IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff, vs. WILLIAM O'NEAL, Defendant.	ON APPEAL FROM THE MEDINA COUNTY COURT OF APPEALS, NINTH JUDICIAL DISTRICT SUPREME COURT OF OHIO CASE NO. 2009-0222 COURT OF APPEALS CASE NO. 08CA0028-M

STATE'S MEMORANDUM OPPOSING JURISDICTION

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Explanation of Why Leave To Appeal Should Be Denied

The case at bar does not involve any substantial constitutional question nor is it an appeal from a capital sentence. Consequently, it is not an appeal of right pursuant to Supreme Court Rule II(A)(1). Rather, an appeal to this Court from a felony conviction is discretionary. The Supreme Court should decline to accept jurisdiction because the instant case was completely and properly adjudicated in the Ninth District Court of Appeals. There is nothing in the instant appeal that is of such statewide importance to be worthy of the Supreme Court's attention. Instead, Appellant merely reasserts the same arguments that were the basis of his appeal to the Ninth District.

Statement of the Case

On October 21, 2004, Appellant, William B. "Bruce" O'Neal, was indicted by the Medina County grand jury for two counts of attempted murder in violation of R.C. 2903.02 and 2923.02 (F-1); three counts of kidnapping in violation of R.C. 2905.01 (F-1); two counts of felonious assault in violation of R.C. 2903.11 (F-2); one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2) (F-3); and one count of illegal possession of a firearm in a liquor premise premises in violation of R.C. 2923.121 (F-5). Also, each count (except for CCW) included a firearms specification pursuant to R.C. 2941.145.

Appellant plead guilty on May 16, 2005 in the Medina County Court of Common Pleas to an amended indictment which excluded the two

attempted murder counts with firearm specifications but was otherwise unaltered from the original indictments. Appellant was sentenced to a total of thirteen years in prison. This consisted of three years for kidnapping and a consecutive seven year term for felonious assault. In addition, the firearms specification added an additional three years. Sentences for the remaining offenses were ordered to be served concurrently with the kidnapping and felonious assault sentences.

On April 9, 2006, this Court of Appeals affirmed O'Neal's conviction, but reversed his sentence pursuant to State v. Foster, 109 Ohio St.3d 1, 2006 Ohio 856, in case no. 05CA0076-M, State v. O'Neal (9th Dist), 2006 Ohio 1904. Following resentencing, the Court of Appeals dismissed O'Neal's appeal, No. 06CA0056-M, for lack of a final, appealable order pursuant to State v. Miller (9th Dist.), 2007 Ohio 1353. State v. O'Neal (9th Dist), 2007 Ohio 2266. Upon refiling with a corrected judgment entry, the Court of Appeals affirmed. State v. O'Neal (9th Dist.), 2008 Ohio 1325, case no. 06CA0056-M.

On October 31, 2007, Appellant O'Neal sought post conviction relief from his sentence. Said petition was denied on March 25, 2008. The transcripts for O'Neal's direct appeal from his conviction, case no. 05CA0076-M, were filed on September 7, 2005.

Statement of the Facts

On October 13, 2004, Appellant went to Christie's Cabaret in Brunswick, Ohio with a loaded 0.45 caliber pistol to shoot the victim, Tina Harrell. The victim was an employee at the cabaret and knew Appellant who sometimes went there. They were friends and Appellant helped Ms. Harrell financially in the past, but their relationship was never amorous. The victim was, in fact, married to another man. Evidently unsatisfied with this, Appellant became infatuated or obsessed with the victim. One may infer that he had made a nuisance of himself at the victim's place of employment because he was "banned" from the establishment. That did not stop him from entering with a loaded firearm. Once inside, Appellant forced Ms. Harrell at gunpoint to be seated and to listen to his rant. This placed not only Ms. Harrell in mortal danger, but also everyone else in the cabaret.

In her victim statement to the trial court, Ms. Harrell described what happened to her. Appellant explained in essence that he wanted her "to be his woman" and when Harrell refused to acquiesce, he said several times, "I will kill you. I want to kill you." The victim was convinced that she would be killed and begged for her life and for Appellant to consider her family. Ms. Harrell knew that if she answered Appellant's questions with answers he did not want, he would kill her. In response, "He had told me it was too late for that." Still shaken by the incident, Ms. Harrell stated that she continues to have nightmares and "saw the devil in [Appellant's]

eyes that day."

While Appellant was terrorizing the victim, the Brunswick police arrived. Having seen officers enter the club, Appellant stood and in cold blood shot Ms. Harrell in the abdomen before exchanging gunfire with the police. Appellant was shot twice. Fortunately and despite Appellant's efforts, the police were not wounded. Ms. Harrell spent weeks in the hospital and incurred over $100 thousand in medical expenses. Ms. Harrell is alive today only because of the efforts of police and medical personnel. She requested the maximum sentence for Appellant because she is afraid he will kill her upon being released from prison.

Appellant's explanation for his behavior is inconsistent with the facts. In asserting that he never meant to hurt Ms. Harrell and that he only wanted to commit suicide in her presence, Appellant ignores the elements of the offenses to which he pled guilty. In pleading guilty to felonious assault, he admitted that he acted "knowingly." In pleading guilty to kidnapping, Appellant admits to employing force, stealth or deception. Appellant's explanation is, therefore, disingenuous.

The trial court noted that whatever Appellant claimed his intentions to be, he only shot Ms. Harrell and not himself as one might expect in a suicide attempt. The purported suicide note left by Appellant reads as a plan to commit murder which further demonstrates premeditation and malice. Besides, Appellant specifically told Ms. Harrell that he intended to kill her.

APPELLEE'S PROPOSITION OF LAW No. 1: The limiting time for a post conviction relief petition runs from the time transcripts are first filed in the Court of Appeals.

APPELLEE'S PROPOSITION OF LAW No. 2: Appellant has no basis for a claim of post conviction relief.

A. Appellant's petition for postconviction relief was untimely.

The transcripts for O'Neal's direct appeal from his conviction, case no. 05CA0076-M, were filed on September 7, 2005. Revised Code 2953.21 is post-**conviction** relief, not post-sentence relief. The plain language of the statute makes this clear by making an exception of capital cases where a death sentence by itself maybe challenged on post-conviction relief. Otherwise, the remedy for an allegedly improper sentence is direct appeal. In addition, the plain language of Mr. O'Neal's petition for postconviction relief indicates he is **challenging the conviction itself** and not merely the sentence.

Revised Code 2953.21(A)(2) requires, "Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the **trial transcript** is filed in the court of appeals in the **direct appeal of the judgment of conviction** or adjudication...." [Boldface added.] Consequently, O'Neal's argument that the trial judge should have used the filing date for the transcripts on appeal from the refiled resentencing is simply wrong.

In State v. Casalicchio (8th Dist.), 2008 Ohio 2362, P.22, the Court of Appeals held that a resentencing under *Foster* does not reset the clock for

a post-conviction relief petition. Further, even if it did in O'Neal's case, then the dismissal cannot reset the clock for a subsequent appeal on the same issue.

> *** Despite our admiration for Casalicchio's contention, however, we still conclude that his "void" sentence did not "restart the clock" to extend his time to file a post-conviction relief petition.
>
> * * * *
>
> The Tenth District was faced with a petitioner's post-conviction relief petition filed after he was resentenced pursuant to a remand in his first appeal. See *State v. Laws*, 10th Dist. No. 04AP-283, 2004 Ohio 6446. It explained that "[w]hile R.C. 2953.21(A)(2) does not specifically address the present situation, we are guided by the purpose of the amendments to R.C. 2953.21(A)(2) [limiting the time to file to 180 days] and the case law interpreting it. *** [I]f we were to determine that the time for filing a defendant's post-conviction did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post-convictions petitions would be extended well beyond the time limits set forth in R.C. 2953.21(A)(2) to an undetermined time in the future, all contrary to the intent of the legislature." Id. at P6.
>
> The Tenth District held, "under the circumstances of this case, the time limits of R.C. 2953.21(A)(2) began to run at the time defendant's transcript was filed in his first appeal. The transcript in defendant's initial appeal was filed on January 28, 1998 and *** [h]is petition therefore was due on July 27, 1998. Defendant, however, filed his petition for post-conviction relief on April 1, 2002. As a result, his petition was untimely. The trial court properly recognized it lacked jurisdiction to entertain defendant's untimely petition unless defendant satisfied the mandatory jurisdictional requirements set forth in R.C. 2953.23(A)." (Internal citations omitted.) Id. at P7.

The prevailing case law makes it clear that the time limit runs from the original appeal from the conviction, the transcripts of which were filed on September 7, 2005, case no. 05CA0076-M. Nevertheless, even if *arguendo* O'Neal is allowed to seek post conviction relief from a sentence

alone, the transcripts from that sentence were filed August 16, 2006 in case no. 06CA0056-M. When that case was dismissed and refiled under the present case number, it did not change the subject matter of the appeal *sub judice*. Consequently, the 180-day window begins **at the latest** on the transcript filing of case no. 06CA0056-M. Nothing about the judgment entry or the status of the appeal would have prevented a civil collateral attack on the sentence through postconviction relief.

Appellant O'Neal has failed to provide any specific case authority to support his argument that the dismissal of the appeal from resentencing restarts the clock for postconviction relief. The time limit in R.C. 2953.21 is just that, a time limit. It in no way links the status of the postconviction relief petition to that of the appeal. That is why the time for postconviction relief runs even if no appeal is filed. (A)(2).

Post conviction relief is not a Constitutional right. It exists by staute and its plain language was drafted narrowly to apply to rare and genuine miscarriages of justice and to prevent it from being a routine second appeal. Consequently, defense counsel's flippant remark about heads and tails is misplaced. The criminal justice system is designed to find the truth and not to allow dangerous criminals to escape justice by gamesmanship and chance. Unless there is a clear injustice, a defendant who has admitted guilt and exhausted his direct appellate remedies is supposed to lose.

B. No exceptions apply

As noted in the trial court's journal entry, none of the exceptions to the 180-day time limit found in R.C. 2953.23 apply to this case. O'Neal in his brief does not allege otherwise. In particular, O'Neal does not allege he was unavoidably prevented from discovering facts upon which his petition is based or that after the 180-day time limit expired, the Supreme Court of the United States recognized a new Federal or state right that would have applied to him retroactively. In either case, O'Neal has not alleged, much less demonstrated that either of those conditions would have prevented him from being convicted.

C. Any error is harmless.

While the State maintains that O'Neal's postconviction relief petition is barred by the 180-day time limit, even if this Court of Appeals finds otherwise, the error is harmless. As a preliminary matter, Appellee, the State of Ohio, categorically denies any withholding of exculpatory evidence. In point of fact, all of the evidence known to the prosecution incriminated O'Neal. He walked into cabaret and held the victim captive at gunpoint until the police arrived while threatening to kill her. When he saw the police, he shot the victim in the abdomen at point-blank range with a 0.45 caliber bullet. He then shot at the police. Only surgical intervention saved the victim's life. No "false evidence" was presented in court as O'Neal claims. In addition, the trial court at resentencing was fully aware that O'Neal disputed serving time in Federal prison.

O'Neal pled guilty as indicated in the statement of facts. As a result he has waived all rights on appeal except sentencing and the propriety of the plea itself. This means, of course, that he has **waived any factual issue concerning his guilt**. O'Neal did not challenge his conviction on direct appeal. *O'Neal*, 2006 Ohio 1904, case no. 05CA0076-M. Before his resentencing, O'Neil moved to withdraw his guilty plea. This Court affirmed the denial stating the trial court had no jurisdiction to vacate a guilty plea that was not challenged on direct appeal. *O'Neal*, 2008 Ohio 1325, P.13, case no. 06CA0056-M.

O'Neal does not indicate anything that would render his conviction or sentence void or voidable. He does not indicate any reliable basis for supposing any violation of Brady v. Maryland (1963), 373 U.S. 83, occurred. Nothing he claims can change the fact that he shot a woman in cold blood in the presence of witnesses in an effort to kill her.

What is more, O'Neal's petition for postconviction relief is barred by *res judicata*. The Court of Appeals explained that the petitioner for postconviction relief is not automatically entitled to an evidentiary hearing.

> [T]he trial court must hold a hearing on a petition for post-conviction relief "unless the petition and the files and records of the case show the petitioner is not entitled to relief[.]" When raising a claim of ineffective assistance of counsel in a petition for post-conviction relief, the **defendant has the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate his claim**. *State v. Jackson* (1980), 64 Ohio St. 2d 107 [...], syllabus. [Boldface added.]

State v. Thomas (9th Dist. 1997), No. 96CA006593, 1997 Ohio App. LEXIS

3745, *3. Where a trial or appellate remedy exists for a claim, a defendant may not raise that claim in a petition for postconviction relief.

The Supreme Court of Ohio has repeatedly held that:

> Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

State v. Szefcyk (1996), 77 Ohio St.3d 93, syllabus, citing State v. Perry (1967), 10 Ohio St. 2d 175, 180. It is well established that, pursuant to the doctrine of *res judicata*, a defendant cannot raise an issue in a petition for postconviction relief if he could have raised that issue on direct appeal. State v. Reynolds (1997), 79 Ohio St.3d 158, 161 citing State v. Duling (1970), 21 Ohio St.2d 13.

> The trial court dismissed Thomas's petition without a hearing because it determined that his claims were barred by the doctrine of *res judicata*. A defendant is barred by the doctrine of *res judicata* from raising any defense or constitutional claim that was or could have been raised at trial or on direct appeal from his conviction. *State v. Perry* (1967), 10 Ohio St. 2d 175 [...], paragraph nine of the syllabus. A claim of ineffective assistance of counsel raised in a petition for post-conviction relief is barred as *res judicata*, as long as defendant had different counsel on appeal, unless the claim cannot be determined without resort to evidence outside or "*dehors*" the record. *State v. Cole* (1982), 2 Ohio St. 3d 112 [...], syllabus.

Thomas, 1997 Ohio App. LEXIS 3745, *4.

An exception to *res judicata* is when a petitioner presents competent, credible evidence *dehors* the record of a Constitutional violation when said

evidence was not available in time to support a direct appeal. State v. Williams (12th Dist.), CA97-08-162, 1998 Ohio App. LEXIS 2782, *6, *cert. denied*, 83 Ohio St. 3d 1449. As in *Williams*, O'Neal has failed to present any real evidence of a *Brady* violation.

For these reasons, even if the trial court erred in concluding that the time limit for postconviction relief had expired, the error was harmless because O'Neal's petition for postconviction relief failed to specify an adequate basis for relief and was barred by *res judicata*.

D. Appellee's second proposition of law.

During the prosecution of this case in the trial court, the prosecution fully complied with all state and Federal discovery requirements. Defense counsel fails to state any good-faith basis for alleging misconduct by the Prosecuting Attorney's office. All evidence known to the State was incriminating. Counsel for Appellee fails to see what evidence could possibly be exculpatory when O'Neal walked into a cabaret and shot a women in cold blood. As noted above, any discrepancy between police "rap sheets" and the P.S.I. report was brought to the trial court's attention.

The defense alleges that documentation in the possession of the prosecution shows a different criminal history than what the trial court's presentence investigation report found. It is entirely possible that the P.S.I. was accurate while the "rap sheets" were erroneous. Such reports are not absolutely reliable. If the P.S.I. relied on actual judgment entries, then it contained the more reliable evidence. Nothing in the record

resolves the alleged discrepancy. This all assumes, of course, that the rap sheets in question were in fact in the possession of the prosecution at sentencing which has not been demonstrated.

In any event and for reasons articulated above, nothing mentioned here renders O'Neal's conviction which was based on a negotiated guilty plea void or voidable. This is simply a desperate attempt by O'Neal to shift blame for his horrific crime onto those who brought him to justice.

Conclusion

For all these reasons, Appellant's Memorandum in Support of Jurisdiction should be denied. The instant matter has been thoroughly adjudicated by the Court of Appeals and there is nothing of such statewide importance to warrant the attention of the Supreme Court.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing State's Memorandum in Opposition to Jurisdiction was sent by regular U.S. Mail on this 27th day of February, 2009 to: Stephen P. Hardwick, Office of the Public Defender, 8 E. Long St.—11th floor, Columbus, OH 43215.

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