

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO : CASE NO. **13-0487**  
Appellee, :  
v. : On Appeal from the  
MARKELUS Q. CARTER : Third District Court Appeals  
Appellant. : of Allen County, Ohio  
: Court of Appeals No. 01-12-019

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**NOTICE OF APPEAL OF APPELLANT MARKELUS Q. CARTER**

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APPELLANT, PRO SE

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**FILED**  
MAR 25 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**RECEIVED**  
MAR 25 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**Notice of Appeal of Appellant Markelus Q. Carter**

Appellant Markelus Q. Carter hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Allen County Court of Appeals, Third Appellate District, entered in Court of Appeals case No. 01-12-019 on February 7, 2013.

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

Respectfully submitted,  
Markelus Q. Carter, Appellant, Pro Se

  
Markelus Q. Carter #618-999

APPELLANT, PRO SE

***Certificate of Service***

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel for the appellee, Juergen A. Waldick, Allen County Prosecutor, 204 North Main Street Suite 302, P.O. Box 1243, Lima, Ohio 45802-1243 March 5, 2013.

  
Markelus Q. Carter #618-999

APPELLANT, PRO SE

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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents that critical substantial constitutional issue of the right to fundamental due process, as embodied by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Article I, Sections 10, 16 of the Ohio Constitution , involving the protected liberty interest of a direct appeal as of right as pronounced by the United States Supreme Court in cases similar to *Evitts v. Lucey*, *Griffin v. Illinois* (1956), 351 U.S. 12 and their progeny.

Here, this case is of public and great general interest, and involves a substantial constitutional question, where it effects the due process and equal protection rights of an Ohio criminal defendant being denied meaningful access to the courts, and a direct appeal as of right, based solely upon that impermissible criteria of being indigent and unable to secure effective assistance of counsel as set forth in the United States Supreme Court decision in *Strickland v. Washington* (1984), 466 U.S. 668 and its progeny.

In this case, the Ohio Third District Court of Appeals (Allen County) applied a misapplication of the decision of the United States Supreme Court in *Anders v. California* (1967), 386 U.S. 738, where Appellant Markelus Q. Carter (“Appellant”) timely set forth before the Ohio Third District intermediate appellate court meritorious substantial constitutional issues regarding his illegal conviction and sentence in the state trial court below. As opposed to providing Appellant the effective assistance of appellate counsel as enumerated by the Ohio Supreme Court in *State v. Murnahan*, 63 Ohio St.3d 60 (1992), instead court-appointed appellate counsel filed an “*Anders Brief*” based solely upon Appellant's indigency and inability to financially retain legal

counsel on appeal in his behalf.

Where Ohio has integrated appellate courts into its criminal justice system, this practice of denying Appellant a direct appeal as of right based upon his indigency fails to comport with the demands of the Due Process and Equal Protection Clauses of the United States Constitution, as well as Article I, Sections 10, 16 of the Ohio Constitution. Consequently, it is imperative that this Court grant jurisdiction to here this case, for if the decision of the intermediate appellate court is allowed to stand it would endanger the standing stare decisis of Ohio jurisprudence in regards to this “state's established appellate procedure (that) must 'affor[d] adequate and effective appellate review to indigent defendants.' *Smith v. Robbins*, 528 U.S. 259, 276, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).” *Mackenzie v. Marshall* (E.D.N.Y.), 2009 U.S. Dist. LEXIS 104119, \*7.

#### **STATEMENT OF THE CASE AND FACTS**

On July 12, 2012, the appellate attorney Michael J. Short (#0063156), for Appellant Markelus Q. Carter (“Appellant”), filed with the Ohio Third District Court of Appeals (Allen County) an *Anders* Motion for Leave to Withdraw as Counsel, pursuant to *Anders v. California*, 386 U.S. 738 (1967). In essence, the *Anders* motion contended that Mr. Short could not ascertain whether Appellant Carter had been denied any constitutional rights with regards to receiving a fair trial, ultimately finding that the appeal would amount to no meritorious issues for review, thereafter, requesting that the appellate court allow Mr. Short's withdrawal.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: A criminal defendant in Ohio may not be denied the right to fundamental due process, as embodied by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Article I, Sections 10, 16 of the Ohio Constitution, involving the protected liberty interest of a direct appeal as of right.**

This case arises from the October 3, 2012 decision of the Ohio Third District Court of Appeals allowing Appellant's court-appointed appellate counsel, Michael Short, to withdraw as appellate counsel based upon an *Anders* brief wholly unsupported by the underlying record for review relevant to Appellant's conviction and sentence.

In response to the appellate court's improper grant of court-appointed appellate counsel's *Anders* brief, Appellant Carter filed his motion to reopen his appeal pursuant to Rule 26(B) of the Ohio Rules of Appellate Procedure. The App. R. 26(B) motion to reopen of Appellant Carter set forth substantial constitutional violations, under both the United States and Ohio Constitutions. By failing to make a proper *de novo* review of the record, the court of appeals committed an abuse of discretion in failing to allow Appellant's motion to reopen pursuant to App. R. 26(B).

Therefore, pursuant to *Anders*, it must be presumed that counsel and the court of appeals denied Appellant a fair appellate proceeding, amounting to the denial of due process and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 16 of the Ohio Constitution.

The decision of the appellate court sets a dangerous precedent for criminal defendants in Ohio seeking meaningful access to the courts on a direct appeal as of right, as well as the effective assistance of appellate counsel as pronounced by this Court in *Murnahan* and its progeny, where Appellant's direct appeal as of right was erroneously dismissed for having lacked merit. In actuality, Appellant's fundamental constitutional claims of ineffective assistance of trial

counsel, illegal search and seizure, and insufficient evidence raised before the court of appeals are meritorious; not only as set forth in his timely filed 26(B) application, yet as supported by the record below.

The test an appellate court must apply when reviewing an ineffective assistance of counsel claim is: (1) whether counsel's performance fell below an objective standard of reasonable professional competence, and (2) if so, whether there is a reasonable probability that counsel's unprofessional errors affected the outcome of the proceedings. *Strickland v. Washington* (1984), 466 U.S. 668.

In the case herein, Appellant asserts that it was an abuse of discretion for the Third District Court of Appeals to allow appellate counsel to withdraw as Appellant's appellate counsel at best, nor to deny Appellant the grant of his application to reopen under App. R. 26(B). Here, the record before the court of appeals below clearly disputes the appellate court's holding that no substantial errors exist sufficient to deserve appellate review. As appellate counsel Mr. Short points out in reference to potential assignments of error 1-3, as referenced in his motion to withdraw, "[t]he trial court's sentence was contrary to law and constituted an abuse of discretion"; "[t]he trial court erred in imposing maximum, consecutive sentences without making the findings required by R.C. 2929.14(C) and (E)"; and, "[t]he trial court failed to conduct a proper colloquy with the (Appellant) before accepting the (Appellant's) *Alford* plea.

Consequently, aside from Appellant's substantial constitutional assignments of errors that include the ineffective assistance of trial counsel, illegal search and seizure, and insufficient evidence, appellate counsel's foregoing proposed assignments of error too demonstrate that

Appellant's appeal is meritorious sufficient to withstand any *Anders* dismissal.

As seems to have evolved as the practice among officers of the court within the Ohio judiciary is that *pro se*, indigent criminal defendant's seeking meaningful access to the courts of appeals are subjected to inadequate *Anders* motions on behalf of attorneys unwilling to incur the costs of legal representation for those citizens unable to afford the costs of said legal representation on appeal.

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right to have Assistance of Counsel for his defense." U.S. Const. Amend. VI.

While the United States Constitution does not require that a state provide for appellate review of a state court criminal conviction, where a state has integrated appellate courts into its criminal justice system, then "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey* (1985), 469 U.S. 387, 393. Thus, a state's established appellate procedure must "affor[d] adequate and effective appellate review to indigent defendants." *Smith v. Robbins* (2000), 528 U.S. 259; see also *Griffin v. Illinois* (1956), 351 U.S. 12, 16-20 (holding that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty).

The critical inquiry for this Court's determination herein regarding whether Appellant, as a criminal defendant, was denied his right to counsel on his direct appeal as of right in violation of his Fourteenth Amendment rights is whether he "manifested his indigency and desire to appeal." *U.S. Ex rel. Edwards v. Follette* (S.D.N.Y. 1968) (internal citations omitted), *aff'd*, 399

F.2d 298 (2<sup>nd</sup> Cir. 1968).

The United States Court of Appeals for the Sixth Circuit has set forth a non-exhaustive list of factors which should be considered when “determining whether an attorney on direct appeal performed reasonably competently: (1) Were the omitted issues 'significant and obvious'; (2) Was there arguably contrary authority on the omitted issues; (3) Were the omitted issues clearly stronger than those presented; (4) Were the omitted issues objected to at trial; (5) Were the trial court's ruling subject to deference on appeal; (6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and if so, were the justifications reasonable; (7) what was appellate counsel's level of experience and expertise; (8) Did the petitioner and appellant counsel meet and go over possible issues; (9) Is there evidence that counsel reviewed all the facts; (10) Were the omitted issues dealt with in other assignment of error; (11) Was decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?” *Mapes v. Coyles* (6<sup>th</sup> Cir. 1999), 171 F.3d 408, 428.

Wherefore, in light of the foregoing viewed in context of the record for review below, Appellant's assignments of error denied direct appellate review represents those meritorious substantial constitutional issues sufficient to withstand the *Anders* ruling made by the court of appeals. If allowed to stand this case sets a dangerous precedent regarding the manifest injustice of the denial of the fundamental right to a direct appeal in Ohio.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

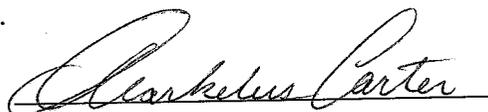
Respectfully submitted,



Markelus Q. Carter  
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Certificate of Service

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent to counsel for appellee, Allen County, Ohio Prosecutor's Office, P.O. Box 1243, Lima, Ohio, 45802, via delivery to the Allen Correctional Inst. legal mail staff for deposit with the regular U.S. Mail, first class postage prepaid, on this 18<sup>th</sup> day of March, 2013.



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IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY

FILED  
COURT OF APPEALS  
2013 FEB -7 AM 11:59

MARCO ANTONIO PALLER  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

STATE OF OHIO,

CASE NO. 1-12-19

PLAINTIFF-APPELLEE,

v.

MARKELUS Q. CARTER,

JUDGMENT  
ENTRY

DEFENDANT-APPELLANT.

This cause comes before the Court on Appellant's motion to reopen direct appeal pursuant to App.R. 26(B).

Upon consideration the Court finds that the assignment of error set forth in Appellant's motion fails to show any genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). *State v. Reed*, 74 Ohio St.3d 534 (1996), applying the analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). See, also, *State v. Bradley*, 42 Ohio St.3d 136 (1989).

Appellate counsel filed a proper "Anders Brief" with proposed assignments of error and a motion seeking leave to withdraw asserting the appeal was frivolous. The documents were served on Appellant by both counsel and this Court, with no response filed. After independent review of the record, this Court agreed with appellate counsel's evaluation and dismissed the appeal. Appellate counsel was not ineffective for failing to assert that the additional evidentiary

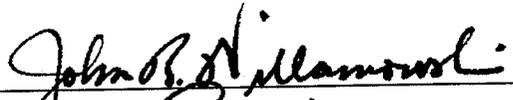
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Case No. 1-12-19

issues now asserted by Appellant. Accordingly, the motion is not well taken.

It is therefore **ORDERED** that Appellant's motion to reopen direct appeal be, and the same hereby is, **DENIED** at the costs of the Appellant for which judgment is hereby rendered.

  
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JUDGES

DATED: FEBRUARY 7, 2013  
/hlo

FILED  
COURT OF APPEALS

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MARK A. WILSON, CLERK  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

---

**STATE OF OHIO,**

**PLAINTIFF-APPELLEE,**

**CASE NO. 1-12-19**

**v.**

**MARKELUS Q. CARTER,**

**JUDGMENT  
ENTRY**

**DEFENDANT-APPELLANT.**

---

This cause came on for determination upon the original papers and transcript of proceedings from the Allen County Court of Common Pleas and the brief and motion for leave to withdraw filed by appellant's counsel.

Counsel appointed to prosecute this appeal filed a motion requesting that he be granted leave of court to withdraw as appellate counsel, pursuant to the guidelines established in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel indicates that he has thoroughly reviewed the case and can find no error in the trial court proceedings upon which to base meritorious issues for appeal. Counsel's brief sets forth and argues three potential errors, but concludes that the same are not supported upon review of the record and the transcript of the proceedings. Appellate counsel requests permission to withdraw on the basis that the appeal is without merit.

Upon consideration the court finds that the brief and motion of counsel are sufficient and consistent with appellant's Sixth Amendment right to counsel. See *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *McCoy v. Ct. of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988); and *Penon v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

In the instant case, appellant was indicted on six counts of pandering obscenity involving a minor, all fourth-degree felonies. Pursuant to plea negotiations, appellant entered an *Alford* guilty plea to the first count amended to illegal use of a minor in nudity-oriented material, a felony of the fifth degree, in exchange for dismissal of the remaining counts. Appellant was sentenced to a stipulated six-month prison sentence, to be served consecutively to a sentence currently being served. Appellant also forfeited his computer and was classified as a Tier 1 sexual offender.

Upon our examination of the record, we find no merit to the "arguable" assignments of error raised by counsel for appellant. The record reflects that appellant's *Alford* plea was voluntarily and intelligently made. See *State v. Schmidt*, 3d Dist. No. 10-10-04, 2010-Ohio-4809. See, also, *State v. Piacella* (1971), 27 Ohio St.2d 92. There was a thorough plea hearing, at which the trial court addressed appellant at length about his *Alford* plea, his understanding of the plea, and his understanding of the rights he was waiving. In addition, the court

finds that appellant was sentenced in accordance with the stipulated sentence. See *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095. The sentence fell within the applicable statutory range according to R.C. 2929.14, being the minimum prison term. Moreover, the trial court's judgment entry of sentencing and the sentencing transcript clearly indicate that the court considered the purposes and principles of felony sentencing of R.C. 2929.11 and factors of R.C. 2929.12. The assignments of error are, therefore, without merit and no arguable issue for appeal exists.

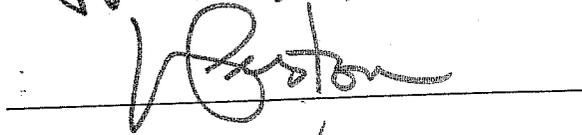
"Only after the appellate court finds no nonfrivolous issue for appeal [i.e. no arguable issue], may the court proceed to consider the appeal on the merits without the assistance of counsel." *Penson*, 102 L.Ed.2d at 309. Counsel's brief and motion for leave to withdraw were served upon appellant by counsel. In addition, this court served appellant with counsel's brief and provided substantial time for a response to the issues raised by counsel or any other issue appellant would like set forth for review, and no response was filed.

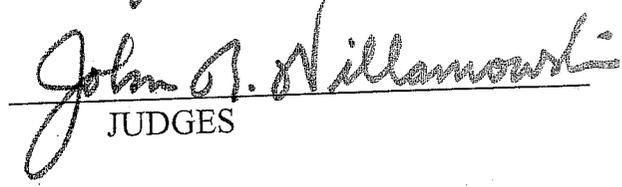
After a separate and full examination of the record, we find no arguable issue in this appeal and declare it wholly frivolous. Accordingly, there exists no error prejudicial to appellant's rights and counsel's motion to withdraw is well taken.

It is therefore **ORDERED** that counsel's motion for leave to withdraw from representation of appellant be, and hereby is, granted.

It is further **ORDERED, ADJUDGED and DECREED** that the appeal be, and the same hereby is, **DISMISSED** at the costs of appellant for which judgment is hereby rendered and that the cause be, and hereby is, remanded to the trial court for execution of the judgment for costs.

  
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JUDGES

DATED: October 3, 2012

/jlr