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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 cause presents a number of critical issues for the future of the Appellate Courts across Ohio, all Defendants', and all Prosecutors' across Ohio: Whether a rule of court, specifically Appellate Rule 26(B)'s 90-day Deadline Rule is such a rule that is to be rigidly applied as to work an manifest injustice or to override a miscarriage of justice; (2) whether App. R. 26(B)'s 90-day Deadline Rule overrides the Double Jeopardy and or Due Process Clause and Equal Protection of the Fifth and Fourteenth Amendments United States Constitution, and Art. I, Sec. 16 and Art. I, Sec. 2 of Ohio's Constitution; (3) whether App. R. 26(B)'s 90-day deadline rule is used to arbitrarily deny a defendants constitutional right to redress in the courts Ohio Constitution Art. I, Sec. 16, and the Amendment United States Constitution; and (4) what is "good cause" defined in App. R. 14(B) and App. R. 26(B) where "good cause" is defined in Black's law as a legally sufficient reason.

In this case, the court of appeals excluded App. R. 14(B)'s clause that allows the court for good cause shown . . . may enlarge the time prescribed by these rules or by its order for doing an act . . . may permit an act to be done after the expiration of the prescribed time And although the court found that Appellant has not demonstrated good cause for his untimely filing under App. R. 26(B), the "good cause" clause in App. R. 14(B) and that of App. R. 26(B) Appellant submits are different.

The court of appeals ruled that, "*To the extent that Appellant has asserted that the lack of good cause should be excused, Appellant has not cited to any cases from this district supporting his argument.*" Appellant cited *State v. Chu* (June 6, 2002), 2002 Ohio 4422, for the proposition ("it would not be just if we denied Chu's application because of a procedural defect . . . an applicant that presents a genuine issue as to the effectiveness of counsel on appeal should supersede any procedural deficiency of the application"). However, the court of appeals *excluded* this issue altogether; arguably to avoid another attempt at a certified conflict between the Ninth District and that of the Eighth District where it

sidestepped that issue recently in State v. Brown, Filed Apr. 17, 2014 C.A. No. 23759, denied June 6, 2014.

The court of appeals further ruled, “*We are not persuaded “that we have the authority” to disregard the procedural mandates set forth in the appellate rules*”. Emphasis added.

Perhaps this court of appeals and that of some of the other courts of appeals in Ohio are confused as to whether or not they do have the authority to disregard the procedural mandates set forth in the appellate rules. Id.

It appears to be evident not all appellate courts in Ohio have followed this Court’s precedent or that of other courts of appeals in Ohio with strict compliance as some districts hold because of this Courts precedent in State v. LaMar (2004), 102 Ohio St. 3d 467 (2004), 2004-Ohio-3976, 812 N.E.2d 970, (90-day deadline firmly established and regularly followed); and State v. Gumm (2004), 103 Ohio St. 3d 162, 2004-Ohio-4755, 814 N.E.2d 861, (90-day rule deadline for filing must be strictly enforced).

This Court has not explicitly defined the “good cause” clause in App. R. 14(B) or App. R. 26(B). Black’s Law Dictionary 9th Edition (2009) defines “good cause” as “a legally sufficient reason”.

Legal is defined as 1. “Of or relating to law; falling within the providence of law. 2. Established, required, or permitted by law. 3. Of or relating to law as opposed to equity”. Black’s Law, supra.

Sufficient is enough to meet the needs of a situation or proposed end. Thus, what is “legally sufficient” as defined to meet the “good cause” clause in both App. R. 14(B) and App. R. 26(B)?

Against the above background. Appellant asks this Court to revisit its earlier precedent. State v. Riddick (1995), 72 Ohio St.3d 88, 647 N.E.2d 784, (Lack of effort or imagination, and ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief); State v. LaMar (2004), 102 Ohio St. 3d 467 (2004), 2004-Ohio-3976, 812 N.E.2d 970, (90-day deadline firmly established and regularly followed); and State v. Gumm (2004), 103 Ohio St. 3d 162, 2004-Ohio-4755,

814 N.E.2d 861, (90-day rule deadline for filing must be strictly enforced).

In *LaMar*, the LaMar court held “the rule and its 90-day deadline were firmly established and regularly followed in Ohio's courts by the time LaMar's appeal as of right was decided by the court of appeals in August 1998, and the same remains true today”. However, this was not true and why *LaMar* was improvidently decided.

The legal landscape was changed prior to this Court's decision in *LaMar*. Where the Eighth District Court of Appeals in *State v. Manos* (Feb. 22, 1994), Cuyahoga App. No. 64616, **reopening granted** (Sept. 13, 1996), motion No. 72558 ; *State v. Simley* (Jan. 26, 1998), Cuyahoga App. No. 72026, **reopening granted** (Apr. 22, 1998), motion No. 91903. (Holding an application that presents a genuine issue . . . should supersede any procedural deficiency of the application).

After *LaMar*, this Court decided *State v. Gumm* (2004), 103 Ohio St. 3d 162, 2004-Ohio-4755, 814 N.E.2d 861. Stating at [**9]. “As we have said, “good cause can excuse the lack of a filing only while it exists, not for an indefinite period.” Citing *State v. Fox* (1998), 83 Ohio St.3d 514, 516, 1998 Ohio 517, 700 N.E.2d 1253. The *Gumm* Court found, “that a courier's delay in delivery is not “good cause” for accepting an App. R. 26(B) application for reopening that is untimely filed. Moreover, there is no denial of due process or equal protection in applying to this appellant a rule applicable to all appellants. Id.

The *Fox* Court held “Under App. R. 26(B)(2)(b), an application for reopening requires 'a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.’” In turn citing *State v. Wickline* (1996), 74 Ohio St. 3d 369, 371, 658 N.E.2d 1052, 1053.

Here, *Wickline* was a case where he relied upon the grounds that App. R. 26(B) did not exist at the time the appellate judgment was journalized. Id. At 371. Moreover, *Wickline* claimed that the court of appeals denied him due process by “retroactively” invoking the time limit of amended App. R. 26(B)

to bar his claim. *Ibid.*

The *Wickline* Court rejected that claim holding, “this amounts to a contention that a litigant's delay, no matter how long, must be forgiven even though there was *no valid reason for the delay*. We reject that contention. *Id.* (Emphasis original).

The *Wickline* Court relied in part on *State v. Riddick* (1995), 72 Ohio St.3d 88, 647 N.E.2d 784, (Lack of effort or imagination, and ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief); and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, (a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and App. R. 14 (B)).

In *Murnahan*, this Court held: Where the time period for reconsideration in the court of appeals on direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and App. R. 14 (B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the Supreme Court, pursuant to Section 8, Rule II. of the Rules of Practice of the Supreme Court. Syllabus by the court, paragraph three.

In 1993, App. R. 26 was amended in response to *Murnahan*. Prior to *Murnahan*, App. R. 26 permitted applications for reconsideration to be filed within ten days of the journalization or announcement of the appellate decision. The *Murnahan* court found claims of ineffective assistance of appellate counsel may be left undiscovered because of the inadequacy of appellate counsel or the inability to identify counsel's errors within the time allowed for reconsideration. For this reason, *Murnahan* provided for a delayed reconsideration. App. R. 26 was amended to provide for reconsideration in criminal cases beyond the previous limitation of time, but only in alleged instances

of ineffective assistance of counsel in the direct appeal, not in post-conviction proceedings. App. R. 26 now provides for applications to be filed more than 90 days after the appellate court's judgment is journalized if the appellant can show good cause.

Although *LaMar* and *Gumm*, supra, relied on the fact that "Ohio and other states "may erect reasonable procedural requirements for triggering the right to an adjudication," *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S. Ct. 1148, 71 L. Ed. 2d 265, and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen.. *Id. LaMar* at [**P7]. This has not always been the case.

Contrary to the holding by this Court in *LaMar* and *Gumm* above, the Eighth District Court of Appeals after *Manos* (1996) and *Smiley* (1998), continued to Change the legal landscape for filing after the 90-day deadline when it found, in *State v. Chu* (June 6, 2002), 2002 Ohio 4422, ("it would not be just if we denied Chu's application because of a procedural defect . . . an applicant that presents a genuine issue as to the effectiveness of counsel on appeal should supersede any procedural deficiency of the application"), citing *Manos* and *Smiley*; and *State v. Fung* (June 6, 2002), 2002 Ohio 2673 Holding same.

Most recently, the Twelfth District Court of Appeals in *Lyttle v. State*, 2012 Ohio 3042 found good cause after a two-year delay and in *State v. Smaltz*, 2013 Ohio 5350, the Sixth District Court of Appeals also found good cause after a three-year delay.

As additional support for appellant's position that good cause exists and needs defined by this Court. The United States District Court for the Southern District of Ohio, Eastern Division, which found that Ohio's procedure for reopening appeals, was not a "firmly established and regularly followed" state practice precluding federal habeas relief. *Carpenter v. Mohr* (Mar. 12, 1997), S.D. Ohio No. C-2-96-447, unreported, affirmed on other grounds and remanded for issuance of a writ of habeas corpus conditioned on the state giving the defendant a new culpability hearing, (C.A. 6 1998), 163 F.3d

938. In *Carpenter*, the District Court's decision was based on the court's belief that Ohio had inconsistently applied the "good cause" standard in App. R. 26. For example, in the District Court's review of Ohio cases, good cause was almost never found in some appellate districts, while in others, a standard was used that nearly always allowed a finding of good cause. Additionally, the District Court noted that the Ohio Supreme Court had offered little guidance in this area. See *State v. Sweeney* (1999), 131 Ohio App. 3d 765.

In addition to the *Sweeny* Court finding this Court "had offered little guidance in this area" Id. The United States District Court for the Southern District of Ohio, Western Division in 2007, found in *Moore v. Mitchell*, 2007 U.S. Dist. LEXIS 96523 (S.D. Ohio Feb. 15, 2007) 2007 U.S. Dist. LEXIS 96523, in a foot note (Fn11): In 2000 the Ohio Supreme Court began ignoring the lower courts dismissals of Rule 26(B) applications as untimely and affirming the dismissal of the applications on the merits. (All citation omitted by this Appellant approximately 24 cases). Recently, in yet another reversal of practice, the Ohio Supreme Court has renewed affirming the dismissal of Rule 26(B) applications in capital cases as untimely. See *State v. Gumm*, 103 Ohio St. 3d 162, 2004 Ohio 4755, 814 N.E.2d 861 (Ohio 2004); *State v. LaMar*, 102 Ohio St. 3d 467, 2004 Ohio 3976, 812 N.E.2d 970 (Ohio 2004); see also *State v. Myers*, 102 Ohio St. 3d 318, 2004 Ohio 3075, 810 N.E.2d 436 (Ohio 2004) (court affirms dismissal as the application was both untimely and meritless). Id. See *State v. Gillard*, 1998 Ohio App. LEXIS 1966. (Emphasis added).

The implications of the decisions of the courts of appeals where this Court "had offered little guidance in this area" Id. and "ignoring the lower courts dismissals of Rule 26(B) applications as untimely and affirming the dismissal of the applications on the merits" Id. yet "renewed affirming the dismissal of Rule 26(B) applications as untimely" Id. affects every defendant, prosecutor, and appellate court in Ohio, and touches the lives of tens of thousands of citizens across Ohio. The public's interest in the orderly operation of the justice system is profoundly affected by the conflicting precedent

concerning the “good cause” clause in App. R. 14(B) and App. R. 26(B) that this Court urgently needs to address.

This case involves a substantial constitutional question where the conflict in decisions between appellate courts and contrary to this Court’s holdings offends Ohio’s constitutional scheme to due process and equal protection as well as the United States constitutional scheme to due process and equal protection. Such a constitutional imbalance if allowed to continue will repeatedly disavow any “good cause” rule. In addition, in this particular case, undoubtedly allows a manifest error (double jeopardy) to go unchecked and creates an miscarriage of justice.

If allowed to stand where the 90-day deadline rule is to be rigidly applied in the strictest sense, it would continue to ravage and over look any manifest error and further propel the injustice that is obvious and direct in this case. The court of appeals found that “even assuming that both cases play an important role in the merits of his motion, Appellant has not demonstrated good cause for his untimely filing”. Is not ineffective assistance of counsel on direct appeal such a constitutional significance to override and untimely filing when app. R. 14(B) allows for enlargement, and where Crim. R. 52(B) plain error allows justice to be served when defects affecting substantial rights may be addressed although they were not brought to the attention of the court.

In sum, the above puts in issue what is “good cause” and puts the fate of all defendants’, prosecutors’ and appellate court’s across Ohio in a quagmire. To continue to promote the denial upon no showing of “good cause” without guidance as to what “good cause” is, is, to promote manifest error’s and to continue to create miscarriages of justice. This Court must grant jurisdiction to hear this case and revisit its prior precedent to establish what “good cause” is.

STATEMENT OF THE CASE AND FACTS :

This case arises from the trial court’s sentencing hearing where the sentencing court found that Appellant’s offenses are allied offense and that they merge. However, the trial court sentenced the

appellant to “concurrent” terms of imprisonment after finding they must merge. Appellant appealed his conviction State v. Jay Andrews, 2010 Ohio 6126 (Dec. 15, 2010) the appellate court affirmed his conviction.

Appellant attempted to reopen his original appeal; however, the appellate court found he did not show “good cause” for his untimely application for reopening.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW :

Proposition of Law No. I:

AMENDMENT OF APP. R. 26 (B) IS NECESSARY TO MEET THE
FEDERAL (AEDPA) ONE-YEAR FINALITY IN THE JUDGMENT OF
CONVICTION FOR DEFENDANT’S IN ORDER TO PROPERLY
EXHAUST STATE PROCEDURAL REQUIREMENTS.

The Antiterrorism and Effective Death Penalty Act (AEDPA) *filing deadline* under 28 U.S.C. §2244(d)(1), §2254 petitions must be filed within *one-year* of: (1) the final judgment on direct review; (2) the expiration of the time for seeking such review; (3) the removal of any state-imposed impediment that unconstitutionally prevented the filing of such a petition; (4) the Supreme Court’s announcement of a new, retroactively applicable constitutional right; or (5) the date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence. 41 GEO. L. J. ANN. REV. CRIM. PROC. Page 981-82 (2012).

Under 28 U. SD. C. §2254, a person in custody pursuant to a state court judgment may challenge the conviction and sentence in federal court by applying (timely within one-year described above) for a writ of habeas corpus.

However, there are procedural bars if a petitioner has failed to present a particular claim before state court’s in the manner prescribed by the state’s procedural rule, and the *crux* of the case sub judice.

Whereas, a petitioner can overcome the procedural bar only by demonstrating either (1) cause for the procedural default and actual prejudice as a result of alleged violation of federal law or (2) that failure to review the claims will “result in a fundamental miscarriage of justice.” Petitioner’s can show

the “cause” requirement by showing, for example, that assistance of counsel was ineffective in violation of the Six Amendment. 41 GEO. L. J. ANN. REV. CRIM. PROC. Page 966-68 (2012).

In the case sub judice, the 90-day deadline rule in App. R. 26(B) prevents most defendant’s from ever filing timely his/her application, and in doing so, treats a certain class of defendant’s differently from those similarly situated. Those who can afford counsel and those who cannot and must precede pro se. Thus, violates those certain defendant’s constitutional right to equal protection, where those who can afford the luxury of counsel will be certain to file timely, whereas, those who cannot are expected to do in 90-day’s, what it takes experienced counsel to learn in eight years of college and law school and why this Court must re-examine *Riddick*, supra for its position that, “Lack of effort or imagination, and ignorance of the law * * * do not automatically establish good cause for failure to seek timely relief” and revisit *LaMar* and *Gumm*, supra for their position that, “90-day deadline firmly established and regularly followed *LaMar*; 90-day rule deadline for filing must be strictly enforced”.
Gumm.

Proposition of Law No. II:

APPELLATE RULE 14(B) AND APP. R. 26(B) “GOOD CAUSE” NEEDS DEFINED IN ORDER FOR APPELLATE COURT’S TO PROPERLY AND UNILATERALLY APPLY THE GOOD CAUSE REQUIREMENT.

What is “good cause”? Pursuant to Black’s Law Dictionary 9th Ed. (2009), good cause means, “a legally sufficient reason”. The next question becomes, what is “legally sufficient”. Legal is defined as, “of or relating to law, falling within the providence of law” Black’s, supra. Sufficient is simply, enough to meet the needs of a situation or proposed end. Coming full circle then, what is enough to meet the need or proposed end for “good cause” for filing past the 90-day deadline rule in App. R. 26(B)? The same can also be asked of App. R.14(B), which allows for enlargement of time of these rules for doing an act after the expiration of the prescribed time upon a “showing” of ‘good cause’. Is a ‘showing’ for ‘good cause’ defined in App. R.14(B) and App. R. 26(B) the same ‘showing’?

Appellant submits there is difference I the "good cause" showing and once a defendant can show a "legally sufficient reason" in App. R.14(B) to enlarge the time for doing an act as prescribed by the appellate rules, he establishes "good cause" in App. R. 26(B) automatically. That is, if an appellant shows a legally sufficient reason to enlarge the time pursuant to App. R. 14(B), an appellate court shall reopen the appeal and reach the merits.

Whereas, if an appellant files his/her delayed application pursuant to App. R. 26(B) "good cause", the standard changes and he or she shall establish a legally sufficient reason for filing after the 980—day deadline rule. In other words, App. R. 14(B) does not require a "showing" of why the appellant is not timely, it only requires a "legally sufficient reason" that relates to law or falling within the providence of law as defined to enlarge the time. Although there are many reason that may fall into this category, that will have to develop and be defined on a case by case, or this Court can simply define what "good cause" is in both App. R. 14(B) and App. R. 26(B) as the Sixth, Eighth, and Twelfth district courts of appeal has. That is, all an appellant need show is a "genuine issue". A genuine issue could be as the federal courts has defined for example, that assistance of counsel was ineffective in violation of the Six Amendment, or that the sentence is contrary to law. A genuine issue can be anything relating to law, or falling within the providence of law pursuant to any case precedent.

Wherefore, the public's interest in the orderly operation of the justice system is profoundly affected by the conflicting precedent concerning the "good cause" clause in App. R. 14(B) and App. R. 26(B) that this Court urgently needs to address.

CONCLUSION

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

Respectfully submitted,

Jay Andrews

Jay Andrews

574-672

2500 Avon-Belden Rd.

Grafton, Ohio 44044

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal and Memorandum in support of jurisdiction has been sent by regular U. S. Mail to the Summit County Prosecutor at the *Safety Bldg, 53 UNIVERSITY AVE,* Akron, Ohio, 44308 on this *15th* day of *August* 2014.

Jay Andrews
Jay Andrews

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

2014 JUL 10 PM 12:09

C.A. No. 25114

Appellee

SUMMIT COUNTY
CLERK OF COURTS

v.

JAY ANDREWS

Appellant

JOURNAL ENTRY

Appellant, through counsel, has moved to reopen his appeal. Pursuant to App.R. 26(B), “[a]n 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.” Appellant’s direct appeal was decided on December 15, 2010. His application for reopening was filed on April 23, 2014. Thus, on its face, Appellant’s motion is untimely.

Appellant has argued that the good cause for his untimely filing is the fact that two cases important to the merits of his motion, *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, and *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, were decided subsequent to the determination of Appellant’s direct appeal. While it is true that the cases were decided subsequent to December 15, 2010, both cases were decided in December 2010, well within the 90-day deadline for filing the motion to reopen. Thus, even assuming that both cases do play an important role in the merits of his motion, Appellant has not demonstrated good cause for his untimely filing.

To the extent that Appellant has asserted that the lack of good cause should be excused, Appellant has not cited to any cases from this district supporting his argument.

Further, we are not persuaded that we have the authority to disregard the procedural mandates set forth in the appellate rules.

Appellant's motion is denied as untimely.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

Judge

Concur:
Moore, J.
Hensal, J.