

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX. REL	:	SUP CT NO : 11-1381
MARCUS HAYES	:	ON APPEAL FROM THE HAMILTON,
DAYTON CORRECTIONAL INST.	:	COUNTY COURT OF APPEAL, FIRST
4104 GERMANTOWN RD	:	APPELLATE DISTRICT
DAYTON, OHIO 45417	:	
	:	
APPELLANT	:	
	:	
VS	:	APPEAL CASE NO. C-1100365
RALPH WINKLER, JUDGE	:	TRIAL NO. B-0103412
HAMILTON COUNTY COURT COMMON PLEAS	:	
1000 MAIN ST	:	
CINCINNATI, OHIO 45202	:	
	:	
APPELLEES	:	

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MERIT BRIEF OF APPELLANT MARCUS HAYES

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Marcus Hayes #566805  
 Dayton Correctional Inst.  
 4104 Germantown Rd  
 Dayton, Ohio 45417  
 Appellant, Pro se

Joesph T. Deters  
 230 E. Ninth Street, Suite 4000  
 Cincinnati, Ohio 45202  
 Counsel for Appellees Ralph Winkler, Judge

RECEIVED  
 SEP 09 2011  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## STATEMENT OF FACT

On **August 23, 2010** the defendant filed a Pro Se motion in accordance with Criminal Rule 32.1 a motion to withdrew his plea, along with a motion to Expand the Record, a Affidavit in Support of informa pauperis upon appeal and Civil Rule 52 Finding of Facts & Conclusion of Law Motion. After not hearing from the trial court the defendant wrote The Hamilton County Public Defenders' Office asking for help in the matter. The Hamilton County Public Defenders' Office wrote back on **November 4, 2010** and informed the defendant that the court have yet to rule on his motions. (*exhibit #2*) On or about **November 15, 2010** defendant sent a letter to the court requesting a ruling (*exhibit #1*). Time went on and the defendant still have not receive anything from the court on his Pro se motions. On **March 7, 2011** the defendant filed a Writ of Procedendo to The Hamilton, County Court of Appeal, First Appellate District to compelling the trial court to rule on his Criminal Rule 32.1 a motion to withdrew his plea, along with a motion to Expand the Record, a Affidavit in Support of informa pauperis upon appeal and Civil Rule 52 Finding of Facts & Conclusion of Law Motion. On **March 29, 2011** The Hamilton, County Court of Appeal, First Appellate District granted a motion to dismiss as moot. The defendant learned that the motion was ruled on December 13, 2010 by the court's ruling, but till this day the trial court have fail to serve notice of the December 13, 2010 judgment entry and opinion and the date of its journal entry upon the parties in accordance with Civ. R. 58(B), and App. R. 4(A). On **June 20, 2011** defendant filed a Mandamus with The Hamilton, County Court of Appeal, First Appellate District asking the Appeals Court to compel the trial court to issue the defendant a copy of the trial court's decision of his Criminal Rule 32.1 a motion to withdrew his plea, along with a motion to Expand the Record, a Affidavit in Support of informa pauperis upon appeal and Civil Rule 52 Finding of Facts & Conclusion of Law Motion in accordance with Civ. R. 58(B), and Civ R 5(B), for the purpose of App. R. 4(A). Till this day the trial court have not issue the defendant anything even though defendant is the party that should receive a copy the judgment entry.

## ARGUMENT

### Proposition of Law No. 1:

**{F}or due process purposes Pro Se litigants are entitled to reasonable notice of the trial courts' appealable orders pursuant to Civil Rule 58 and Civ. R. 5(B)**

Civ R 58 (B) provides When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ R 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

Civ R 5(B) provides in part as follow; Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon the attorney unless service upon the party is ordered by the court.

In this case the trial court never sent notice to the Pro Se litigant about his motions he filed, (Criminal Rule 32.1 a motion to withdraw his plea, along with a motion to Expand the Record, a Affidavit in Support of informia pauperis upon appeal and Civil Rule 52 Finding of Facts & Conclusion of Law Motion). The Pro Se litigant was just that a Pro Se litigant therefor he was not represented by counsel in this matter. The Pro Se litigant was due-diligent in this matter, to find if the court made a ruling on his motions. After the trial court made it's ruling, the court never sent notice to all parties as require by Ohio rule Civ. R. 58(B), and Civ R 5(B) which serve as the rule governing the way the courts serve notice on all litigants. The certificate of service will show that the court never comply with Civ. R. 58(B), and Civ R 5(B). The district attorney's claimed in it's Memorandum in Opposition to Petition for Mandamus filed June 27, 2011 stating "*Counsel for respondent attached copies of the entries to its Memorandum in Opposition*". This action is "**not**" service or notice in accordance with Civ. R. 58(B), and Civ R 5(B). The Hamilton, County Court of Appeal, First Appellate District ruling was bad law in which it deny the Appellants motion as moot to be serve in accordance with Civ. R. 58(B), and Civ R 5(B) where as the district attorney had no legal argument in this matter. The

Hamilton, County Court of Appeal, First Appellate District ruling means that Pro Se litigant don't have the same rights as litigants that are represented by counsel.

**Section 16, Article I of the Ohio Constitution** states “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law”.

Appellant and Pro Se litigants have a right to appeal trial court's ruling in accordance with App. R. 4(A). The district attorney attaching a copy of the trial courts' ruling in its Memorandum in Opposition to Petition for Mandamus filed June 27, 2011 was a meaningless attempt to circumvent the rules Civ. R. 58(B), and Civ R 5(B) and deny the appellant his opportunity to file a timely appeal in accordance with App. R. 4(A).

Failure to give reasonable notice of final appealable orders is a denial of the right to legal redress of injuries created by Section 16, Article I of the Ohio Constitution and The U.S.C.A. Constitution Amend. 14. ' *Moldovan v Cuyahoga Cty. Welfare Dept. (1986)*, 25 Ohio St. 3d 296, 25 OBR 343, 496 N.E.2d 466; *State ex rel Sautter vs Grey 117 Ohio St 3d 465*. “The opportunity to file a timely appeal is rendered meaningless when reasonable notice of a appealable order is not given.” Id at 295,25 OBR 343,496 N.E.2d 466. “[F]or due process purposes litigants are entitled to reasonable notice of the trial courts' appealable orders.” *Atkinson v Grunman Ohio Corp. (1988)*, 37 Ohio St. 3d 80, 85, 523 N.E.2d 851. However the trial court failed to order the clerk of court to serve notice of the judgment entry on the Pro Se litigant as required by Civ. R. 58(B), and Civ R 5(B) for the purpose of App. R. 4(A). *Moldovan* and *Atkinson* stand for the proposition that if a right of appeal from a trial court's judgment is to have meaning, the parties to the judgment or their attorneys of record must be given notice of the judgment before the time for appeal begins to run. *Swander Ditch Landowners' Assn v Joint Bd. Of Huron & Seneca Cty. Commurs. (1990)*, 51 Ohio St. 3d 131, 133, 554 N.E.2d 1324 .In those cases in which both Civ. R. 58(B) and App. R. 4(A) are applicable, if service of the notice of judgment and its entry is made within the three-day period of Civ. R. 58(B), the appeal period begins on the date of judgment, but if the defendant is not served with a timely notice, the appeal period is tolled until the defendant have been served. *In re Anderson (2001)*, 92 Ohio St. 3d 63, 67, 748 N.E. 2D 67 . Consequently, App.R. 4(A) “tolls the time period for filing a notice of appeal if service is not made within the three-day period of Civ. R. 58(B)”. *State ex rel. Hughes v Celeste (1993)*, 67 Ohio St. 3d 429,

431, 619 N.E.2d 412. The evidence is uncontroversial here in that the trial court failed to order the clerk of court to serve the December 13, 2010 judgment entry and opinion and the date of its journal entry upon the parties (the appellant) in accordance with Civ. R. 58(B), and Civ R 5(B). The record clearly shows that the Pro Se motion should've been serve upon the defendant Marcus Hayes, because he was the only party for, Hayes was not represented by counsel. The ruling by The Hamilton, County Court of Appeal, First Appellate District as moot even though the appeals court offer no opinion to why the issue was moot is bad law and practice. The fact that the district attorney had no legal argument in this matter, demonstrates that the Appellant and Pro Se litigants have the right to be serve in accordance with Civ. R. 58(B), and Civ R 5(B) to redress his injuries.

### CONCLUSION

**THEREFORE;** We respectfully ask this court to reverse the The Hamilton, County Court of Appeal, First Appellate District ruling of moot and compel the trial court to comply with Civ. R. 58(B), and Civ R 5(B) and order the trial court to order the clerk of court to serve the December 13, 2010 judgment entry and opinion and the date of its journal entry upon the parties (the appellant) in accordance with Civ. R. 58(B), and Civ R 5(B) for the purpose of App.R. 4(A) to correct the violation of the appellant's rights under The Ohio Constitution Art I § 16, U.S.C.A. Constitution Amend. 14

Date:

  
\_\_\_\_\_  
Marcus Hayes #566805  
Dayton Correctional Inst.  
4104 Germantown Pk.  
Dayton, Ohio 45417

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing petition was sent by regular U.S. Mail to the Hamilton County Prosecutors Office at: 230 E. Ninth Street 4000 Cincinnati, Ohio 45202

Please Stamp Filed and Return

IN THE SUPREME COURT OF OHIO

11-1381

STATE OF OHIO EX.REL

:

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

MARCUS HAYES

:

On Appeal from the Hamilton County

DAYTON CORRECTIONAL INSTITUTION

:

Court of Appeals, First Appellate Dist.

4104 GERMANTOWN RD

DAYTON, OHIO 45417

:

APPELLANT

:

APPEAL CASE NO : C-1100365

VS.

:

TRIAL NO. B-0103412

RALPH WINKLER, JUDGE

HAMILTON COUNTY COURT COMMON PLEAS

1000 MAIN ST

CINCINNATI, OHIO 45202

:

APPELLEES

NOTICE OF APPEAL OF MARCUS HAYES MANDAMUS

Marcus Hayes #566805

Dayton Institution Institution

4104 Germantown Rd

Dayton, Ohio, 45417

Appellant, Pro se

Joseph T. Deters

230 E. Ninth Street, Suite 4000

Cincinnati, Ohio 45202

Counsel for Appellees RALPH WINKLER, JUDGE

RECEIVED  
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX.REL : SUP CT. NO. \_\_\_\_\_  
MARCUS HAYES : On Appeal from the Hamilton County  
DAYTON CORRECTIONAL INSTITUTION : Court of Appeals, First Appellate Dist.  
4104 GERMANTOWN RD  
DAYTON, OHIO 45417 :  
APPELLANT : APPEAL CASE NO : C-1100365  
VS. : TRIAL NO. B-0103412

RALPH WINKLER, JUDGE  
HAMILTON COUNTY COURT COMMON PLEAS  
1000 MAIN ST  
CINCINNATI, OHIO 45202 :  
APPELLEES

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**NOTICE OF APPEAL OF MARCUS HAYES MANDAMUS**

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Now comes the Appellant, Marcus Hayes, acting pro se, who having no other remedy at law, respectfully request that this Honorable Court pursuant to Article IV, Section § 2, 2(i)(ii) of the Ohio Constitution and O.R.C. 2731.02 invoke its original jurisdiction. This case originated in the court of appeals First Appellate District, Hamilton County, appeal number C-1100365 on July 20, 2011. This case raises a substantial constitutional question.

Respectfully Submitted

\_\_\_\_\_  
Marcus Hayes, Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the forgoing petition was sent by regular U.S. Mail to the Hamilton County Prosecutors Office at: 230 E. Ninth Street 4000 Cincinnati, Ohio 45202

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

STATE OF OHIO ex rel. MARCUS HAYES,

CASE NO. C-110365

Relator,

vs.

ENTRY DISMISSING PETITION  
FOR WRIT OF MANDAMUS

RALPH WINKLER, JUDGE,

Appellant.

ENTERED  
JUL 20 2011

This cause came on to be considered upon the petition for a writ of mandamus and upon the memorandum of the respondent to dismiss the petition.

Upon consideration of the pleadings, the Court dismisses this action as moot. The petition for a writ of mandamus is dismissed.

To The Clerk:

Enter upon the Journal of the Court on JUL 20 2011 per order of the court.

By:   
Presiding Judge

(Copies sent to all counsel)



IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX.REL

AFFIDAVIT OF INDIGENCY

MARCUS HAYES

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

VS

TRIAL NO. B-0103412

RALPH WINKLER, JUDGE

APPEAL NO. C-1100365

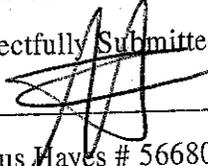
Marcus Hayes, being duly sworn, deposes and say:

- 1) I'm the defendant in the above captioned case, and I make this affidavit in support of the attached Motion to Proceed in Forma Pauperis.
- 2) I'm a layman in the matters of law and seek this court's indulgence for errors, defects and faults.
- 3) That I'm a inmate at Dayton Corr. Inst. 4104 Germantown St. Dayton Ohio 45417
- 4) I'm unable to prosecute this motion because of my indigence to pay costs, fee and expense necessary.
- 5) I'm currently incarcerated and earning \$20.00 per month in which \$5.00 per month is pay to the Hamilton County Court for court cost.
- 6) I have no other income.
- 7) I believe in good faith that I'm entitled to the relief I 'm seeking in this case.

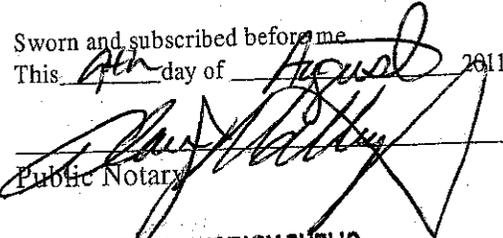
WHEREFORE, I respectfully ask for an order permitting me to move forward as a poor person and for such other and further relief as may be proper and equitable pursuant to rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio, I am requesting that the filing fee and security deposit, and required number of copies, if applicable, be waived.

Date

Respectfully Submitted

  
 \_\_\_\_\_  
 Marcus Hayes # 566805  
 Dayton Correction Inst  
 4104 Germantown St  
 Dayton, Ohio 45417

Sworn and subscribed before me  
This 11th day of August 2011

  
 \_\_\_\_\_  
 Public Notary

ALAN J. MATTINGLY, NOTARY PUBLIC  
 IN AND OF THE STATE OF OHIO  
 MY COMMISSION EXPIRES 4/6/13

**FILED**  
 AUG 11 2011  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

THE COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

STATE OF OHIO

Plaintiff

VS

MARCUS HAYES

Defendant

Request for ruling on motion  
Criminal Rule 32.1  
Trial No. B-0103412

Now comes the defendant Marcus Hayes, in the above entitled cause, move this honorable court, by requesting a ruling on defendant's motion filed August 23, 2010. Defendant filed a number of motions; Trial number B-0103412

- 1) Criminal Rule 32.1, Withdraw plea.
- 2) Affidavit in Support of Motion to proceed as a Poor person, and for Assignment of counsel upon appeal.
- 3) Motion to Expand the Record.
- 4) Civil Rule 52; Findings of Facts & Conclusion of Law.,

along with five exhibits. It has been almost 90 days since the filing of the motion, and no action or ruling has been render in this matter. This situation is causing me great heart ship. I understand the court wants to be fair in this matter, but defendant feels that the time that has elapse should be sufficient to take a good look in to the matter and render a ruling.

THEREFORE defendant request a ruling in this matter and ask for the County of Hamilton, Public Defenders' Office to be assign on appeal in accordance with the law of Ohio.

Date November 15, 2010



---

Marcus Hayes 566805  
Dayton Correctional Inst.  
4104 Germantown Rd  
Dayton, Ohio 45418

EX #1



# County of Hamilton

COMMISSION MEMBERS

MARY W. SULLIVAN, CHAIR  
WILLIAM R. GALLAGHER  
JOHN K. ISSENMANN  
MICHAEL J. LAUMANN  
ROSS A. WRIGHT

OFFICE OF

**PUBLIC DEFENDER COMMISSION**

SECOND FLOOR, WM. HOWARD TAFT LAW CENTER

230 EAST NINTH STREET

CINCINNATI, OHIO 45202

PHONE 513-946-3700

FAX 513-946-3707

LOUIS F. STRIGARI  
PUBLIC DEFENDER

THOMAS J. ROTTINGHAUS  
DEPUTY PUBLIC DEFENDER

ASSISTANT:  
JAMES F. DAVIS

APPELLATE DIRECTOR  
ROBERT R. HASTINGS, JR.  
FELONY DIRECTOR  
TIMOTHY R. CUTCHER

November 4, 2010

Mr. Marcus Hayes  
A566805  
Dayton Correctional Institution  
P.O. box 17399  
Dayton, OH 45418

RE: Your letter dated October 16, 2010

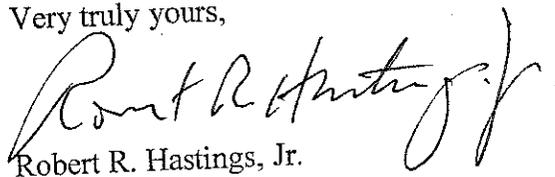
Dear Mr. Hayes:

Enclosed are the stamped filed copies of the pleadings you filed on August 23, 2010. Judge Ralph E. Winkler has not ruled on your motions as of this date. The Hamilton County Prosecutor's Office has not filed a response to your motions.

I suggest you write to the judge and ask him to rule on your motions. Send a copy of the letter to the Hamilton County Prosecutor's Office.

I have also enclosed a copy of your plea form, the sentencing entry and the judgment entry from the Court of Appeals for your records.

Very truly yours,

  
Robert R. Hastings, Jr.

E4 #2