisrael's petition demonstrated that his counsel had discussed with him a habeas-corporis challenge to his extradition, and that his counsel had correctly informed him that he "could still raise on appeal the issue of whether [the trial court] had jurisdiction over his case." But the evidence did not demonstrate either that his counsel had misinformed him that the alleged irregularities in his extradition had deprived the trial court of jurisdiction to convict him, or that he could challenge his extradition in his direct appeal.

Yisrael thus failed to sustain his burden of submitting with his petition evidentiary material setting forth sufficient operative facts to demonstrate that his guilty pleas were the unintelligent product of his trial counsel's ineffectiveness.⁵

² See R.C. 2963.09

³ See *Ross v. Auglaize Cty. Common Pleas Court* (1972), 30 Ohio St.2d 323, 285 N.E.2d 25.

⁴ See *Tomalski v. Maxwell* (1963), 175 Ohio St. 377, 378, 194 N.E.2d 845.

⁵ See R.C. 2953.21(C); *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

OHIO FIRST DISTRICT COURT OF APPEALS

Accordingly, we overrule the assignment of error and affirm the judgment of the court below.

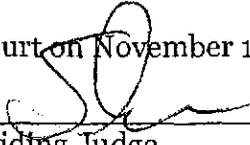
A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 19, 2008

per order of the Court



Presiding Judge