

IN THE SUPREME COURT OF OHIO

09-0415

STATE OF OHIO

:

SUP. CT. CASE NO. \_\_\_\_\_

Plaintiff-Appellee,

:

ON APPEAL FROM THE BUTLER  
COUNTY COURT OF APPEALS, TWELFTH  
APPELLATE DISTRICT

-vs-

:

MARCIANO VALLEJO

:

COURT OF APPEALS  
CASE NO. CA2008-05-132

Defendant-Appellant.

:

:

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NOTICE TO FILE DELAYED APPEAL

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NOW COMES Defendant-Appellant, Marciano Vallejo Pro Se herein and respectfully moves this Honorable Supreme Court of Ohio pursuant to Ohio Supreme Court Rule II, Section 2(A)(4)(a) for leave to file a delayed appeal in the above captioned case. Appellant asserts that this case involves a felony and more than forty-five (45) days have lapsed since the Twelfth District Court of Appeals for Butler County rendered its decision in the case. A memorandum in support is attached.

Respectfully submitted,

*Marciano Vallejo*

\_\_\_\_\_  
Marciano Vallejo #478-130  
Dayton Correctional Institution  
P.O. Box 17249  
Dayton, Ohio 45417

IN PRO SE

FILED  
FEB 27 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT FOR DELAYED APPEAL

The Defendant-Appellant concedes that more than 45-days after the Butler County Court of Appeals, Twelfth Appellate District rendered its decision in Case No. CA2008-05-132 (November 17, 2008), that the untimely filing cannot be cured "except" for a showing of "good cause" and/or an reasonable explanation for the delay. Appellant asserts that for cause of his untimely delay in failing to file the Notice of Appeal in a timely manner, were outside the control of the Appellant, and for cause, prevent the appellant from submitting the timely Notice of Appeal to the Supreme Court of Ohio. Those delays that have been suffered by the appellant are attributable to the following events:

1. During Appellant's transition from Lebanon Correctional Institution to the Dayton Correctional Institution left the Appellant without the necessary legal and personal effects to properly continue drafting of the Notice of Appeal to the Supreme Court, because once appellant arrived at (DCI), the appellant was to undertake a orientation period;
2. That once the orientation period had ended, appellant was then afforded to retrieve all personal and legal effects, wherein the appellant could continue the processing of his legal briefs, after the completion of the orientation period;
3. That once appellant had retained his personal and legal materials, the appellant then continued to possibly comply with the Rules of Practice of the Supreme Court of Ohio, however, the Appellant asserts that he was unknowingly prevented access to the required personnel at (DCI) because during December 18, 2008 thru January 3, 2009, were prevented from Copying, Notarizing the legal documents because of the "absence and closure" of those staff individuals who are most responsible to assist an inmate in the processing of legal documentation to the Courts of Ohio, including the Supreme Court of Ohio;
4. The Appellant argues that the most troubling of this case, is the Ohio Supreme Court, Clerk of Courts ruled appellant Notice of Appeal as untimely (inter alia), that the date of proper filing was on December 29, 2008. This must be rejected because Appellant contends that the date the Notice of Appeal submitted contained the received date of December 31, 2008. SEE (EXHIBIT "A");

And since the Butler County Court of Appeals didn't render its decision until November 17, 2008, this would make Appellant's first filed Notice of Appeal, including Memorandum In Support of Jurisdiction timely and proper before the Supreme Court. Given that the Appellant had 45 days to perfect and file the Appeal, which made it due on or before January 2, 2009, can only be construed as timely. November 17, 2008 plus 45 days equal January 2, 2009, not December 29, 2008, respectively."

The Appellant further asserts that no actual filed stamped is to be found on the Butler County Court of Appeals Judgment Entry, "Accept" for its "Cover Page." SEE (Judgment Entry November 17, 2008, Attached).

In furtherance, Appellant contends that he is a non-citizen of the United States and is unable to understand and speak fluent English language to properly submit and argue the necessary points of law to effectively participate meaningfully in the legal arena and urges this Honorable Supreme Court of Ohio to excuse his errors, if any, to allow the Appellant to proceed in this action, or grant other relief this Court deems appropriate, or in the alternative allow the appellant to be represented by appointed representation.

IT IS SO PRAYED FOR

Respectfully submitted,

  
\_\_\_\_\_  
Maricano Vallejo #478-130  
Dayton Correctional Institution  
P.O. Box 17249  
Dayton, Ohio 45417

IN PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal, Notice of Delayed Appeal, Memorandum In Support of Delayed Appeal, (Exhibit "A"), was sent to the Butler County Prosecutor Office at Government Services Center, 315 High Street; 11th Floor, Hamilton, Ohio 45012-0515, this 25 day of February 2009, by regular U.S. mail service.

M. M. M. M. M.  
DEFENDANT-APPELLANT [ PRO SE ]

# The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE  
THOMAS J. MOYER

CLERK OF THE COURT  
KRISTINA D. FROST

JUSTICES  
PAUL E. PFEIFER  
EVELYN LUNDBERG STRATTON  
MAUREEN O'CONNOR  
TERRENCE O'DONNELL  
JUDITH ANN LANZINGER  
ROBERT R. CUPP

TELEPHONE 614.387.9530  
FACSIMILE 614.387.9539  
www.supremecourtsohio.gov

December 31, 2008

Marciano Vallejo  
#478-130  
Dayton Correctional Institution  
P.O. Box 17249  
Dayton, Ohio 45417

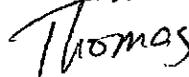
Dear Mr. Vallejo:

The enclosed documents were not filed and are being returned to you because they do not meet the requirements of the Rules of Practice of the Supreme Court of Ohio. The specific areas of noncompliance and relevant rules are as follows:

- The materials necessary to perfect your appeal were not filed within the 45-day time period prescribed by Rule II, Section 2(A)(1). An appeal from a November 14, 2008 judgment entry would have been due *in the Clerk's Office* no later than 5:00 p.m. on Monday, December 29, 2008. The Clerk's Office is prohibited from filing documents that are not submitted on time.

Additionally, your memorandum in support of jurisdiction exceeds the 15 page limit set forth in Rule III, Section 1(C). Please refer to the copy of the court's rules on file with your institution's library for additional information. Specifically, if your case involves a felony review the provisions for filing a delayed appeal in Rule II, Section 2(A)(4).

Sincerely,



Thomas  
Deputy Clerk

Enclosures

IN THE SUPREME COURT OF OHIO

MARCIANO VALLEJO : SUP. CT. NO. \_\_\_\_\_  
Defendant-Appellant, :  
-vs- : **On Appeal from the Butler**  
STATE OF OHIO, : **County Court of Appeals**  
Plaintiff-Appellee. : **Twelfth Appellate District**  
: **Court of Appeals**  
: **Case No. CA2008-05-132**

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**NOTICE OF APPEAL OF APPELLANT MARCIANO VALLEJO**

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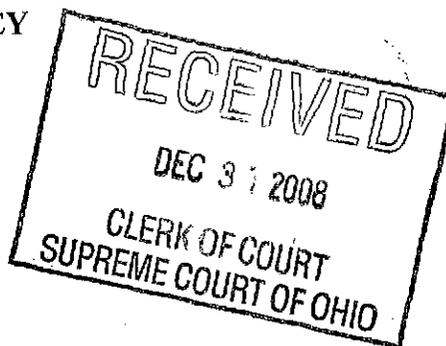
MARCIANO VALLEJO #478-130  
DAYTON CORRECTIONAL INSTITUTION  
P.O. BOX 17249  
DAYTON, OHIO 45417

DEFENDANT-APPELLANT [PRO SE]

ROBIN PIPER [0023205]  
CHIEF PROSECUTOR, BUTLER COUNTY

DANIEL G. EICHEL [0008259]  
ASSISTANT PROSECUTING ATTORNEY  
GOVERNMENT SERVICES CENTER  
315 HIGH STREET, 11<sup>th</sup> FLOOR  
HAMILTON, OHIO 45012-0515

COUNSEL FOR APPELLEE  
STATE OF OHIO



**ATTENTION**

Please find enclosed a copy of this court's decision in this matter. **The original decision will be officially and publicly released at 9:00 a.m. on November 17, 2008.**

The court is sending you this copy in advance of the official release as a courtesy so that you may review it before either you or the litigants become aware of the court's decision from some other source.

It is anticipated that public comment will not be made prior to the official release of the decision.

The Court of Appeals

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, :

CASE NO. CA2008-05-132  
(Accelerated Calendar)

- vs - :

JUDGMENT ENTRY

MARCIANO VALLEJO, :

Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR04-01-0098

{¶1} This matter is before us on an appeal brought by defendant-appellant, Marciano Vallejo, from a decision of the Butler County Court of Common Pleas, denying his motion to withdraw his guilty plea and dismissing his petition for postconviction relief.<sup>1</sup>

{¶2} In June 2004, Vallejo pled guilty to one count of complicity to trafficking in cocaine, two counts of trafficking in cocaine, one count of engaging in a pattern of corrupt activity, and one count of money laundering. The trial court convicted Vallejo on these charges and sentenced him to an aggregate prison term of nine years. His conviction and sentence were affirmed by this court on direct appeal.

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1. Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.

{¶3} On April 18, 2008, Vallejo filed a motion to withdraw his guilty plea and a petition for postconviction relief. The trial court overruled Vallejo's motion and dismissed his petition without holding an evidentiary hearing.

{¶4} Vallejo's first four assignments of error, in which he argues he was deprived of several of his constitutional rights, including his right to a speedy trial and his rights under Crim.R. 11, are overruled, because all of these arguments could have been raised and fairly determined on direct appeal without resort to any evidence outside the record; therefore, Vallejo was precluded under the doctrine of res judicata from raising them in a petition for postconviction relief. See *State v. Szefcyk*, 77 Ohio St.3d 93, syllabus, 1996-Ohio-337; and *State v. Smith* (1997), 125 Ohio App.3d 342, 348.

{¶5} In his fifth assignment of error, Vallejo argues his trial counsel provided him with constitutionally ineffective assistance by failing to object to the trial court's imposition of a non-minimum sentence that violated *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531.

{¶6} Vallejo's fifth assignment of error is overruled because Vallejo's petition for postconviction relief, which was filed on April 18, 2008, was not filed within 180 days of the date (November 10, 2004) on which the trial transcript was filed in this court with respect to Vallejo's direct appeal, see R.C. 2953.23(A) and 2953.21(A)(2), and the exceptions to the 180-day time limit contained in R.C. 2953.23(A)(1) or (2) do not apply in this case.

{¶7} "[T]he plain language of R.C. 2953.23(A)(1)(b) extends only to trial error and does not extend to sentencing errors, except those occurring within the capital punishment context." *State v. Carter*, Clinton App. No. CA2006-03-010, ¶16, quoting

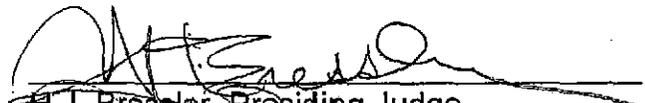
*State v. Schroyer*, Clermont App. No. CA2005-05-032, ¶23.

{¶18} The argument that Vallejo raises in this assignment error, i.e., his sentence violates *Blakely*, addresses only a sentencing issue, which is unrelated to capital punishment; Vallejo's argument does not address any issue relating to Vallejo's guilt. *Carter* at ¶16.

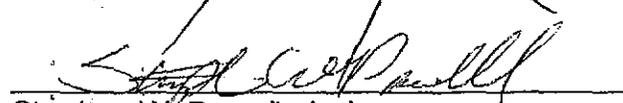
{¶19} Judgment affirmed.

{¶10} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this judgment entry shall constitute the mandate pursuant to App.R. 27.

{¶11} Costs to be taxed in compliance with App.R. 24.

  
H.J. Bresler, Presiding Judge

  
William W. Young, Judge

  
Stephen W. Powell, Judge

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : SUP. CT. CASE NO. \_\_\_\_\_  
Plaintiff-Appellee, :  
-vs- :  
MARCIANO VALLEJO : AFFIDAVIT FOR DELAY  
 : [(AFFIDAVIT OF VERITY)]  
Defendant-Appellant. :  
 :

AFFIDAVIT FOR THE DELAY

I, Marciano Vallejo, do solemnly swear and hereby state that I was unable to perfect and file a timely appeal to this Supreme Court of Ohio within the 45-days after the Butler County Court of Appeals, Twelfth Appellate District rendered its decision for the following reasons:

1. That during the transitional period from one facility to another left the Affiant without the possession of his legal and personal effects;
2. That during his initial arrival at his new place of confinement (DCI), Affiant was to undertake an orientation period;
3. That during the orientation period, left the affiant without the legal materials needed to comply with the rules and practice of the Supreme Court of Ohio;
4. That during December 18, 2008 thru January 3, 2009, the Legal Department at the Dayton Correctional Facility prevented the affiant from copying, notarizing, complying, with the necessary legal documentation that is required to comply with the Rules and Practice of the Supreme Court, because of its closure and absence of the (DCI) staff and/or personnel most responsible for the handling of an inmates legal processing;
5. That the Affiant was timely and proper before the Ohio Supreme Court, but the Clerk of Court refused to file because of alleged untimeliness;

6. That the Affiant believes that his "first" Notice of Appeal to the Ohio Supreme Court of Ohio was "timely";
7. That Affiant is unlearned in the law, and is a non-citizen of the United States, and unable to speak or understand fluent English language which creates a barrier to properly argue the appeal;
8. That the Affiant believes that he has presented "cause" for his untimely filing of the Notice of Appeal/Delayed Appeal in this case;
9. That the Affiant is submitting this Notice of Delayed Appeal in good faith;
10. That the Affiant is averring that this Affidavit is truthful and is based upon "entirely" the truth and wisdom of this Honorable Supreme Court.

FURTHER AFFIANT SAYETH NAUGHT.

Maxwell D. [Signature]  
AFFIANT

NOTARIZATION

Sworn and subscribed to in my presence a Notary Public this 23<sup>rd</sup> day of February 2009, did Maxwell D. signature hereto.

8/29/2011  
My Commission Expires



Tracy M. Callahan [Signature]  
TRACY M. CALLEHAN, Notary Public  
In and for the State of Ohio  
My Commission Expires August 27, 2011  
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Affidavit For Delay/Affidavit of Verity was sent to the Butler County Prosecutor Office, at Government Services Center; 315 High Street, 11th Floor Hamilton, Ohio 45012-0515, this 25 day of February 2009, by regular U.S. mail service.

Maxwell D. [Signature]  
APPELLANT-AFFIANT [PRO SE]