

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

v

LARRY GODFREY

Defendant-Appellant

Case No:

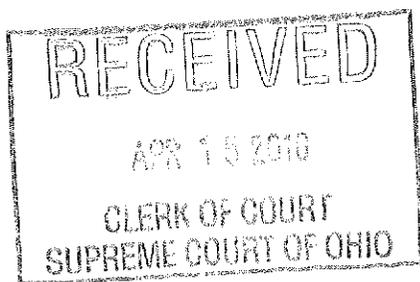
10-0666

Discretionary Appeal from the
Licking County Court of Appeals,
Fifth Appellate District
Case No. 97-CA-155A

NOTICE OF APPEAL

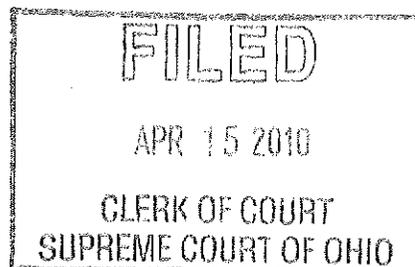
Appellant Larry Godfrey hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Licking County Court of Appeals, Fifth Appellate District, in State v Godfrey, Court of Appeals case NO. 97-CA-155A, rendered March 4, 2010.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.



Larry Godfrey

Larry Godfrey, *pro se*
#351-586 NCI E1 E103
15708 McConnelsville Rd.
Caldwell, OH 43724



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

v

LARRY GODFREY

Defendant-Appellant

Case No:

Discretionary Appeal from the
Licking County Court of Appeals,
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**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LARRY GODFREY**

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MEMORANDUM IN SUPPORT OF JURISDICTION

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fundamental: it was set forth in the Constitution to assure the fairness and legitimacy
of the adversarial process. The courts have the constitutional duty to correct the
deprivation of this right, regardless of when or how this is brought to their attention.

PROPOSITION OF LAW NO 2: The Constitutional guarantee of prosecution only by 8
indictment which has been passed by a grand jury is fundamental to Due Process and
fundamental fairness, and cannot be taken away. A conviction based on a void or fatally
defective indictment is void *ab initio* and cannot stand.

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effective assistance of counsel when his counsel fails to recognize and raise the
lack of a valid indictment; fails to provide critical information to his client; fails to
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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The right of effective assistance of legal counsel is guaranteed under the Sixth Amendment of the United States Constitution and Art. I, §10, of the Ohio Constitution. Ohio has granted the right to appeal, with effective representation, to every criminal defendant. Ohio App. R. 26(B) protects this essential constitutional right in appellate proceedings by providing for reopening a direct appeal when counsel in that appeal was constitutionally ineffective. In the instant case, the Court of Appeals reopened the appeal because Appellant's appointed appellate counsel – who was also his appointed defense counsel – did not appeal either his conviction or sentence; did not raise critical constitutional issues; and then failed to obtain and provide the transcripts necessary to support an appeal.

The right to prosecution only by indictment of a grand jury is guaranteed under the Sixth Amendment of the United States Constitution and Art. I, §10, of the Ohio Constitution, and this is necessary to ensure the fundamental right to fair and complete notice of the nature of the charge and the constituent elements thereof. Appellant was convicted of offenses in an indictment which was not presented to or passed by a grand jury; to which he did not consent, or waive his right; and which is so ambiguous and confusing that he does not know to this day what he was convicted of or sentenced for.

When a defendant has been deprived of his right to the effective assistance of counsel, no matter at what stage, or even through several stages of, the proceedings, he is constitutionally entitled to have this corrected and have his issues brought before a court for meaningful review with the benefit of effective legal representation. *Powell v Alabama*, 287 US 45 (1932).

For these reasons it is submitted that this case presents important issues relating to the fundamental and inviolable rights of persons convicted of criminal offenses, and their right of access to Ohio courts and redress of these rights.

STATEMENT OF THE CASE

Appellant has for the past several years unsuccessfully pursued every avenue open to him in an effort to obtain a decision of the merits of his appeal.

On October 14, 1997, Appellant agreed to a plea offer pursuant to *Alford v North Carolina*, 400 US 25 (1970), wherein he pled to 6 charges. This agreement was unilaterally modified by the prosecutor with the addition of 4 reinstated charges.

On November 11, 1997, Appellant was sentenced to concurrent and consecutive terms of imprisonment: the aggregate of these is unclear. (*infra* @10)

Appellant's defense counsel was appointed as his appellate counsel, and filed a notice of appeal on December 12, 1997. The Clerk of Court filed a notice of transmittal of the record to the Court of Appeals on January 21, 1998, before counsel filed the motion and obtained the order for this transcript. The Court of Appeals has certified that this transcript was never filed. Counsel filed an appeal which did not address the conviction or sentence, with no supporting documents.

On June 3, 1998, Appellant filed a *pro se* motion to obtain a transcript of "all plea and pre-trial proceedings, and all post-trial and sentencing proceedings ... excepting any portions of the same which may have already been provided." This was summarily dismissed by the trial court.

On August 28, 1998, the Court of Appeals dismissed the appeal "because Appellant has failed to provide this court with those portions of the transcript necessary for resolution of the assigned error."

On November 25, 1998, through retained counsel, Appellant filed an Application for Reopening" in the Court of Appeals, arguing that he was denied his constitutional right to the effective assistance of appellate counsel. This application was granted on January 1, 1999. On February 16, 1999, the clerk transmitted the record and transcripts to the Court of Appeals. (The records which were claimed to have been previously transmitted)

On July 6, 1999, Appellant filed in the trial court a "Motion to Withdraw Guilty Plea and

Alternative Petition to vacate or Set Aside Sentence Pursuant to O.R.C. 2923.21”. The trial court dismissed this petition without review on August 11, 1999.

On August 19, 1999, Appellant filed a notice of appeal of this dismissal.

On September 2, 1999, the Court of Appeals filed its opinion denying Appellant's reopened appeal.

On February 25, 2000, the Court of Appeals affirmed the trial court's dismissal of Appellant's Motion to Withdraw his plea.

Appellant continued to seek relief through collateral proceedings in federal courts, which are not relevant to this appeal and which were dismissed without review.

On March 14, 2007, Appellant filed a motion under Crim. R. 32.1 to withdraw his Alford plea, alleging ineffective assistance of trial counsel. The trial court dismissed this on March 20, 2007, claiming lack of jurisdiction. Appellant appealed, and the Court of Appeals affirmed, stating a “direct appeal of the conviction or sentence” precludes a collateral attack on a plea, disregarding the fact that Appellant has never filed the “direct appeal of the conviction or sentence” cited.

On January 22, 2010, Appellant filed a motion to reopen his original appeal on the grounds that the attorney representing him on his previous attempt to reopen his appeal was ineffective because he did not appeal the conviction or sentence, but merely addressed the same issue of appointed counsel in the original appeal. The Court of Appeals dismissed this on March 14, 2010, claiming “Appellant is again raising ineffective assistance of counsel” and “there is no right to file successive petitions for reopening pursuant to App. R. 26(B)”. However, there is also no prohibition to a “successive” petition, nor does this apply here, as the application to reopen addressed inadequate representation of different appellate counsel. This cannot be classified as “successive” because the earlier application could not have produced a judgment on the merits of the claim in question, nor did the earlier application result in adjudication of Appellant's claims. *Stewart v Martinez-Villareal*, 523 US 637 (1998); *Slack v*

McDaniel, 529 US 473 (2000).

This is the central issue in this appeal: when someone has never received his benefit and right of effective assistance of counsel, there can be no “successive reopening” and he is entitled to have his claims of ineffective assistance and constitutional deprivation subjected to meaningful review and resolution.

STATEMENT OF FACTS

The facts underlying the prosecutions in this case have no relevance to the legal issues raised in this appeal.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO 1:

The right to the effective assistance of counsel is fundamental: it was set forth in the Constitution to assure the fairness and legitimacy of the adversarial process. The courts have the constitutional duty to correct the deprivation of this right, regardless of when or how this is brought to their attention.

It is through the right to counsel that all of an accused's other rights are secured and protected.

Maine v Moulton, 474 US 159 (1985); *United States v Cronin*, 466 US 648 (1984). Appellant has not as yet received the constitutionally guaranteed effective assistance on his appeal. When his appointed appellate counsel proved ineffective, Appellant attempted to remedy this by filing an application to reopen this appeal pursuant to App. R. 26(B). This appeal did not address the constitutional deprivations and rule or statute violations regarding his conviction and sentence: in this, too, counsel for the reopened appeal provided ineffective assistance. When Appellant recognized this, he filed another application to reopen his appeal, based on the ineffectiveness of different appellate counsel, and have these serious issues brought before a court. This attempt to obtain relief has also been tossed aside without review of the issues or merit of his appeal.

This is the central question before this Honorable Court: when does the right to effective assistance of counsel cease to exist? Courts have ruled that this right is applicable on a first appeal as of right of a conviction or sentence. If, as here, an appellant has not been afforded this first appeal, can he be denied the right to effective assistance of counsel to correct this deprivation? Of course not. It would only be reasonable and fair to afford a person in this situation a meaningful review with constitutionally effective representation. Denial of an appeal in this case would completely deprive an appellant of his constitutional right to effective representation. Such deprivation cannot be condoned.

Court proceedings are governed by intricate rules that a layperson finds confusing and hopelessly forbidding. *Evitts v Lucey*, 469 US 387 (1985). This Court has recognized the constraints

and difficulties which adversely affect the ability of inmates to research and brief issues – or even to recognize viable issues, such as when counsel was ineffective – often until long after their incarceration. This requires that a court carefully consider the principles and application of fundamental fairness, due process, and liberal interpretation of statutes and rules in favor of a defendant when determining if procedural errors are serious enough to warrant complete deprivation of constitutional rights. “A court must review an error that seriously affects the fairness or integrity of the judicial proceeding.” *United States v Young*, 470 US 1 (1985); *United States v Olano*, 507 US 725 (1993). When such fundamental rights have been violated, a appellant should not be given additional hurdles to clear just because his rights were violated at earlier stages of the proceedings or because he was unaware of the significance of these violations or the procedures to correct this. *Rodriguez v United States*, 395 US 327 (1969).

Cause and prejudice are automatically present when, as here, an appellant has been deprived of any assistance at all during critical stages of the proceedings; when his trial and appellate counsel were the same; when he was denied any assistance of counsel, *Gideon v Wainwright*, 372 US 335 (1963); and when he has received inadequate assistance at any stage of the proceedings. Cause also exists, again, as here, when the State withholds evidence or essential records from a defendant or appellant. *Brady v Maryland*, 373 U.S. 83 (1963), and when denial of an appeal would constitute a miscarriage of justice. *United States v Young*, 470 US 1 (1985); *United States v Frady*, 465 US 152 (1986). Any procedural default for this must be laid to the State and cannot serve to deny Appellant meaningful review and resolution of the over-riding constitutional errors. Appellant's counsels were responsible for the errors and omissions: this must be imputed to the State because the defaults occurred at stages of the proceedings when he was constitutionally entitled to effective assistance. The State is responsible for the denial of constitutional rights and must bear the responsibility for any resulting default. *Coleman v Thompson*, 501 US 722 (1991); *Murray v Carrier*, 477 US 478 (1986); *Kimmelman v*

Morrison, 477 US 365 (1991). “It is enough that the adversarial testing envisioned by the Sixth Amendment has been thwarted: the result is constitutionally unacceptable, and reversal is automatic.”
Lockhart v Fretwell, 506 US 364 (1993).

PROPOSITION OF LAW NO 2:

The Constitutional guarantee of prosecution only by indictment which has been passed by a grand jury is fundamental to Due Process and fundamental fairness, and cannot be taken away. A conviction based on a void or fatally defective indictment is void *ab inito* and cannot stand.

Appellant was arrested on a single charge dating from some 12 years previously; a *prima facie* violation of his right to a speedy trial and of the Ohio statute of limitations as proscribed by the Ohio Legislature. Following Appellant's arrest, the prosecutor obtained an indictment which charged Appellant with offenses between November 29, 1985, and March 31, 1989. The law defining the charged offenses, Ohio Senate Bill 94, did not come into effect until September 27, 1989 – after the alleged offenses. This is an obvious violation of the ex post facto clauses of the Constitution of the United States and the even stronger prohibition against retroactive laws of the Ohio Constitution. *Carper v State*, 27 OhioSt 572 (1875).

The indictment also included charges which did not include the mandatory element of intent. This raises a substantial question of due process because the Ohio Legislature considered this so important it was declared an element of the offense. In order to prove the charges brought, the State must prove that Appellant not committed the act in question, but that he did so for the specific purpose defined by Ohio law. Intent is an essential element of the charged offense which must be specified in the indictment and proved beyond a reasonable doubt. If a fact is by law the basis for prosecution or punishment, it is an element. *Apprendi v New Jersey*, 530 US 466 (2000); *Ring v Arizona*, 536 US 584 (2002). The Due Process guarantee mandates that an accused be proved guilty of every element of an offense – not some, or most, but every element. *In re Winship*, 397 US 358 (1970); *Sullivan v Louisiana*, 508 US 275 (1993); *United State v Gaudin*, 515 US 506 (1996). Since an essential element was not included, the indictment describes no chargeable offense; conferred no subject-matter jurisdiction; and is null and void on its face. *Almendarez-Torres v united States*, 523 US 224 (1998);

United States v Middleton, 246 F3d 825 (6th Cir 2001); *United States v Caldwell*, 176 F3d 898 (6th Cir 1989).

The State has punished Appellant for conduct that was not criminal at the time. This violated the fundamental due process requirement that a criminal statute must give fair warning of the conduct that it makes a crime. It has long been held that “the required criminal law must have existed when the conduct in issue occurred.” *Bouie v City of Columbia*, 378 US 347 (1964); *Pierce v United States*, 314 US 306 (1941); *Kring v Missouri*, 107 US 221 (1883); *Cummings v Missouri*, 4 Wall 277 (1867); *Fletcher v Peck*, 6 Cranch 87 (1910).

The courts must always conform to Constitutional provisions. “If a state legislature is barred by the Ex Post Facto Clause from passing a retroactive law, it must follow that a State court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.” *Rogers v Tennessee*, 532 US 451 (2001); *Bouie, supra*; *Marks v United States*, 430 US 188 (1977); *Rose v Locke*, 423 US 48 (1975).

Appellant was convicted of charges brought in an “amended” indictment which changed the character of the offense and was never presented to the grand jury. This constitutes a fatal variance which violated Appellant's right to indictment by grand jury and rendered the indictment void on its face, requiring reversal of Appellant's conviction.

PROPOSITION OF LAW NO 3:

A criminal defendant is deprived of his right to effective assistance of counsel when his counsel fails to recognize and raise the lack of a valid indictment; fails to provide critical information to his client; fails to follow his client's instructions; regarding an appeal; and otherwise fails to provide competent representation.

Appellant was subjected to custodial interrogation twice while being denied his right to the guidance of counsel, a clear *Miranda* violation. Counsel did not object to this or to the denial of Appellant's request for appointment of counsel following his release on bond, leaving him bereft of any assistance. Counsel appointed later to defend Appellant proved to be so ineffective as to be incompetent. He did not interview key witnesses; did not file any pre-trial motions; did not recognize the ex post facto or double jeopardy violations; did not recognize the missing elements in the indictment; and made no use of the substantial evidence available to support an alibi defense or Appellant's innocence.

Appellant, as with any client, had the right to expect his counsel to explain the charges, including the required elements; how the evidence applied to those charges; what the prosecutor had to prove; and the range of possible penalties. He did not. On the morning of the trial, Appellant was met with the attorney's statement that the trial judge did not want a trial but had instructed counsel to work out a plea agreement. If true, this is improper participation by the court. If not, this was a blatant lie by counsel to induce a plea. Either is a substantial violation of Appellant's constitutional rights. *State v Byrd*, 63 OhioSt 2d 288 (1980). Counsel represented this agreement to Appellant in very favorable terms, which Appellant reluctantly accepted. Much later, after being incarcerated, Appellant learned the true terms of the agreement, which held no benefit to him, but exposed him to the maximum possible sentence, and that his counsel had withheld vital information relevant to making this decision, rendering it unknowing, unintelligent, and involuntary. Counsel did not ensure that the terms and conditions of this agreement were on the record; did not provide Appellant with a copy of the written

agreement after it was signed; and did not ensure that the mandates of Crim. R. 11 or *Alford* were met. Counsel' incompetence is evidenced by the fact that he accepted a pre-sentence investigation report to be used to support his client's sentence when neither he nor his client had seen this report and did not know what it contained! Neither he nor the judge informed Appellant of his right to appeal; to have the assistance of counsel for his appeal; the procedures and time limits; or the penalties he faced by agreeing to the agreement. Constitutional rights are mere illusions when the defendant does not know of the rights; does not know how they apply to him; or when they have been violated before he can claim their protection. There is no benefit from rights of which one is unaware. *Johnson v Zerbst*, 304 US 458 (1938); *Goodwin v Cardwell*, 432 F2d 521 (6th Cir 1970); *State v Sims*, 27 Ohio St 2d 79 (1971). A right without a remedy to redress is a right without value. "If the means be not existent, the privilege itself would be lost." *ex parte Bollman*, 8 US (4 Cranch) 75 (1907).

Counsel also failed to object to the prosecution's unilateral change of this agreement after it had been signed, and the introduction of an amendment as noted above. The amendment, dialog at the hearing, and the judgment entry are all so confusing that Appellant does not know to this day what he was convicted of or sentenced for, nor has anyone else been able to arrive at a reasonable conclusion. Various attorneys, courts, and legal advisors have calculated Appellant's sentence to be in a range from 7 to 38 years.

Appellant made it clear in his application for reopening that it was not, as the Court of Appeals alleged, a "successive application" because it presented the issue of ineffectiveness of counsel who represented Appellant on his earlier attempt to reopen his original appeal – not his original counsel. This issue was not previously brought before a court. It is also clear from the Appellate Court's Opinion that this primary issue was completely ignored. The court instead chose to base its opinion on an alleged res judicata violation "because his new claim of ineffective assistance application to reopen." This is nonsense: it is impossible to raise a claim of ineffective counsel in the brief prepared by the

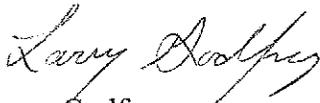
counsel in question in the appeal! While Appellant did describe the failures of his defense counsel and original appellate counsel in his brief, he pointed out that “it is necessary to provide information which, while not directly applicable under App. R. 26(B), is both relevant and critical to the issue of appellate counsel's ineffectiveness,” i.e., to show why counsel for the reopened appeal was ineffective in not raising the many errors of previous counsel.

CONCLUSION:

The Constitutional deprivations in this case are serious and easily overcome any need to show cause or prejudice. These errors should have been resolved long ago, at the very inception of this case – even before any charges were filed. Refusal to grant this appeal would result in a miscarriage of justice and would completely deny Appellant his rightful opportunity to appeal his constitutionally invalid conviction and/or sentence. *Perry v Maxwell*, 175 OhioSt 369 (1963); *State v Edwards*, 157 OhioSt 175 (1952). It is extremely unfortunate that the burden to resolve these issues falls on this Honorable Court due to the inability, or unwillingness, of lower courts to fulfill their duty.

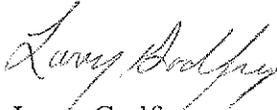
Appellant requests that this Honorable Court grant this appeal, or, in the alternative, order the Court of Appeals to allow Appellant to reopen his original appeal, with the effective assistance of counsel.

Respectfully submitted,


Larry Godfrey, *pro se*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Notice of Appeal; Memorandum in Support of Jurisdiction; Affidavit of Indigency; and Appendix for the above appeal were placed in the institutional mail system at Noble Correctional Institution for delivery via pre-paid first-class mail to Ken Oswalt, Licking County Prosecutor, 20 South Second St., Fourth Floor, Newark, Ohio, 43055, Counsel for Appellee, on April 12, 2010.



Larry Godfrey
Appellant, *pro se*

IN THE SUPREME COURT OF OHIO

AFFIDAVIT OF INDENCY

I, Larry Godfrey, do hereby state that I am without the necessary funds to pay the cost of this action because I am incarcerated at Noble Correctional Institution, where I earn \$21.00 a month. I have previously been confirmed as indigent by the Licking County Court of Common Pleas; the Licking County Court of Appeals; the United States District Court; the Sixth Circuit Court of Appeals; and the Supreme Court of the United States (federal actions were not related to this filing).

Pursuant to Rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio, I request that the filing fee and security deposit, if applicable, be waived.

Larry Godfrey
Affiant

Sworn to, or affirmed, and subscribed in my presence this 8 day of April, 2010.

Deborah C. King
Notary



DEBORAH C. KING
Notary Public, State of Ohio
My Commission Expires
2-12-14

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FILED

FIFTH APPELLATE DISTRICT

2010 MAR -4 A 10: 07

STATE OF OHIO

Plaintiff-Appellee

-vs-

LARRY GODFREY

Defendant-Appellant

CLERK OF COURTS
OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

JUDGMENT ENTRY

CASE NO. 97-CA-155A

On October 14, 1997, appellant, Larry Godfrey, entered *Alford* pleas of guilty to two counts of attempted felonious sexual penetration in violation of R.C. 2923.02 and R.C. 2907.12 and eight counts of gross sexual imposition in violation of R.C. 2907.05. By judgment entry filed November 14, 1997, the trial court sentenced appellant to an aggregate indefinite term of fifteen to thirty-eight years in prison, and classified him as a sexual predator.

Appellant filed an appeal (App. No. 97CA0155). This court affirmed appellant's case, presuming regularity in the proceedings because of the lack of a complete transcript. *State v. Godfrey* (August 28, 1998), Licking App. No. 97CA0155, (*Godfrey I*).

On November 25, 1998, appellant filed a motion to re-open his appeal pursuant to App.R. 26. This court granted the motion and re-opened appellant's appeal.

On July 6, 1999, while his re-opened appeal was pending, appellant filed a motion to withdraw guilty plea or in the alternative, post conviction relief to vacate or set aside his sentence pursuant to R.C. 2953.21. By judgment entry filed August 11, 1999,

the trial court dismissed the motion/petition for want of jurisdiction because of appellant's pending appeal. Appellant appealed this decision (App. No. 99 CA 95).

On September 2, 1999, this court affirmed appellant's re-opened appeal. See, *State v. Godfrey* (September 2, 1999), Licking App. No. 97CA0155, (*Godfrey II*).

On February 28, 2000, this court affirmed the trial court's denial of appellant's motion/petition for want of jurisdiction. See, *State v. Godfrey* (February 28, 2000), Licking App. No. 99 CA 95, (*Godfrey III*).

On March 14, 2007, appellant filed a motion to withdraw guilty plea pursuant to Crim.R. 32.1. By judgment entry filed April 10, 2008, the trial court denied appellant's motion for want of jurisdiction.

On March 30, 2009, this court affirmed the trial court's decision that it lacked jurisdiction to entertain appellant's Crim. R. 32.1 motion to withdraw his plea. See, *State v. Godfrey*, Licking App. No. 2008CA0056, 2009-Ohio-480. (*Godfrey IV*).

On January 22, 2010, appellant filed a motion to re-open his appeal pursuant to App.R. 26. Appellant assigns two errors:

"I. DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS INITIAL APPEAL.

"II. DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS RE-OPENED APPEAL."

App. R. 26 (B) states:

(B) Application for reopening:

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of

appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B) (2) (c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

Appellant is again attempting to reopen the appellate judgment that was rendered by this court in *State v. Godfrey* (September 2, 1999), Licking App. No. 97CA0155, (Godfrey II). Appellant is again raising ineffective assistance of counsel.

Appellant's second application to reopen is not well taken because there is no right to file successive applications for reopening pursuant to App.R. 26(B). *State v. Richardson*, 74 Ohio St.3d 235, 1996-Ohio-258, 658 N.E.2d 273; *State v. Cheren*, 73 Ohio St.3d 137, 1995-Ohio-28, 652 N.E.2d 707; *State v. Peeples*, 73 Ohio St.3d 149, 1995-Ohio-36, 652 N.E.2d 717.

Furthermore, the doctrine of Res Judicata prohibits this court from considering appellant's second application for reopening because his new claims of ineffective assistance of trial and/or appellate counsel could have been raised in his initial application to reopen. Once ineffective assistance of counsel has been raised and adjudicated, *res judicata* bars its relitigation. See *State v. Cheren* (1995), 73 Ohio St.3d 137, 652 N.E.2d 707; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

In addition, our decision in *Godfrey II* was entered September 29, 1999. Our decision in *Godfrey III* was entered February 28, 2000, and our decision in *Godfrey IV* was entered March 30, 2009. Appellant's application to re-open was not filed until January 22, 2010. Accordingly, appellant's application was not timely filed within ninety (90) days of the journalization of any of our previous opinions in appellant's case.

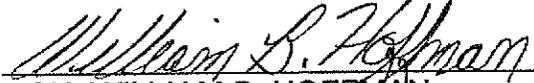
The Supreme Court has upheld judgments denying applications for reopening solely on the basis that the application was not timely filed and the applicant failed to show "good cause for filing at a later time." See, e.g., *State v. Keith*, 119 Ohio St.3d 161, 892 N.E.2d 912, 2008-Ohio-3866; *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861; *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970.

Appellant has not carried his burden to establish that there is good cause for the untimely filing of the application nearly eleven years after our decision in his re-opened appeal, and nearly ten (10) months after our most recent decision in appellant's case. His failure to demonstrate good cause is a sufficient basis for denying the application for reopening.

MOTION DENIED.

IT IS SO ORDERED.


HON. W. SCOTT GWIN


HON. WILLIAM B. HOFFMAN


HON. JOHN W. WISE