

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Case No.:

11-0678

Plaintiff-Appellee,

Vs.

Appeal from the Licking  
County Court of Appeals  
Fifth Appellate District  
Case No. 11-CA-0011

BERNARD HOLMES,

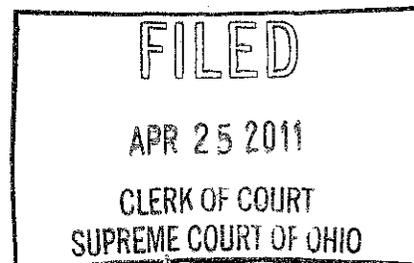
Defendant-Appellant,

BERNARD HOLMES  
#328-297 NCI E1 W79  
15708 McConnelville Road  
Caldwell, Ohio 43724

pro se

KEN OSWALT, ESQ  
Licking County Prosecutor  
20 South Second St., Fourth Floor  
Newark, Ohio 43055

COUNSEL FOR APPELLEE



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Case No.:

Plaintiff-Appellee,

Vs.

Appeal from the Licking  
County Court of Appeals,  
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BERNARD HOLMES,

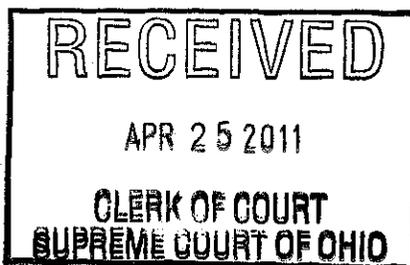
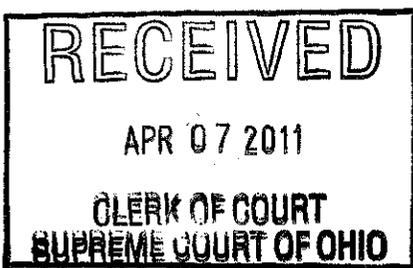
DEFENDANT-APPELLANT,

NOTICE OF APPEAL

Appellant, Bernard Holmes, 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 HOLMES, Court of Appeals case NO. 11-CA-0011, rendered February 2, 2011.

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

Bernard Holmes, pro se  
#328-297 NCI E1 W79  
15708 McConnelsville Road  
Caldwell, Ohio 43724



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,  
Plaintiff-Appellee,

On Appeal from the Licking  
County Court of Appeals,  
Fifth Appellate District

Vs.

BERNARD HOLMES,  
Defendant-Appellant,

Court of Appeals Case No.  
11-CA-0011

MOTION TO FILE DELAYED APPEAL

Now comes the Defendant-Appellant, Bernard Holmes,  
respectfully moves the Court pursuant to Ohio Supreme Court  
Rule II, Section 2(A)(4)(A) for leave to file a delayed appeal  
and a notice of appeals. This case involves a felony and more  
than 45 days has passed since the Court of Appeals decision  
was filed in this case. A memorandum in support is attached.

Respectfully submitted,



Bernard Holmes, #328-297  
Noble Correctional Institution  
15708 McConnelville Road  
Caldwell, Ohio 43724

DEFENDANT-APPELLANT, PRO SE

MEMORANDUM IN SUPPORT

On February 2, 2011, the Court of Appeals for Licking County, Ohio, Fifth Appellate District filed its decision in my case. I have attached a copy of the Court of Appeals Judgment Entry to this motion. There was no opinion in this case from that Court.

I was unable to file a timely appeal to this Court within the 45 days of the Court of Appeal decision for the following reasons:

I am currently incarcerated at Noble Correctional Institution. The policies here to use the Law Library is limited. First, there are only two computers that can be used to research a case or action. An inmate can only sign up for half-hour times, once a day. This must also be done during an inmate's recreation times during the day and/or recreation periods after dinner (which is every other night), and not during an inmate's institutional job assignment. Which really limits the access to the Law Library.

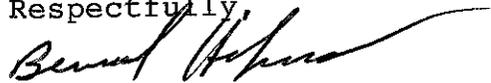
I have been incarcerated for over 15 years, and have very limited use prior to my incarceration, and during my incarceration to use a computer. It took longer to prepare an appeal to this Court. After I did my research, and prepared my Supreme Court Action, I found out that it would not be accepted because I wrote it like I would for the lower courts. So I had to re-do it. When I had my second revised appeal done, it was typed 1½ instead of double spaced, and again was told if I sent it in, it would probably be returned. My third attempt went too long in the body (over the 15 pages), so I had to re-do it again. My final appeal was suitable to send in.

My filing deadline was actually March 19, 2011. My understanding was that the appeal had to be in by that date. I did not realize or know that that meant that this Court must receive this action prior to or on this day. Since March 19, 2011 fell on a Saturday, that gave me until March 21, 2011. I hand delivered the Appeal packet to Mrs. King (E1 Unit Secretary) in the morning of March 16, 2011. All mail requiring a cash slip must go through staff to be signed and processed. I thought that was enough time to be post-marked by the post office by the 19th deadline. I did not realize this meant this Court must receive it by the deadline to be properly filed.

I gave the Appeal to Mrs. King on the 16th. My cash slip was processed on the 17th (cash slip enclosed for your review), and then it was sent out. My appeal packet should have been mailed that day, the 17th (Thru), or in any event no later than the 18th (Fri.), which would have gotten it to the Court in Columbus on the 21st. I gave it to an agent of the State 5 days before the deadline; from then on it was out of my control.

I hope and pray that this Court will not hold me responsible for the delay of this institution policies and procedures that is the main reason that the Supreme Court of Ohio, Clerk of Court, not receiving the Appeal on time, or the lack of understanding of all the procedures involved in filing an Appeal in this Court. The Appeal was received one day late and not several days or months late. This matter really does need to be addressed and I will explain that in the following section.

Respectfully,



Bernard Holmes, pro se

If this Court would grant me a delayed appeal I would raise the following issues in my Memorandum Of Jurisdiction.

Proposition 1, involves the right to assistance of counsel, and the courts having an constitutional duty to correct the deprivation of this right, regardless of when or how this is brought to their attention. Appellant did not receive effective assistance of counsel when trial counsel (Bruce Ennen) gave him information that was not true, and based on that information changed his plea to guilty based on the fact that counsel told him: "I advised Mr. Holmes that in each of his cases, he could not serve no more than fifteen years combined." Disciplinary Counsel filed counsels response to complaint through the Supreme Court of Ohio, File No. A3-0383 , page 4 of 4, Time Stamped May 1, 2003. This violates Appellant's right to effective assistance of counsel.

Proposition 2, involves The Trial Court violated Rule 11, when the plea agreement was not put into the record as required to do. This violates the Appellant's right to Due Process and the right to know, and have the terms of the plea agreement put on the record. Trial Court also failed to inform the Appellant how the Multi-Sentence law in effect at the time the court accepted the change of plea and sentenced Appellant to 18-45 years. Ohio Revised Code §2929.41 states that my minimum sentence could not exceed 15 years. Appellant was sentenced to 18-45 years. Therefore, by not explaining this to the Appellant, the Trial Court could not have determined if the Appellant understood the terms and condition of the agreement, which violated Appellant's constitutional rights and the statutes of the Ohio Revised Code.

Proposition 3, involves Due Process and Ex Post Facto clause of the constitution. This issue not only effects the Appellant, but other inmates that has had their parole taken from them by allowing the judge, prosecutor and/or victim or victim's representative to submit a petition to the Ohio Parole Board a few weeks prior to their release on parole. Ohio Revised Code §2967.121, only states and gives the Parole Board the authority to inform them of the inmates early release, and not gives them the right to petition for a full board hearing as in this case. Ohio Revised Code §2967.12, allows the Ohio Parole Board to notify these three parties three weeks prior to any hearing, and also allows at this time to petition for a hearing. The Supreme Court has held that ex post facto violations may be established with regards to parole board regulations where the prisoner demonstrates a significant risk of punishment. Appellant can and will if this action is granted.

Proposition 4, involves Breach of Contract, Due Process, and Effective Assistance of Counsel. The Appellate Court denied the Delayed Appeal because Appellant was untimely. Appellant, up until December 15, 2010 could have been released from prison by the Ohio Parole Board, or the Court of Licking County Common Pleas Court as to the counseled plea agreement. The Parole Board has not responded to my requests of a Reconsideration Hearing, and the Court did not release Appellant on early release as Appellant asked them to do in October 2010. Therefore, Appellant had no other choice but to file for a Delayed Appeal following the violation of the broken plea agreement and the violations against the Appellant's constitutional rights.

#### CONCLUSION

These issues not only has constitutional violation, but also explains why this case is one of Public or Great General interest. This decision

will effect all inmates that the parole board has violated in this situation.

This Court should grant me leave to file a Delayed Appeal and Notice of Appeal.

  
Bernard Holmes, #328-297  
Noble Correctional Institution  
15708 McConnelsville Road  
Caldwell, Ohio 43724

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Delayed Appeal, Notice of Appeal, Memorandum In Support, Certificate of Service, Affidavit of Indigency, Affidavit In Support of the Facts, along with a letter to Ken Oswalt, Licking County Prosecutor, informing him that the Memorandum In Support of Jurisdiction of Bernard Holmes, was rejected as required by Rule 14.2(E) of the Rules of Practice of the Supreme Court, was all sent by regular U.S. Mail to Ken Oswalt, Licking County Prosecutor, 20 South Second Street, Fourth Floor, Newark, Ohio 43055, on April 4, 2011.

  
Bernard Holmes  
Appellant, pro se

IN THE SUPREME COURT OF OHIO

AFFIDAVIT OF INDIGENCY

I, Bernard Holmes, 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 \$22.00 a months.

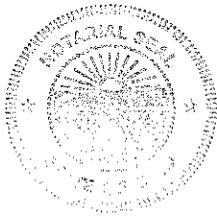
Pursuant to Rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio, I am requesting that the filing fee and security deposit, if applicable, be waived.

*Bernard Holmes*  
Bernard Holmes  
Appellant, pro se

4 Sworn to, or affirmed, and subscribed in my presence this day of April, 2011.

XXXXXXXXXXXX

SEAL:



DEBORAH L. KING  
Notary Public, State of Ohio  
My Commission Expires

2-12-14

NOTARY PUBLIC

My Commission Expires: 2-12-14

*Deborah King*

AFFIDAVIT IN SUPPORT OF THE FACTS

I, Bernard Holmes, do hereby state that the statements in the Memorandum In Support are true to my best ability under penalty of perjury.

*Bernard Holmes*  
Bernard Holmes  
Appellant, pro se

4 Sworn to, or affirmed, and subscribed in my presence this day of April, 2011.

SEAL:



DEBORAH L. KING  
Notary Public, State of Ohio  
My Commission Expires

2-12-14

NOTARY PUBLIC

My Commission Expires: 2-12-14

*Deborah King*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the JUDGMENT ENTRY from the Court of Appeals for Licking County, Ohio Fifth Appellate District; the Judgment Entry from the Common Pleas Court , Licking County, Ohio; the JUDGMENT ENTRY from the Trial Court, Common Pleas Court of Ohio , for case number 96-CR-16-F and case number 96-CR-146-F was sent to Ken Oswalt, Prosecuting Attorney for Licking County, Ohio, by regular U.S. Mail on this 18th day of April, 2011.

  
Bernard Holmes #328-297  
pro se

# Personal A/C Withdrawal Check Out Slip

Dollars	Cents
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Institution: <i>NCI</i>	Date: <i>3/16/2011</i>	
Name: <i>Office of the Clerk - Supreme Court of Ohio</i>		
Address: <i>65 South Front Street, 8th Floor</i>		
City: <i>Columbus</i>	State: <i>OHIO</i>	Zip Code: <i>43215-3131</i>

- Postage     Copies     ID     Misc.     Check-out CK #

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature: <i>Bernard Helms</i>	Number: <i>328-297</i>	Block & Cell Number: <i>E1-W79</i>
Approved By:	Witnessed: <i>ROLAND</i>	

Ship VIA:	Date Processed: <i>3/16/11</i>
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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FILED

FIFTH APPELLATE DISTRICT

2011 FEB -2 A 10: 06

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

STATE OF OHIO

Plaintiff - Appellee

-vs-

BERNARD HOLMES

Defendant - Appellant

Case No. 11CA0011

JUDGMENT ENTRY

This matter came before the Court for consideration of Appellant's pro se motion for leave to file a delayed appeal pursuant to App.R. 5(A). Appellee has filed a response in opposition.

It appears from Appellant's memorandum in support that Appellant seeks to file a delayed appeal from a conviction and sentence entered on April 22, 1996. Appellant asserts this request is made because he has been unable to resolve his issue with the parole board.

Whether to grant or deny leave to file a delayed appeal is in the sound discretion of the appellate court. *State v. McGahan* (1949), 86 Ohio App. 283, 88 N.E.2d 613. A delayed appeal should be granted where it appears on the face of the record the overruling of such motion would result in a miscarriage of justice. *State v. Bendnarik* (1954), 101 Ohio App. 339, 123 N.E.2d 31. "Lack of effort or imagination, and ignorance of the law, are not such circumstances and do not

automatically establish good cause for failure to seek timely relief". *State v. Reddick* (1995), 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

Upon review of Appellant's motion and affidavit, the Court finds that Appellant has failed to establish good cause for delay in filing a timely appeal.

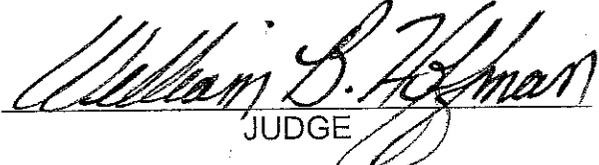
MOTION DENIED.

APPEAL DISMISSED.

COSTS TO APPELLANT.

IT IS SO ORDERED.

  
JUDGE

  
JUDGE

  
JUDGE

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

LICKING COUNTY  
COMMON PLEAS COURT

State of Ohio,

Plaintiff,

v.

Bernard E. Holmes,

Defendant.

2006 NOV 17 P 1:07  
CASE NO. 96 CR 00016  
96 CR 00146  
FILED  
GARY R. WALTERS  
CLERK  
JUDGMENT ENTRY

This matter is before the Court on defendant's motion to suspend further execution of sentence, the State's response, and defendant's reply.

Defendant filed his motion pursuant to former R.C. 2947.061. On April 22, 1996, he was convicted of voluntary manslaughter, abuse of a corpse, and multiple counts of breaking and entering.

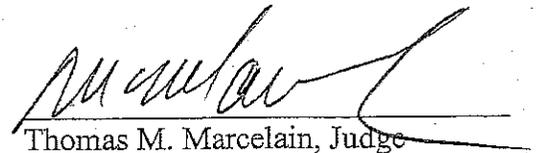
The parole board determined that the defendant is not a suitable candidate for release. Defendant has been in custody of the Department of Rehabilitation and Corrections for nearly fifteen years, and the board is in a better position to determine the defendant's suitability for release. The Court finds no reason to disagree with the determination of the parole board in light of the number and severity of the offenses committed by the defendant.

Accordingly, defendant's motion is DENIED.

It is so ORDERED. There is no just cause for delay. This is a final appealable order.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.

Judge  
Thomas M. Marcelain  
740-670-5777

  
Thomas M. Marcelain, Judge

Copies to:

Judge  
Jon R. Spahr  
740-670-5770

Assistant Prosecuting Attorney, 20 S. Second Street, Newark, OH 43055

Adult Court Services, Courthouse, Newark, OH 43055

Courthouse  
Newark, OH 43055

Bernard E. Holmes, #328-207, N.C.I., 15708 McConnelsville Rd., Caldwell, OH 43724

IN THE COMMON PLEAS COURT OF LICKING COUNTY, OHIO

CLEARING HOUSE  
LICKING COUNTY, OHIO  
LAW

State of Ohio,

Plaintiff

APR 22 P 1:12

vs.

Case No. 96-CR-16-F

Bernard E. Holmes,

Defendant

JUDGMENT ENTRY  
(Change of Plea)

This matter came on for a change of plea hearing this 22nd day of April, 1996. The defendant appeared with counsel, Bruce Ennen.

The State made an oral motion to amend Count 1 of the indictment from the charge of murder in violation of R.C. 2903.02 to the charge of Voluntary Manslaughter in violation of R.C. 2903.03. The Court accepted the motion.

At the hearing, the defendant requested that he/she be permitted to withdraw his/her previously entered plea of not guilty and enter a plea of guilty to the charge(s) of Voluntary Manslaughter in violation of R.C. 2903.03 and Gross Abuse of a Corpse in violation of R.C. 2927.01(B) contained in the indictment.

The defendant presented to the Court a written plea of guilty to the charge(s) and waived his/her right to a jury trial. The Court advised the defendant and determined that the plea was being entered voluntarily; that the defendant understood the nature of the charge(s); and that the defendant understood the maximum penalty involved. The Court advised the defendant and determined that the defendant knew and understood the effect of the plea and that the Court would proceed with sentencing upon accepting the plea.

The Court further informed the defendant and determined that the defendant understood that by entering the plea, he/she was waiving the right to a jury trial, to confront witnesses against him/her, to have compulsory process for obtaining witnesses in his/her favor, and to require the State to prove his/her guilt beyond a reasonable doubt at a trial at which he/she cannot be compelled to testify against himself/herself.

Judge  
Gregory L. Frost  
(614) 349-6186

Judge  
Jon R. Spahr  
(614) 349-6181

Courthouse  
Newark, O. 43055

A factual basis for the charges were presented. Thereafter, the defendant was permitted to withdraw the former plea of no guilty, the guilty plea was accepted and based upon the factual basis presented, the defendant was found guilty as charged.

The defendant is sentenced on amended Count 1 to an indeterminate sentence of 10 to 25 years at the Correctional Receiving Center at Orient, Ohio.

The defendant is sentenced on Count 2 to a determinate sentence of one year at the Correctional Receiving Center at Orient, Ohio, to be served in a concurrent manner with Count 1.

No fine is entered. Court costs are assessed against the defendant.

The defendant receives credit for time served of 129 days.

The prison sentence imposed in this case shall be served in a consecutive manner with the sentence imposed in Case No. 96-CR-146-F.

  
\_\_\_\_\_  
JUDGE GREGORY L. FROST  
COMMON PLEAS COURT

cc: Prosecutor's Office  
Counsel for defendant  
Adult Court Services

IN THE COMMON PLEAS COURT OF LICKING COUNTY, OHIO

State of Ohio,

Plaintiff

vs.

Case No. 96-CR-146-F

Bernard E. Holmes,

Defendant

JUDGMENT ENTRY  
(Plea Entry)

This matter came on for a hearing on the entry of a guilty plea this 22nd day of April, 1996. The defendant appeared with counsel, Bruce Ennen.

At the hearing, the defendant requested that he be permitted to enter a plea of guilty to the charge(s) of six counts of Breaking and Entering in violation of R.C. 2911.13, two counts of Receiving Stolen Property in violation of R.C. 2913.51, and specifications in violation of R.C. 2941.143 contained in the Bill of Information.

The defendant presented the Court with a written Waiver of Prosecution by Indictment as well as a written plea of guilty to the charge(s) and waived his right to a jury trial. The Court advised the defendant and determined that the plea was being entered voluntarily; that the defendant understood the nature of the charge(s); and that the defendant understood the maximum penalty involved. The Court advised the defendant and determined that the defendant knew and understood the effect of the plea and that the Court would proceed with sentencing upon accepting the plea.

The Court further informed the defendant and determined that the defendant understood that by entering the plea, he/she was waiving the right to a jury trial, to confront witnesses against him/her, to have compulsory process for obtaining witnesses in his/her favor, and to require the State to prove his/her guilt beyond a reasonable doubt at a trial at which he/she cannot be compelled to testify against himself/herself.

A factual basis for the charge(s) was/were presented. Thereafter, the plea of guilty was accepted and the defendant was found guilty as charged.

Judge  
Gregory L. Frost  
(614) 349-6186

Judge  
Jon R. Spahr  
(614) 349-6181

Courthouse  
Newark, O. 43055

The defendant is sentenced on all eight counts to an indeterminate sentence of two to five years at the Correctional Receiving Center at Orient, Ohio.

Counts 1, 2, 3, and 4 shall be served consecutively with each other. Counts 5, 6, 7, and 8 shall be served concurrently with each other and concurrently with the first four counts.

The prison sentences in this case shall be served consecutively with the sentence imposed in Case No. 96-CR-16-F.

No fine is entered. Court costs are assessed against the defendant.

  
\_\_\_\_\_  
JUDGE GREGORY L. FROST  
COMMON PLEAS COURT

cc: Prosecutor's Office  
Counsel for defendant  
Adult Court Services