

# The Supreme Court of Ohio

FILED

DEC 29 2020

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

v.

Edward Smith

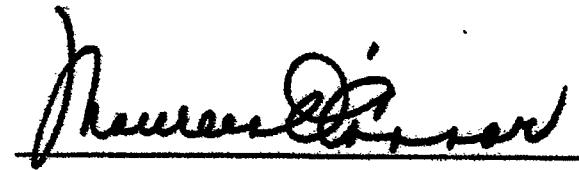
Case No. 2020-1152

## RECONSIDERATION ENTRY

Hamilton County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Hamilton County Court of Appeals; No. C-190289)



Maureen O'Connor  
Chief Justice

## Appendix A:

The Official Case Announcement can be found at <http://www.supremecourt.ohio.gov/ROD/docs/>



FILED  
The Supreme Court of Ohio

NOV 10 2020

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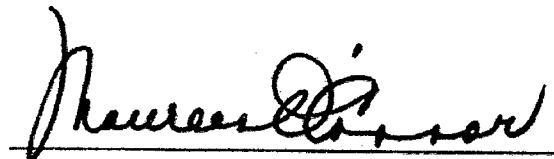
Case No. 2020-1152

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

It is further ordered that appellant's motion for stay of court of appeals' judgment is denied.

(Hamilton County Court of Appeals; No. C-190289)



Maureen O'Connor  
Chief Justice

Appendix B:

The Official Case Announcement can be found at <http://www.supremecourt.ohio.gov/ROD/docs/>



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ENTERED

JUN 10 2020

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

STATE OF OHIO, : APPEAL NO. C-190289  
Plaintiff-Appellee, : TRIAL NO. B-9609928  
vs. : JUDGMENT ENTRY.  
EDWARD SMITH, :  
Defendant-Appellant. :

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.*

Defendant-appellant Edward Smith advances two assignments of error on appeal, both challenging the Hamilton County Common Pleas Court's judgment denying his motion to vacate his conviction and sentence. In 1998, following Mr. Smith's conviction for murder and an accompanying firearm specification, this court reversed the trial court's judgment and remanded for a new trial. *See State v. Smith*, 130 Ohio App.3d 360, 720 N.E.2d 149 (1st Dist.1998). On remand, the jury once again found Mr. Smith guilty of murder and an accompanying firearm specification, and he received a 15-year-to-life sentence on the murder charge and a three-year sentence on the specification. Mr. Smith subsequently appealed his conviction, which this court in turn affirmed. *See State v. Smith*, 1st Dist. Hamilton No. C-990689, 2000 WL 1643583, \*1 (Nov. 3, 2000). In the interim since his conviction, Mr. Smith filed numerous postconviction petitions, his most recent motion, filed in February 2019, titled "Vacate Void Judgment/Sentence." The trial court recast this motion as a postconviction petition, ultimately denying it, as well as other pending postconviction petitions the court had before it.

Appendix C:



VERIFY REC'D

On appeal, Mr. Smith contends that the trial court erred in recasting his motion and-denying-it.—However,—despite—the-name,—Mr.—Smith’s—motion—seemingly—alleged— constitutional violations, contending his double jeopardy and due process rights were violated because the state did not inform him, during the second trial, of the firearm specification accompanying his murder charge. Consequently, as to the extent Mr. Smith’s motion alleged constitutional violations, the court below properly recast his motion as a petition for postconviction relief. *See State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 (“Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged.”); *State v. Young*, 1st Dist. Hamilton No. C-170628, 2019-Ohio-134, ¶ 5 (“A common pleas court may grant relief from a conviction under R.C. 2953.21 et seq., the postconviction statutes, upon proof of a constitutional violation during the proceedings resulting in the conviction.”); R.C. 2953.21(A)(1)(a).

While R.C. 2953.21 generally permits a petitioner’s collateral attack upon a judgment of conviction, here the trial court lacked jurisdiction to review Mr. Smith’s motion, as his motion was both untimely and successive. When Mr. Smith filed his tenth postconviction motion in February 2019, the statutory deadline for filing a timely postconviction petition had long since passed. *See R.C. 2953.21(A)(2)* (“[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[.]”). Further, Mr. Smith failed to demonstrate that one of the exceptions in R.C. 2953.23(A) applied. *See State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 38 (“By providing that a court ‘may not entertain’ an untimely or successive postconviction petition except in limited circumstances, R.C. 2953.23(A) plainly prohibits a court from hearing and deciding on the merits a petition that does not meet one of the exceptions.”). Consequently, as to the alleged constitutional claims, the postconviction statutes did not confer upon the court jurisdiction to entertain Mr. Smith’s motion.

Nor, upon review of his motion, do we see another avenue by which the trial court may have exercised jurisdiction. See *State v. Ellis*, 1st Dist. Hamilton No. C-180331, 2019-Ohio-3164, ¶ 6 (explaining that the defendant's motions were "not reviewable as motions for a new trial under Crim.R. 33 or as motions to withdraw a guilty or no-contest plea under Crim.R. 32.1, because [the defendant] was convicted following a jury trial, not upon guilty or no-contest pleas, and his motions did not seek a new trial."); *State v. Dardinger*, 1st Dist. Hamilton No. C-160467, 2017-Ohio-1525, ¶ 9 (noting the defendant's motions were not reviewable as a writ of mandamus, as a declaratory judgment, or as a writ of habeas corpus).

Although a trial court always possesses jurisdiction to correct a void judgment, no such circumstances existed here. See *State v. Wurzelbacher*, 1st Dist. Hamilton No. C-130011, 2013-Ohio-4009, ¶ 7, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19 (noting a court's authority to correct a void judgment); *Young*, 1st Dist. Hamilton No. C-170628, 2019-Ohio-134, at ¶ 7 ("And a judgment of conviction is void to the extent that a sentence is unauthorized by statute or does not include a statutorily mandated term[.]"). In his motion, Mr. Smith challenged his sentence, seemingly asserting his 15-year-to-life sentence for murder was contrary to law, and thus void, because the court failed to state in its entry that his sentence was "an indefinite term" of 15-years-to-life pursuant to R.C. 2929.02(B). The trial court here sentenced Mr. Smith to "15 years — Life in Prison," in accordance with R.C. 2929.02(B), but left out the term "indefinite." See former R.C. 2929.02(B) ("Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life[.]"). However, we find the court's failure to use the term "indefinite" inconsequential here as the indefinite nature of Mr. Smith's 15-year-to-life prison term is evident from the absence of a certain number of years and the presence of a range defined by minimum (i.e., 15 years) and maximum (i.e., life) terms. See *State v. Johnson*, 8th Dist. Cuyahoga No. 108419, 2020-Ohio-191, ¶ 18, quoting *State v. Wolfe*, 2d Dist. Montgomery Nos. 26681, 26729 and

## OHIO FIRST DISTRICT COURT OF APPEALS

26983, 2016-Ohio-4897, ¶ 14 ("A prison term of 'fifteen years to life' for murder is, by its nature, indefinite because it is a prison range defined by minimum and maximum terms. \_\_\_\_\_

And because 'the indefinite nature of the 15-year-to-life prison term is apparent since the term is not a specific number of years,' the omission of the term 'indefinite' does not alter the sentence."). Accordingly, the absence of the term "indefinite" here does not render Mr. Smith's sentence void. *See id.* at ¶ 18; *State v. Bandy*, 8th Dist. Cuyahoga No. 108676, 2020-Ohio-808, ¶ 6 ("[W]e find that [the defendant's] sentence is not void despite the trial court failing to include the term 'indefinite' in [his] sentence."); *State v. Albert*, 10th Dist. Franklin No. 19AP-780, 2020-Ohio-3154, ¶ 5 ("A prison sentence of fifteen years to life is inherently indefinite, and the law does not require that the sentencing entry add a redundant adjective to that effect.").

Because the trial court lacked jurisdiction to grant Mr. Smith the relief he sought, the court's entry denying his petition is appropriately modified to reflect its dismissal. *See App.R. 12(A)(1)(a)*. And we affirm the judgment as modified.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**MYERS, P.J., BERGERON and WINKLER, JJ.**

To the clerk:

Enter upon the journal of the court on June 10, 2020,  
per order of the court *John M. Winkler*.

Presiding Judge

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

STATE OF OHIO,

APPEAL NO. C-190289  
TRIAL NO. B-9609928

Appellee,

vs.

ENTRY GRANTING MOTION TO  
COMPLETE THE RECORD

EDWARD SMITH,

Appellant.

This cause came on to be considered upon the motion of the appellant to complete the record with certified copies of documents that were previously filed with the trial court.

The motion is well taken and is granted. The Court hereby accepts the documents submitted on July 5, 2019, as filed.

To The Clerk:

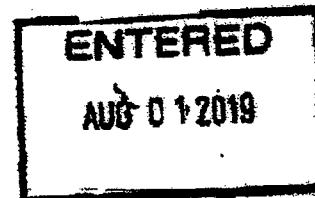
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Enter upon the Journal of the Court on \_\_\_\_\_ per order of the Court.

By: \_\_\_\_\_

  
Presiding Judge

Appendix D:



1 RANDALL MARCELLUS ROZIER

2 having been first duly sworn, was examined and testified  
3 as follows:

4 THE COURT: Good morning.

5 THE WITNESS: Good morning.

6 THE COURT: Speak into the mike, please.

7 Keep your voice up. Go ahead.

8 DIRECT EXAMINATION

9 BY MR. LEON:

10 Q. State your name, and spell your last  
11 name.

12 A. Randall Marcellus Rozier, R-o-s-i-e-r.

13 Q. How are you employed?

14 A. Special agent, Federal Bureau of  
15 Investigation.

16 Q. And you work for the FBI now?

17 A. I do.

18 Q. Where are you stationed? Where do you  
19 work?

20 A. I'm assigned to the New York division.

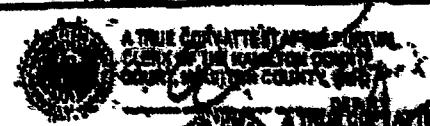
21 Q. You work in where?

22 A. New Rochelle, New York.

23 Q. New Rochelle?

24 A. Yes.

25 Q. How long have you been with the FBI?



1                   A.     Approximately twenty-and-a-half years.

2                   Q.     Were you a police officer before you were

3     with the FBI?

4                   A.     That is correct.

5                   Q.     And where were you a police officer

6     before that?

7                   A.     I was employed in two places, Lincoln

8     Heights, Ohio, first, and Woodlawn.

9                   Q.     What, exactly, are your duties, now, in

10   the FBI?

11                  A.     I'm assigned to organized crime.

12                  Q.     Do you have specialized training in your

13   duties and background as an organized crime -- in your

14   organized crime assignment?

15                  A.     I do.

16                  Q.     And what kind of specialized training

17   have you received?

18                  A.     I've been trained in collecting,

19   preserving evidence, interviewing people, arrest

20   situations, search and seizure.

21                  Q.     Okay. And do you do undercover work?

22                  A.     Yes, I do.

23                  Q.     What kind of undercover work do you do?

24                  A.     I've done fraud against the government,

25   theft of interstate shipment, I've done drugs, political

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1 corruption; that's about it.

2 Q. Okay. And have you done -- been involved  
3 in undercover situations that involve dangers?

4 THE COURT: Can we move this along?

5 MR. LEON: This is my last question.

6 THE COURT: I don't know the relevancy.

7 MR. LEON: I'll tie it up.

8 THE COURT: Let me see you at sidebar,  
9 please.

10 (The following proceedings were had at  
11 sidebar conference.)

12 MR. LEON: What?

13 THE COURT: What's the relevancy? Is he  
14 an expert witness or something?

15 MR. LEON: He will be testifying that  
16 when he came upon the situation, that he was --  
17 basically, his training and his experience as a  
18 police officer, he was frightened enough to pull  
19 his firearm when he saw what was happening between  
20 Spikner and the defendant. He's a trained --

21 THE COURT: What's the relevancy?

22 MR. LEON: There's a dispute here about  
23 whether or not the defendant had a gun. This  
24 witness will testify that Spikner told him that he  
25 had a gun. He withdrew his weapon when they came

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DEPUTY

1 on the scenes because of his fear, based on his  
2 training. That gives relevance to his actions.

3 MR. BURLEW: Spikner never testified to  
4 that.

5 THE COURT: Spikner never said he saw a  
6 gun. You don't object?

7 MR. BURLEW: I do object.

8 MR. LEON: He's going to testify --

9 THE COURT: No. Are you trying to  
10 impeach your own witness?

11 MR. LEON: No.

12 THE COURT: Then I'm not allowing it.

13 Thank you.

14 (The following proceedings were had in  
15 open court, in the presence of the jury.)

16 BY MR. LEON:

17 Q. On December the 27th, 1996, were you in  
18 Lincoln Heights?

19 A. I was.

20 Q. And you were here for what reason?

21 A. I was on vacation.

22 Q. You are related or were related to the  
23 victim in this case, Eugene Jenkins?

24 A. That's correct.

25 Q. What was your relationship?

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1 A. He was my first cousin.  
2 Q. Okay. And at some time on the 27th of  
3 December, 1997, did you become aware of some problem with  
4 Gene?  
5 A. That is correct.  
6 Q. What called your attention to this? How  
7 did you find out?  
8 A. I received a phone call at my mother's  
9 residence that Gene had been shot.  
10 Q. And what did you do then?  
11 A. I asked where, where had the incident  
12 happened; and was told. And I went to the barbershop,  
13 then I went to where the incident occurred.  
14 Q. And how far was the incident from the  
15 barbershop?  
16 A. Roughly a mile.  
17 Q. And you -- when you went to the scene,  
18 what did you do when you first got there?  
19 A. I saw Police Chief McCowen.  
20 Q. And did you speak with him?  
21 A. I did.  
22 Q. Based upon your conversation with Chief  
23 McCowen, what did you do?  
24 A. Police Chief McCowen told me what had  
25 happened. I asked him what was Gene's condition. And



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1 then I went over to where the truck was, and I observed  
2 the truck that he was in.

3 Q. Okay. Was -- was Mr. Jenkins in the  
4 truck when you went over there?

5 A. No.

6 Q. They had pulled him out?

7 A. Yes. He was gone to the hospital  
8 already.

9 Q. Okay. What did you do next?

10 A. I went to the hospital where Gene was,  
11 and met part of the family there.

12 Q. Okay. And when did you find out that he  
13 had died?

14 A. Immediately upon my arrival at the  
15 hospital.

16 Q. What did you do then?

17 A. I went back to the crime scene, and I  
18 started interviewing people that were employed by Gene.

19 Q. Okay. And --

20 A. Mr. Jenkins.

21 Q. Were you, at that point, helping Lincoln  
22 Heights in their investigation?

23 A. I was.

24 Q. Who did you talk to?

25 THE COURT: Can you move this a little



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1 . bit, Mr. Leon?

2 MR. LEON: Sure.

3 A. I spoke with --

4 THE COURT: Excuse me. Can we move that  
5 a little?

6 MR. LEON: Yeah. .

7 THE COURT: Would you do that?

8 MR. LEON: I'm trying.

13 MR. LEON: I'll do my best, Judge.

14 Q. What did you do after you spoke with  
15 people at the scene?

16 A. I went to the residence of Mr. Spikner.

17 Q. All right. And did you see him there?

18 A. I did.

19 Q. And what was your purpose in going to his  
20 residence?

21 A. Mr. Spikner was an employee of the  
22 construction company that was doing business with  
23 Mr. Jenkins.

24 Q. All right. And did you attempt to make  
25 contact with Ed Smith?



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COURT, HAMILTON COUNTY, OHIO

DEPUTY

1 A. I did.  
2 Q. Through Mr. Spikner?  
3 A. Yes.  
4 Q. And can you tell us what you tried to do  
5 and how you did it?  
6 A. Mr. Spikner advised me that he was  
7 employed by --  
8 MR. BURLEW: Objection.  
9 THE COURT: Sustained.  
10 Q. What did you do to try to contact  
11 Mr. Smith?  
12 A. I found out the location of Mr. Smith's  
13 residence, and I went with Mr. Spikner to his residence.  
14 Q. Who drove?  
15 A. I did. Both of us drove to the  
16 residence.  
17 Q. You were the driver or Spikner was the  
18 driver?  
19 A. I drove my car, Spikner drove his car.  
20 Q. What happened when you went there?  
21 A. We met after we parked on the street. He  
22 -- I was -- he told me what the address was. He went up  
23 to the address, knocked on the door, and there was no  
24 answer.  
25 Q. Okay. And were you looking for a truck



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COURT, HAMILTON COUNTY, OHIO  
DEPUTY

1 when you went there?

2 A. Yes.

3 Q. What kind of truck were you looking for?

4 A. A Ford. I believe it was a gray truck.

5 Q. Was the truck there when you went to the  
6 house?

7 A. No, it was not.

8 Q. Did you go somewhere after that?

9 A. Yes, we did.

10 Q. Where did you go after that?

11 A. The tools that are usually used by the  
12 construction company were stored at a storage bin. And we  
13 went to the bin to see if the tools were still there.

14 Q. Can you describe that storage bin?

15 A. It's a -- it's roughly about ten feet  
16 wide, the depth I would approximate maybe about fifteen  
17 feet, twenty feet.

18 Q. Was it like a garage?

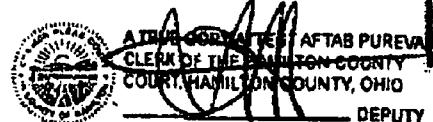
19 A. Similar, but a little smaller.

20 Q. It had a garage door type of door?

21 A. Yes.

22 Q. What happened when you got there?

23 A. Mr. Spikner and I rode together. I was  
24 driving my vehicle, Mr. Spikner got out of the car. We --  
25 I observed truck tire tracks with mud and straw on the



1 pavement, like someone had backed up to the bin.

2 Mr. Spikner got out of the car and opened the -- observed  
3 that the door was opened, unlocked, and opened the garage  
4 door.

5 Q. Okay. Did you expect to -- what happened  
6 when you opened the garage door?

7 A. He raised it partially up and observed a  
8 -- the front end of a truck.

9 Q. Did you see that, also?

10 A. Yes, I did.

11 Q. Were you surprised to see the truck  
12 there?

13 A. Very much so.

14 Q. Why is that?

15 A. For one, I didn't think a truck would fit  
16 in there. And we were looking for tools.

17 Q. I'm showing you what have been marked  
18 State's Exhibits Numbers 4A and 4B. Can you tell us what  
19 those are?

20 A. Yeah. This is the truck that you -- that  
21 I saw in the bin.

22 Q. All right. Thank you. You said Spikner  
23 opened the door?

24 A. Yes.

25 Q. Did he open it all the way?



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1                   A.       At first it was just partial.

2                   Q.       Okay. What happened then? He opened it  
3 partial, what did he do?

4                   A.       He stopped, and he looked back in my  
5 direction. And then he raised it down. And at the time,  
6 observed a male raise up in the seat.

7                   Q.       Okay.

8                   THE COURT: Excuse me. You observed  
9 this?

10                  THE WITNESS: Yes, ma'am.

11                  Q.       You saw a male in the truck seat?

12                  A.       Yes.

13                  Q.       Raise up?

14                  A.       In the driver's seat.

15                  Q.       Okay. What did you do then?

16                  A.       I became alarmed and --

17                  Q.       Why?

18                  A.       Because I knew it was Mr. Smith, and the  
19 expression that I saw on his face alarmed me.

20                  Q.       Do you see that individual here today?

21                  A.       Yes, I do.

22                  Q.       Can you point him out to us?

23                  A.       He is the gentleman sitting next to the  
24 defense attorney, Mr. Burlew.

25                  MR. LEON: May the record reflect



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1 identification, Your Honor?

2 THE COURT: Any objection?

3 MR. BURLEW: No.

4 THE COURT: It may.

5 Q. What did you do then?

6 A. I pulled my revolver from my waistband  
7 and braced myself.

8 Q. Why did you pull your revolver?

9 A. Because I was alarmed at the expression  
10 that was on his face, and Mr. Smith --

11 THE COURT: Excuse me. Ask your next  
12 question.

13 MR. BURLEW: Objection.

14 THE COURT: Sustained.

15 Q. What happened next?

16 A. I -- Mr. Spikner pulled the door  
17 partially down. And with his hands, he gave me a negative  
18 wave motion.

19 Q. And what did you do then?

20 A. I really didn't know how to interpret  
21 that, but I just remained ready.

22 Q. You kept your gun out?

23 A. Yes, I did. I rolled the window of the  
24 car down.

25 Q. What happened next?



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1                   A.        Mr. Spikner raised the door all the way  
2 up, and went around to the driver's side of the vehicle.

3                   Q.        And did you observe the two do anything?

4                   A.        They had conversation. The only action I  
5 observed with the two, Mr. Smith leaned over to the  
6 passenger's side, as to lie down into the seat, and  
7 immediately come back up. And I observed Mister -- at  
8 another point in time I observed Mr. Spikner reach toward  
9 the window of the vehicle.

10                  Q.        Okay. Did you see anything change hands?

11                  A.        No, I did not.

12                  Q.        Did the two speak?

13                  A.        Yes.

14                  Q.        Can you describe the -- the appearance of  
15 Mr. Smith when you saw him there?

16                  A.        To me he had a very wild look on his  
17 face. And I would describe it, pretty much, as a  
18 despondent look.

19                  Q.        What happened -- go ahead.

20                  A.        I'm sorry. And I also observed  
21 Mr. Spikner's expression --

22                  MR. BURLEW: Objection, nonresponsive.

23                  THE COURT: Sustained.

24                  Q.        Did you observe Mr. Spikner's face, also?

25                  A.        I did.



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COURT HAMILTON COUNTY, OHIO  
DEPUTY

1 Q. What did you observe about him?  
2 A. To me it appeared that he was -- there  
3 was fear --

4 MR. BURLEW: Objection.

5 THE COURT: Overruled.

6 Well, excuse me. You need to lay a  
7 foundation for that, so I'll sustain that.

8 Q. What happened after the conversation  
9 between the two?

10 A. Mr. Smith went again to the prone  
11 position of the vehicle, immediately raised back up. And  
12 he got out of the vehicle. And -- with Mr. Spikner --

13 Q. Okay. What happened next?

14 A. Mr. Spikner walked hurriedly over towards  
15 my car. Both gentlemen looked in my direction, then  
16 Mr. Spikner walked hurriedly over to my car.

17 Q. What did he do?

18 A. He got in the car and he told me, said --

19 MR. BURLEW: Objection.

20 THE COURT: Sustained.

21 Q. And after speaking with Spikner in the  
22 car, what did you do?

23 A. I was going to take Mr. Spikner out of  
24 the area, back my car up. And I went on Production Drive.  
25 And I noticed, in my rearview mirror, that the truck that



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1 was parked in the bin, was also pulling out.

2 Q. Why did you want to take Mr. Spikner out  
3 of the area?

4 A. Because if -- I did not want to endanger  
5 Mr. Spikner, because I -- the situation could become  
6 confrontational.

7 Q. And you said you saw the truck pull out?

8 A. Yes.

9 Q. You're talking about the gray truck that  
10 you've identified?

11 A. That's correct.

12 Q. What exactly did it do?

13 A. When it came out of the parking area,  
14 went on Production Drive in the opposite direction I was  
15 going, and sped hurriedly away. I immediately turned my  
16 vehicle around in pursuit. But when we got around to  
17 Reading Road, we did not see the vehicle any more.

18 Q. You lost it?

19 A. Yes.

20 Q. Did you try to get a license plate?

21 A. I tried, but I did not -- I had a partial  
22 license plate that I had obtained from Mr. Spikner.

23 Q. About what time did all this happen?

24 A. I believe it was about one.

25 Q. One in the afternoon?



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1 A. Yes.

2 Q. Did you call police or anything after  
3 that?

4 A. Yes. I called 911, Cincinnati Police.  
5 gave them a description of Mr. Smith, the vehicle. And I  
6 believe they put out a broadcast.

7 Q. When you went to the scene where  
8 Mr. Jenkins had been killed, did you go into Mr. Jenkins'  
9 truck or touch it or anything of that nature?

10 A. No, I did not.

11 MR. LEON: Your witness.

12 THE COURT: Mr. Burlew?

13 CROSS-EXAMINATION

14 BY MR. BURLEW:

15 Q. Mr. Rozier, at the time of the homicide,  
16 where were you stationed?

17 A. My office of assignment was New York.

18 Q. And who was the agent in charge of that  
19 office, your boss?

20 A. In charge of New York office, we've  
21 changed three times since then.

22 Q. Well, let me ask you --

23 A. I believe it was Talcstrum.

24 Q. Do you need authorization to get involved  
25 in a local matter?

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1 A. Mr. Calstrum did not know.

2 Q. Did any of the agents involved give  
3 permission for you to assist?

4 A. No.

5 Q. You asked to get involved, you weren't  
6 asked; you wanted to get involved in this matter, correct?

7 A. You asked me two questions.

8 Q. You asked the chief if you could get  
9 involved, correct?

10 A. I asked if I could assist them, yes, sir.

11 Q. I believe you asked if you could get  
12 involved. As a matter of fact, you asked him if he would  
13 mind if you assisted, did you not?

14 A. I think we're saying the same thing, sir.

15 Q. Just to be clear, you went to the chief  
16 and asked if he would mind if you assisted, correct?

17 A. That is correct.

18 Q. Now, at the time you got involved, you  
19 were not a sworn Cincinnati police officer, correct?

20 A. I was not a Cincinnati police officer.

21 Q. And what is the FBI protocol when you get  
22 involved in an investigative matter in a foreign  
23 jurisdiction, are you required to notify your agent in  
24 charge?

25 A. You asked me two questions there, sir.



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1                   Q.        Are you required to notify the agent in  
2 charge, or his representative, if you get involved in a  
3 criminal investigation in another jurisdiction?

4                   A.        That is correct.

5                   Q.        And that's why your agent in charge was  
6 in New York, and he was the only -- and that's where  
7 geographical limits were, unless he authorized you to  
8 travel outside those limits or be involved in an  
9 investigation outside of those limits, is it not?

10                  A.        That is not the FBI protocol, sir.

11                  Q.        So you can go where you want?

12                  A.        Would you like for me to explain the  
13 protocol to you?

14                  Q.        I'd like the answer to my question. Can  
15 you go where you want?

16                  A.        No, you cannot go where you want.

17                  Q.        Can you volunteer to assist any  
18 department that you want to get involved in?

19                  A.        I can volunteer, that is correct.

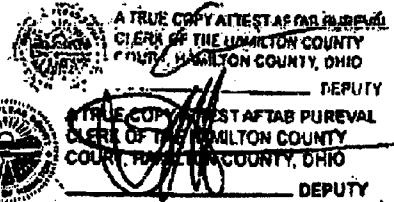
20                  Q.        And you need no prior permission?

21                  A.        With permission, yes, sir.

22                  Q.        Did you have permission?

23                  A.        I did not.

24                  Q.        Now, when you went with Mr. Spikner to  
25 this garage, how did you know that that was Ed Smith's



1 garage?

2 A. Mr. Spikner told me it was his.

3 Q. He told you that it was Ed Smith's

4 garage?

5 A. He told me that's where he stored the  
6 tools, yes, sir.

7 Q. Where was your warrant to go inside?

8 MR. LEON: Objection.

9 THE COURT: Overruled.

10 A. I had no warrant.

11 Q. You had no authority to go inside,  
12 correct?

13 MR. LEON: Objection.

14 THE COURT: Overruled.

15 A. I did not have a warrant, no, sir.

16 Q. As a matter of fact, the police chief you  
17 talked to was the chief of Lincoln Heights?

18 A. Yes.

19 Q. He had no authority to police the streets  
20 of the City of Cincinnati, did he?

21 MR. LEON: Objection.

22 THE COURT: Sustained.

23 Q. Did you ever ask him if you were  
24 permitted to go into the City of Cincinnati?

25 MR. LEON: Objection.

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THE COURT: Overruled. You may answer.

2 P. No, sir, I did not.

3 Q. Now, what could have happened is that you  
4 could have endangered a private citizen by going into  
5 property that is not authorized to go into, for which you  
6 had no warrant, correct?

7 MR. LEON: Objection.

THE COURT: Overruled.

9 MR. LEON: Can we approach?

10 THE COURT: Yes.

11 (The following proceedings were had at  
12 sidebar conference.)

13 MR. LEON: Judge, the insinuation that a  
14 warrant was somehow required is something -- it's  
15 a legal conclusion. The jury needs to know and  
16 understand that a warrant's not required for the  
17 employee of the defendant to go into the garage  
18 that he works in. This is misleading the jury.

19 THE COURT: Well, go ahead, Mr. Burlew.

20 MR. BURLEW: Judge, I'm not misleading  
21 the jury. I think the State went into all of this  
22 and tried to qualify him as an expert law  
23 enforcement officer. He violated his own  
24 protocol. And that's just a fact, that he had no  
25 warrant, no authority. I'm not attacking the

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1 search, we've done that pretrial.

2 MR. LEON: Exactly. That's my point.

3 MR. BURLEW: I'm not trying to suppress

4 anything.

5 MR. LEON: I don't have a problem with  
6 the questions, necessarily, other than the fact  
7 that the insinuation here is that he violated a  
8 duty to get a warrant when, in fact, it wasn't  
9 necessary. And, you know, it's a legal  
10 conclusion. It's not a whole lot different than  
11 having a statement with a motion to suppress, and  
12 then in trial attacking the propriety of taking  
13 the statement. It's a pretrial decision we're  
14 talking about.

15 THE COURT: Actually, with respect to a  
16 statement, it's both a trial and a pretrial. So I  
17 disagree on that point. I understand the point  
18 you're trying to make, though.

19 MR. BURLEW: I'm not attacking the  
20 search, but you can't hold him up as the world's  
21 greatest policeman, and have him violate rules.  
22 It's disingenuous.

23 MR. LEON: But he did not violate a rule  
24 about a warrant, and that's the implication,  
25 because he went to a garage that this employee had.

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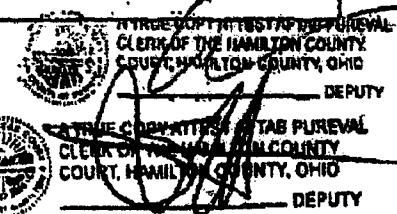
1 access to.

2 THE COURT: The reason I permitted -- I  
 3 take all this as seeking my explanation as to the  
 4 reason for my ruling. And the reason I permitted  
 5 it is that number one, a law enforcement officer  
 6 cannot direct somebody to do something and make it  
 7 a permissible search, number one. So I disagree  
 8 with your legal conclusion that the officer can  
 9 direct a private citizen to enter a private space  
 10 and obviate the need for a warrant.

11 Number two, there's no basis for a  
 12 contention that this person, Mr. Spikner, had the  
 13 authority. I have heard no testimony that he had  
 14 the authority to consent to a search. So I  
 15 disagree with your overall premises.

16 Number two, what -- you set him up as  
 17 probably the most experienced law enforcement  
 18 officer that's going to be testifying in this  
 19 trial. And, certainly, if he's circumventing a  
 20 procedure, that's something that Mr. Burlew's  
 21 entitled to bring to the jury's attention.

22 NUMBER THREE, I permitted THAT last  
 23 question, and that's what I think brought us all  
 24 up here, because he's testified that he took  
 25 certain actions to protect the safety of a private



citizen. And the last question, I believe,  
1  
2 Mr. Burlew just asked, was what he was doing  
3 actually endangering Mr. Spikner, so that would  
4 contradict his previous testimony. So that's why  
5 I permitted that question.

6 (The following proceedings were had in  
7 open court, in the presence of the jury.)

8 MR. BURLEW: Would you read the last  
9 question back.

10 (The pending question was read back by  
11 the court reporter.)

12 THE COURT: Sir, go ahead and answer.

13 A. That is correct.

14 Q. Now, you talked about your training. What  
15 Is your homicide training?

A. I worked approximately seven homicide --

17 Q. When was that?

18 A. I worked five in Lincoln Heights.

19 Q. How many years ago was that?

20 A. That was in 1972 through '78

21 8. Okay.

22 A And I worked two in Woodlawn.

31 a Any with the FBI

• **Kenidicas?** No

2. **Conclusões** - Ajustes e modificações ao horário de aula

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1 homicide investigation was limited to what was available  
2 to you in Lincoln Heights and Woodlawn, right?

3 A. That's correct.

4 Q. You're not claiming that you're an expert  
5 homicide investigator, are you?

6 A. No, sir.

7 MR. BURLEW: Just one moment, Your Honor.

8 THE COURT: Yes.

9 MR. BURLEW: One other question. Sorry.

10 THE COURT: That's okay.

11 Q. You indicated that you drew your weapon,  
12 correct?

13 A. Yes. Yes, sir.

14 Q. And you're trained by the FBI, correct?

15 A. Yes, sir.

16 Q. You only draw your weapon when you're  
17 ready to kill, correct?

18 A. In preparation thereof, yes, sir.

19 Q. You are not to draw your weapon unless  
20 you're prepared to fire it and kill, correct?

21 A. That is correct.

22 Q. You're not trained to shoot to wound or  
23 to pull that weapon to scare, intimidate, or frighten, but  
24 to kill?

25 A. That is correct.



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1                   Q.        So with no homicide investigation,  
 2 without notifying the agent in charge, you took a private  
 3 citizen to the scene, and you were prepared to kill?

4                   A.        That is correct.

5                   MR. BURLEW: Thank you.

6                   REDIRECT EXAMINATION

7                   BY MR. LEON:

8                   Q.        Did you -- did you force Mr. Spikner to  
 9 take you to the storage area?

10                  A.        He volunteered. He wanted to check to  
 11 see -- he was supposed to work that day, he wanted to  
 12 check to see if the tools were there.

13                  MR. BURLEW: Objection.

14                  THE COURT: I'll permit it.

15                  MR. LEON: Nothing further.

16                  THE COURT: Anything further?

17                  MR. BURLEW: Nothing further.

18                  THE COURT: May I excuse this witness?

19                  MR. LEON: Yes, ma'am.

20                  MR. BURLEW: No objection.

21                  THE COURT: You are free to go about your  
 22 business.

23                  (Witness excused.)

24                  THE COURT: Is this a good time for a  
 25 break? Let's take our break, till twenty minutes

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THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 09/01/99

code: GJH

judge: 146

Entered

Date:

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*Judge*  
Judge: ANN MARIE TRACEY

NO: B 9609928

STATE OF OHIO  
VS.  
EDWARD SMITH

JUDGMENT ENTRY: SENTENCE:  
INCARCERATION

Defendant was present in open Court with Counsel WILLIAM P WHALEN on the 1st day of September 1999 for sentence.

The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of  
count 1: MURDER, 1993-02-08CN, PI

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:  
count 1: CONFINEMENT: 15 Yrs - LIFE IN PRISON, Credit 978 Days, DEPARTMENT OF CORRECTIONS TO BE SERVED CONSECUTIVE TO SPECIFICATION.  
CONFINEMENT ON SPECIFICATION: 3 yrs DEPARTMENT OF CORRECTIONS TO BE SERVED PRIOR TO COUNT 1. CREDIT INELIGIBLE TOTAL TIME INCARCERATED SINCE DAY OF ARREST, INCLUDING PRISON TIME.

Defendant was notified of the right to appeal as required by Crim. R 33(A) (2)

Printed Case No: 14-4204114



## Appendix H

Page 1

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DEPUTY

IN THE SUPREME COURT OF OHIO

EDWARD SMITH.

)  
) Case No. 2020-1152+9\*\*963.852.

APPELLANT,

)  
) On Appeal from Hamilton County  
) First Appellate District  
) Court of Appeals,  
) C.A. No. C-1900289

vs.

)  
)  
)

STATE OF OHIO,

)  
)

APPELLEE,

)  
)

---

S. CT. PRAC. R. 18.02 MOTION FOR RECONSIDERATION

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EDWARD SMITH #346-408

Grafton Correctional Institution

2500 S. Avon-Belden Rd.

Grafton, Ohio 44044

DEFENDANT/APPELLANT, PRO SE

HAMILTON COUNTY PROSECUTOR

JOSEPH T. DETERS

Assistant Prosecuting Attorney

230 East 9th Street, Ste. 4000

Cincinnati, Ohio 45202-2174

Appendix I

## MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Now comes Appellant, and request this S. CT. to grant this Reconsideration Motion from its Entry on Nov. 10, 2020. Pursuant To: Art. IV, Section 2(B)(2)(b)(e). This case includes a felony charge, in an amended indictment in which the Prosecutionat trial changed the name and identity of the original indictment, murder with a specification. This is forbidden by Crim. R, 7(D); Section 10 & 14 of the Ohio Constitution of the United States 6th & 14th Amendment. "Subject Matter Jurisdiction Void Conviction." Appellant relies extensively on Citations And Arguments for this Motion for Reconsideration below:\*\*\* Relies Especially On: See **Brook Hart v Janis**, 384 U.S. 1 at HN 3-4; **State v. Wellman**, 37, Ohio St. 2d 162, at syllabus 1 & 2; and **Argessing v. Hamlin**, 407 U.S. 25 (1972), at HN1. See Below:

### **PROPOSITION OF ERROR AND LAW AND FACTS:**

#### **"FELONY" AMENDED INDICTMENT SUBJECT MATTER JURISDICTION**

#### **VOID CONVICTION:**

#### **FEDERAL LAW ENCROACHMENT, FELONY FEDERAL WEAPONS CHARGE**

Due to the fact Appellant's Notice Of Appeal Memorandum And Support contained "Subject Matter Jurisdiction Void Conviction." makes this an "amended indictment federal constituiion claim," and of "great public interest," This court has authority to accept this motion and issue, 1 of 5 of the following: 1). First: "Brief Allowed"; 2). Second: "Remand"; 3).Third: 26(B)(Ineffective Assistance Of Appellant Counsel); 4).Fourth: MOST IMPORTANTLY ACCEPT THIS MOTION AS A "DISCRETIONARY APPEAL.."; 5). Fifth: Art. 1, Section 10 & 14 Ohio Constitution,

Discharge! Only through the Certified Transcript of the Procedure Record That Contained The Truth, Will The Law Prevail For Appellant And Public. There is no Bill of Particulars that contains the felony charge.

It is well settled law that the federal guarantee of a grand jury indictment has not been applied to the states. See, **Branzburg v. Hayes**, 408 U.S. 665 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972).

(:But.) Cross-Examination Of A Witness Is A U.S. Constitution Right. See **Alford v. United States**, 282 U.S. 687 (1931). In fact, it was the Prosecution who violated "Vouched Rule." See **State v. Adams**, 62 Ohio St. 2d 151, at HN 5 & 11. Without referring to the "Certified Transcript Of Record," This Supreme Court Will Be Intentionally "Misled" By The Silence Of The Appellate's Court Waiver To Reply. This is a continued error of law that has happened through the years by the lower court. See First District Court Of Appeals Journal Entry August 1, 2019 by Chief Judge Mock, Certified Transcript Of Record. (See Attachment In Appendix.) See **Brook Hart v Janis**, 384 U.S. 1 at HN 3-4; **State v. Wellman**, 37, Ohio St. 2d 162, at syllabus 1 & 2; and **Argessing v. Hamlin**, 407 U.S. 25 (1972), at HN1

Because the amended indictment is a Felony Federal Law Encroachment, "Felony Federal Weapon Charge" it is in violation of the 6th & 14th Amendment of the U.S. Constitution. This is also a violation of Crim. R. 7(d); Section 10 & 14th of the Ohio Constitution. The U.S. S. Ct. states when a case revolves in the (felony) resolution of a factual dispute, (T.p. 448-449; 467-468.) :The United States Supreme Court is "duty bound to make an independent examination of the evidence in the record." See **Brook Hart v Janis**, 384 U.S. 1 at HN 3-4; See also e.g., **Edwards v South Carolina**, 372 U.S. 229, 235; **Blackburn v. Alabama**, 361 U.S. 199, 205, n. 5. In fact, this applies to Ohio Constitution Art. 1, Section 1 10

& 14; and Crim. R 7(D). **State v. Wellman**, supra at syllabus 1 & 2.

Moreover, Appellant's Case "Mirrors" **Brook Hart v Janis**, 384 U.S. 1 at HN 3-4; **State v. Wellman** supra at syllabus 1 & 2. As stated by the U. S., Supreme Court, this Ohio Supreme Court has a constitutional duty and authority to review the record and enforce, One Of Five Resolutions Of Law stated above. Otherwise, Appellant And The Public Suffers!

There is no statutory plea of nolo contendere in Ohio felony cases, as is permitted in federal courts. This amended indictment, a felony federal weapons charge made by the Prosecution was impossible for the Appellant to overcome and defend in a one count indictment for murder with specification, especially when a felony federal weapons charge was presented at trial in which Appellant did not know existed (T.p.448-449 & 467-468). See also **Glasser v. United States**, 315 U.S. 60, 70-71. Appellant never waived any of his constitutional rights, nor was there "an intentional relinquishment or abandonment of known rights or privileges;" **Johnson v. Zerbst**, 304 U.S. 448, 464.

Moreover due process of the 6th & 14th amendment of the U.S. Constitution, the state must give a criminal defendant fair notice of charges against him to permit adequate preparation of his defense. See, e.g., in **Re Ruffalo** 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); **Koontz v. Glossa** 731 F. 2d 365 (1984), U.S. App. Lexxis 23643 (6th Cir. 1984). The trial court clearly lacked "Subject Matter Jurisdiction Void Conviction. This "amended indictment," is forbidden by Federal Law Encroachment, Felony Federal Weapon Charge. See, **Branzburg v. Hayes** supra; **Alford v. United States** supra **Johnson v. Zerbst**, 304 U.S. 448, 464; **United States v. Panilidis**, 524 F. 2d 644 (6th Cir. 1975); and **United States v. Goldstein**, 502 F. 2d 526 3d Cir. (1974).

Appellant was not able to prepare an adequate defense. See, e. g., in **Re Ruffalo**, 390 U.S., 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); **Koontz v. Glossa**, 731 F 2d 365, (1984) U.S. App. Lexis 23643 (6 Cir. Ohio 1984); **Blake v. Morford**, 563 F 2d 248 (6th Cir. 1977); **Watson v. Jago**, 558 F 2d 330, 338 (6th Cir. (1977); and **Combs v. Tennessee**, 538 F. 2d at 698.

This is perhaps one of the most blantly Ineffective Appellate Counsel violations for any attorney in America, in not presenting a "**DEAD-BANG WINNER**" to the Appellate Court. This totally disregards Appellant's 6th & 14th Amendment rights granted by the United States Constitution. See **Strickland v Washington**, 466 U.S. 668;

### **CONCLUSION**

Appellant hope and pray this Supreme Court grant this Motion For Reconsideration With Citations, Arguments, and The Certified Record presented above. Appellant especially relies on: **Brook Hart v. Janis**, *supra*; **State v. Wellman**, *supra*; and **Argessing v. Hamlin**, *supra*. This court should allow and enforce one of five lawful resolutions stated above. Especially the fifth resolution: Art. 1, Section 10 & 14th Amendment of the Ohio State Constitution Constitution of the United States 6th a 14th amendment.

Respectfully Submitted,

E/S/ Edward Smith

Edward Smith, #346-408

**CERTIFICATE OF SERVICE**

I hereby certify a true and accurate copy of the foregoing motion was electronically filed by Ammann Process Servers, LLC, to Hamilton County, Prosecutors 230 E. 9th street suite 4000, Cincinnati, Ohio 45202 on the 20th day of November 2020.

E/S/ Edward Smith

Edward Smith #346-408