

Original

ORIGINAL

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,  
Plaintiff-Appellee,

Case No. 17-1431

vs.

On Appeal from the Stark  
County Court of Appeals  
Fifth Appellate District

CALVIN RICHARD JOHNSON  
Defendant-Appellant.

C.A. Case No. 2016 CA 00069

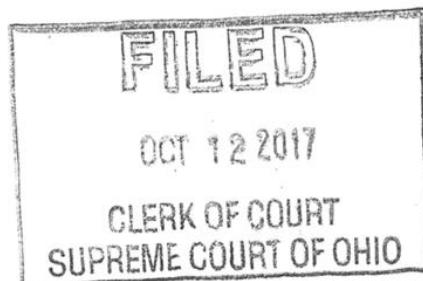
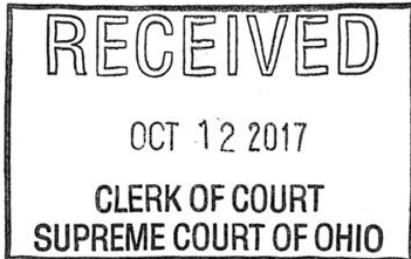
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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT CALVIN RICHARD JOHNSON**

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Lorain Correctional Institution  
2075 South Avon-Belden Road  
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DEFENDANT-APPELLANT, PRO SE

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

This case involves the denial of substantial Federal, as well as State, Constitutional Rights in the following regard.

The Fifth District Court of Appeals decision in denying Appellant's Application to Reopen Direct Appeal resulted in a decision that involved an unreasonable application of, clearly established State and Federal law, in light of the evidence presented which clearly shown that trial court, after pronouncing sentence failed --contrary to Sixth and Fourteenth Amendment of the United States Constitution; as well as the statutory mandates of Ohio Revised Code 2953.21 Post Conviction Remedy - to advise Appellate of such relief as well as the time constraints to file such.

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

In denying Appellant's motion for delayed appeal, held- in pertinent part:

“Appellant's application was not timely filed within ninety days of the journalization of our opinion in Appellant's case.....Appellant in his motion has failed to establish good cause for missing the filing deadline, citing only his own ignorance of the law.

“For the foregoing reasons, appellant's motion to re-open his appeal is hereby DENIED.”

**Id. at Appendix A-1.** Appellant filed an Application to Reopen Direct Appeal on August 7, 2017, due to the constitutionally deficient ineffective assistance of appellate counsel representation Johnson was subjected to during his appeal as of right. That is, direct appeal counsel, Derek Lowry, was constitutionally ineffective where counsel failed to bring appellant aware of: (1) the existence of O.R.C. 2953.21 Post Conviction Proceeding; (2) that such post-conviction remedy was the proper vehicle to raise the constitutional violations that was dependent on material outside of the record; and (3) that the filing of the trial court record within the court of appeals triggered the 365 day deadline for filing a timely post-conviction petition under O.R.C. 2953.21 (A)(2).

## PROPOSITION OF LAW

USCS Const. Amend. 6:

“Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence (sic).”

USCS Const. Amend. 14, § 1:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Ohio Revised Code 2953.21 (A)(2)

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

Id.

“Whatever the practice of other jurisdictions or indeed at common law, the basic constant is that Ohio criminal law is a creature of statute.” *State v. Loudermill*, (1965) 2 Ohio St. 2d 79, 80. “As a general rule, statutes which relate to the essence of the act to be performed are matters of substance, and are mandatory;...” *Abate v. Pioneer Mut. Casualty Co.*, (1970) 22

Ohio St. 2d 161, 164. "It is axiomatic that the use of the word 'shall' in a statute, indicates that compliance with the statute is mandatory, absent clear unequivocal legislative intent to the contrary. *State ex rel. Bokins v. Laws* (1994), 39 Ohio St.3d 383, 385. 'A mandatory statute may be defined as one where noncompliance \*\*\* will render the proceedings to which it relates illegal and void.'" *State v. Hann*, 173 Ohio App. 3d 716, 718(8<sup>th</sup> App. Dist. 2007).

## CONCLUSION

For the foregoing reasons, Appellant respectfully request that Jurisdiction be accepted and his appeal be permitted to proceed, with the appointment of counsel.

Respectfully submitted,

Calvin Johnson  
Calvin Richard Johnson, 681-903  
Lorain Correctional Institution  
2075 South Avon-Belden Road  
Grafton, Ohio 44044

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal  
was forwarded by regular U.S. Mail to Stark County Prosecutor, at 110 Central Plaza South,  
Suite 510, Canton, Ohio, 44701, on this 18 day of September, 2017.

Calvin Johnson  
Calvin Richard Johnson, 681-903  
Lorain Correctional Institution  
2075 South Avon-Belden Road  
Grafton, Ohio 44044

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, : Case No. \_\_\_\_\_  
Plaintiff-Appellee, :  
vs. : On Appeal from the Stark  
CALVIN RICHARD JOHNSON : County Court of Appeals  
Defendant-Appellant. : Fifth Appellate District  
: C.A. Case No. 2016 CA 00069

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**APPENDIX TO  
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT CALVIN RICHARD JOHNSON**

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JUDGMENT ENTRY

CALVIN RICHARD JOHNSON

Defendant-Appellant

CASE NO. 2016 CA 00069

CLERK'S OFFICE  
STARK COUNTY, OHIO

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This matter comes before this Court pursuant to Appellant Calvin Richard Johnson's "Application to Reopen Direct Appeal" pursuant to App.R. 26(B), filed August 17, 2017. The State of Ohio filed a response August 18, 2017.

This Court upheld appellant's convictions and sentences for complicity to commit murder with a firearm specification, two counts of felonious assault, each with firearm specifications, and tampering with evidence. See *State v. Johnson*, 5th Dist. Stark No. 2016 CA 00069, 2016-Ohio-8261.

App. R. 26 (B) states:

(B) Application for reopening:

(1) A defendant in a criminal case may apply for re-opening 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

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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 re-opening 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.

Our original judgment was filed on December 19, 2016, and appellant's application was filed August 17, 2017. Accordingly, appellant's application was not timely filed within ninety days of the journalization of our opinion in appellant's case. Appellant does not give a reason for his delayed filing.

App.R. 14(B), "Enlargement or reduction of time," states:

For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. The court may not enlarge or reduce the time for filing a notice of appeal or a motion to certify pursuant to App.R. 25. Enlargement of time to file an application to reconsider pursuant to App.R. 26(A) shall not be granted except on a showing of extraordinary circumstances.

The Ohio Supreme Court has interpreted App.R. 26 and App. R. 14, stating that both were "intended to allow the belated presentation of colorable claims that defendants/appellants were prevented from presenting timely by particular circumstances. 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*, 72 Ohio St.3d 88, 647 N.E.2d 784, 1995-Ohio-249.

An applicant has no right to counsel in filing the application, and he does not show good cause if he has no counsel to submit a timely App.R. 26(B) application. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157; *Accord, State v. Williams*, 129 Ohio St.3d 19, 2011-Ohio-232, 950 N.E.2d 140, ¶8; *State v. Hoffner*, 112 Ohio St.3d 467, 2007-Ohio-376, 860 N.E.2d 1021, ¶6; *Lopez v. Wilson*, 426 F.3d 339, 352–353(6th Cir. 2005).

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. Hoffner*, 112 Ohio St.3d 467, 2007-Ohio-376,

860 N.E.2d 1021, *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.

In *State v. Hoffner*, 112 Ohio St.3d 467, 2007-Ohio-376, 860 N.E.2d 1021 the Ohio Supreme Court observed,

And Hoffner himself cannot rely on his own alleged lack of legal training to excuse his failure to comply with the deadline. "Lack of effort or imagination, and ignorance of the law \* \* \* do not automatically establish good cause for failure to seek timely relief" under App.R. 26(B). *State v. Reddick* (1995), 72 Ohio St.3d 88, 91, 647 N.E.2d 784. The 90-day requirement in the rule is "applicable to all appellants," *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722, and Hoffner offers no sound reason why he—unlike so many other Ohio criminal defendants—could not comply with that fundamental aspect of the rule.

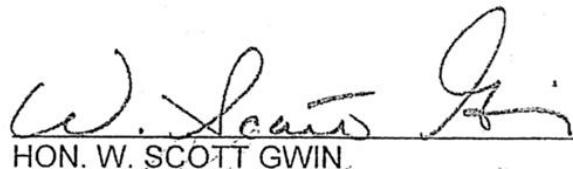
*Hoffer*, ¶8.

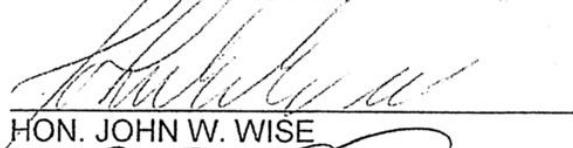
"Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the State's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved." *Hoffner, supra*, paragraph 8, *citing State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, paragraph 7.

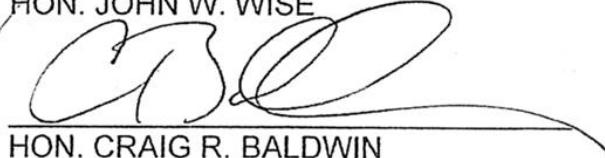
Appellant in his motion has failed to establish good cause for missing the filing deadline, citing only his own ignorance of the law.

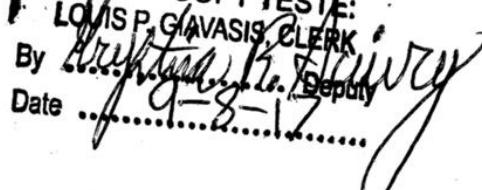
For the foregoing reasons, appellant's motion to re-open his appeal is hereby  
DENIED.

IT IS SO ORDERED.

  
HON. W. SCOTT GWIN

  
HON. JOHN W. WISE

  
HON. CRAIG R. BALDWIN

A TRUE COPY TESTE:  
LOUIS P. GIAVASIS, CLERK  
By   
Date 9-8-17