

# **APPENDIX**

## **A**

(Sixth Circuit's Decision 3 pages)

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

In re: WILLIE S. SMITH,

Movant.

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)  
)  
)  
)

**FILED**  
Oct 17, 2019  
DEBORAH S. HUNT, Clerk

O R D E R

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Willie S. Smith, a pro se Ohio prisoner, moves this court for an order authorizing a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b).

In 1995, a jury in the Cuyahoga County Court of Common Pleas convicted Smith of kidnapping and aggravated murder but found him not guilty of other counts and specifications. The trial court sentenced Smith to consecutive prison terms of ten to twenty-five years for the kidnapping conviction and life for the aggravated murder conviction. The Ohio Court of Appeals affirmed Smith's convictions. *State v. Smith*, Nos. 69799, 70451, 71643, 1997 WL 691187 (Ohio Ct. App. Nov. 6, 1997), *appeal not allowed*, 690 N.E.2d 1287 (Ohio 1998) (table).

Smith filed his first habeas petition under 28 U.S.C. § 2254 in 2002. Adopting a magistrate judge's recommendation, the district court denied Smith's habeas petition. Smith appealed, and this court denied him a certificate of appealability.

Smith has continued to challenge his convictions in both the state and federal courts. In 2017, Smith filed a common law motion in state court to correct a void judgment, arguing that the jury's not-guilty finding on the felony-murder specification negated an essential element of the aggravated murder offense. The trial court denied Smith's motion, and the Ohio Court of Appeals affirmed. *State v. Smith*, No. 106486, 2018 WL 3599318 (Ohio Ct. App. July 26, 2018), *appeal not allowed*, 111 N.E.3d 21 (Ohio 2018) (table). Smith then filed a § 2254 habeas petition,

asserting that he was denied his constitutional rights (1) when the trial court imposed a sentence on a charge for which he was acquitted by the jury and (2) when the Ohio Court of Appeals failed to address a clear and unambiguous assignment of error regarding clearly established law on void sentences in Ohio. The district court transferred Smith's second or successive habeas petition to obtain this court's authorization for its consideration. *See* 28 U.S.C. § 1631; *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

Smith now moves this court for an order authorizing his second or successive habeas petition. To obtain such authorization, Smith must make a *prima facie* showing that his proposed habeas petition satisfies the requirements of 28 U.S.C. § 2244(b): (1) his "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) the facts underlying his claim "could not have been discovered previously through the exercise of due diligence" and, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2); *see id.* § 2244(b)(3)(C). Smith concedes that his proposed habeas petition does not rely on any new rule of constitutional law or newly discovered evidence. Smith instead argues that "the only question is whether [he] can obtain relief under the manifest injustice exception for compliance with 28 U.S.C. § 2244(b)." D. 6 at 43 (Pet'r's Mem. Supp. Leave to File Second or Successive Pet.). But this judicially created exception to the restrictions on second or successive habeas petitions did not survive the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See McQuiggin v. Perkins*, 569 U.S. 383, 396 (2013) ("Congress thus required second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof ('clear and convincing evidence') and to satisfy a diligence requirement that did not exist prior to AEDPA's passage.").

Because Smith's proposed habeas petition does not satisfy the requirements of 28 U.S.C. § 2244(b), we **DENY** his motion for an order authorizing a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

# **APPENDIX**

## **B**

**(Certified Sentencing Journal Entry 1 page)**

STATE OF OHIO,  
CUYAHOGA COUNTY

ss.

IN THE COURT OF COMMON PLEAS

SEPTEMBER

Term 19 95

STATE OF OHIO

vs.

WILLIE S. SMITH

Town: OCTOBER 6, 1995

19

No. CR-323987 & CR-325283

KIDNAPPING

INDICTMENT AGGR. MURDER W/FEL MURD. W/FIREARM

HAVING WEAPON UNDER DISAB. W/VIOL

& FIREARM SPEC.

JOURNAL ENTRY

CASES CR-323987 AND CR-325283 ARE CONSOLIDATED FOR TRIAL. CHARGES  
RENUMBERED. CASE CR-323987 KIDNAPPING COUNT ONE, CASE CR-325283, AGGR. MURDER  
W/FEL MURD W/FIREARM SPEC & AGGR. MURD. W/FIREARM COUNTS TWO AND THREE, HAVING WEAPON UNDER  
DISABILITY W/VIOL & FIREARM SPEC COUNT FOUR.

This day again comes the prosecuting attorney on behalf of the State  
and defendant, Willie S. Smith in open court, represented by Attorneys Tom Lobe  
and Gary Purin, with Prosecutors John Kosko and Darcy Moulin present.

Now comes the Jury conducted into Court by the Bailiff and returned  
the following verdicts in writing, to-wit: "We, the Jury being duly impaneled  
and sworn, do find the defendant, Willie S. Smith Guilty of Kidnapping per  
OBC 2905.01, as charged in the First Count of the indictment." and "WE, the Jury  
further find and specify that the defendant Did Not release the victim in a safe  
place unharmed while committing the offense charged in this count of the indictment."  
and "WE, the Jury do find the defendant, Willie S. Smith Not Guilty of Aggravated  
Murder per OBC 2903.01, as charged in the Second Count of the indictment." and "WE,  
the Jury do find the defendant, Willie S. Smith Guilty of Aggravated Murder per  
OBC 2903.01 as charged in the Third Count of the indictment." and "WE, find and  
specify that the defendant Did Not have a firearm on or about his person or under  
his control while committing the offense charged in the indictment." in regards to  
Specification One; Specification Two: "We, the Jury find defendant, Not Guilty  
of committing this offense while he was committing, attempting to commit or fleeing  
immediately after committing or attempting to commit Kidnapping and defendant was the  
principal offender in the aggravated murder or if not the principal offender, com-  
mitted the aggravated murder with prior calculation or design." and "WE, the Jury  
do find the defendant, Willie S. Smith Not Guilty of Having Weapon While Under  
Disability, per OBC 2923.13, as charged in the Fourth Count of the indictment."

Defendant was informed of the verdict of the Jury and inquired of if he had  
anything to say and he having nothing but what he had already said.

It is ordered by the Court that defendant, Willie S. Smith is sentenced to  
the Lorain Correctional Institution, under both counts, Count One for term of ten  
(10) years to twenty-five (25) years, and pay a fine of \$10,000.00 Count Three for  
term of LIFE, and pay a fine of \$25,000.00, Count One to run Consecutive to Count  
Three, pay court costs. Defendant read his rights to appeal. Defendant found  
to be indigent. Public Defender appointed to for his appeal. All documents and  
transcripts are ordered at the state's expense. Defendant given No credit for time  
served, due to the fact that defendant was on probation in another Court on two (2)  
separate felonies at time he committed this Kidnapping and Aggravated Murder.

FILED

NOV 03 1995

GLEN D. FIERST

COURT CLERK

CUYAHOGA COUNTY

Timothy J. McDevitt, Judge  
va 10/12/95

Vol 144 1260167

## 28 USCS § 2241, Part 1 of 2

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001)

Part VI. Particular Proceedings (Chs. 151 — 190)

CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)

### § 2241. Power to grant writ

- (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
- (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
- (c) The writ of habeas corpus shall not extend to a prisoner unless—
- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
- (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
- (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
- (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
- (5) It is necessary to bring him into court to testify or for trial.
- (d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.
- (e)

# 28 USCS § 2254, Part 1 of 5

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service

**TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001)**

**Part VI. Particular Proceedings (Chs. 151 — 190)**

**CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)**

## § 2254. State custody; remedies in Federal courts

**(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

**(b)**

**(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

**(B)**

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

**(2)** An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

**(3)** A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

**(c)** An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

**(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

**(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

**(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

**(e)**

**(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

**(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

**(A)** the claim relies on—

**(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

**(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and

**(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

**(f)** If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

**(g)** A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

**(h)** Except as provided in section 408 of the Controlled Substance Acts [[21 USCS § 848](#)], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

**(i)** The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [[28 USCS § 2254](#)].

# **APPENDIX**

## **E**

(AEDPA 28 USCS § 2244 (b)(2)(B)(ii) 3 pages)

# 28 USCS § 2244, Part 1 of 2

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service

**TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001)**

**Part VI. Particular Proceedings (Chs. 151 — 190)**

**CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)**

## § 2244. Finality of determination

**(a)** No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [[28 USCS § 2255](#)].

**(b)**

**(1)** A claim presented in a second or successive habeas corpus application under section 2254 [[28 USCS § 2254](#)] that was presented in a prior application shall be dismissed.

**(2)** A claim presented in a second or successive habeas corpus application under section 2254 [[28 USCS § 2254](#)] that was not presented in a prior application shall be dismissed unless—

**(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

**(B)**

**(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

**(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

**(3)**

**(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

**(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

**(C)** The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this subsection.

**(D)** The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

**(E)** The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

**(4)** A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

**(c)** In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

**(d)**

**(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

**(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

**(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

**(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

**(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

**(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

**(1)** No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

**(2)** Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 ([10 U.S.C. 801 note](#)), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

# **APPENDIX**

## **F**

(Supreme Court of Ohio 1 page)

The Supreme Court of Ohio

FILED

NOV - 7 2018

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

v.

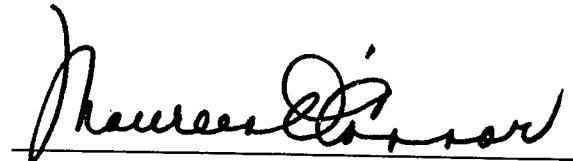
Willie Smith

Case No. 2018-1340

E N T R Y

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).

(Cuyahoga County Court of Appeals; No. 106486)



Maureen O'Connor  
Chief Justice

# **APPENDIX**

## **G**

(Eighth Appellate District of Ohio 7 pages)

**Court of Appeals of Ohio**

*'JUL 26 2018*

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 106486

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**WILLIE SMITH**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-95-325283-ZA

**BEFORE:** McCormack, P.J., Celebreeze, J., and Jones, J.

**RELEASED AND JOURNALIZED:** July 26, 2018

CR95325283-ZA

104767099



**FOR APPELLANT**

Willie Smith, pro se  
Inmate No. 312990  
Richland Correctional Institution  
1001 Olivesburg Road  
Mansfield, OH 44901

**ATTORNEYS FOR APPELLEE**

Michael C. O'Malley  
Cuyahoga County Prosecutor

Katherine Mullin  
Assistant County Prosecutor  
Justice Center, 9th Floor  
1200 Ontario Street  
Cleveland, OH 44113

TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Willie Smith ("Smith") appeals the trial court's denial of his common law motion to correct void judgment. For the reasons that follow, we affirm.

**Procedural and Substantive History**

{¶2} This appeal stems from Smith's 1995 criminal convictions. Smith was indicted in one case with two counts of aggravated murder with felony and firearm specifications and one count of having a weapon while under disability. He was indicted in another case with one count of kidnapping, and the cases were consolidated for trial. A jury found Smith guilty of one count of aggravated murder and one count of kidnapping and not guilty of the remaining counts and specifications. The trial court sentenced Smith to 10 to 25 years for kidnapping and a term of life for aggravated murder, to run consecutively.

{¶3} Smith appealed his conviction, raising 12 assignments of error, including inconsistent verdicts. This court affirmed Smith's convictions in 1997. *State v. Smith*, 8th Dist. Cuyahoga Nos. 69799, 70451, 71643, 1997 Ohio App. LEXIS 4892 (Nov. 6, 1997).

{¶4} Smith also filed a motion for a new trial and a petition for postconviction relief. The trial court denied both the motion and petition, and this court affirmed the trial court's judgment. *State v. Smith*, 8th Dist. Cuyahoga No. 78229, 2001 Ohio App. LEXIS 2076, 1 (May 10, 2001). Smith

subsequently filed another motion for a new trial. This motion was also denied. Smith appealed again, and this court dismissed the appeal. Smith filed a second petition for postconviction relief in 2009, and this too was denied. On appeal, this court again affirmed the trial court's decision.

{¶5} On June 21, 2017, Smith filed a common law motion to correct void judgment, arguing that the trial court imposed a void sentence in 1995. According to Smith,

the jury acquitted [him] of aggravated murder in [C]ount 3 when the jury made a unanimous factual finding beyond a reasonable doubt of "not guilty" on the felony-murder specifications attached to the aggravated murder and that [finding] negated one or more of the essential elements of the aggravated murder as charged in [C]ount 3.

The trial court denied this motion, and Smith appealed, presenting two assignments of error for our review.

#### Law and Analysis

{¶6} In Smith's first assignment of error, he argues that the trial court abused its discretion when it denied his common law motion to correct void judgment. In his second assignment of error, he argues that the trial court imposed a sentence that is contrary to law when it failed to impose a mandatory consecutive sentence pursuant to former R.C. 2929.41(B)(3).

{¶7} In Smith's motion to correct void judgment, he argues that because the jury found him not guilty of the felony murder specification, this effectively

negated an essential element of the aggravated murder offense. This, according to Smith, operates as an acquittal, and therefore, his conviction and sentence for aggravated murder was improper following this acquittal.

{¶8} Smith attempts to avoid the procedural obstacles to his case by arguing that his conviction is void. A void judgment is not subject to the legal principles of res judicata, and may be challenged at any time. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 30. Here, however, despite Smith's insistence to the contrary, his argument that his conviction and sentence are void is based on an argument that has previously been raised on direct appeal. The argument in his first assignment of error, therefore, is barred by res judicata.

{¶9} In Smith's initial direct appeal, he argued that the trial court erred in accepting inconsistent verdicts. Specifically, he contended that it was inconsistent for the jury to find him guilty of aggravated murder and not guilty of the corresponding firearm specification. This court affirmed Smith's conviction, holding that "a finding upon a specification cannot change the finding of guilt as to the principal charge since specifications are considered only after, and in addition to, the finding of guilt upon the principal charge." *State v. Smith*, 8th Dist. Cuyahoga Nos. 69799, 70451, and 71643, 1997 Ohio App. LEXIS 4892, 26 (Nov. 6, 1997).

{¶10} Here, Smith claims that he is not making a claim of inconsistent verdicts. Despite his attempt to characterize this argument so as to avoid res judicata, we find no meaningful difference between the arguments in his first assignment of error and those addressed by this court in 1997.

{¶11} Smith was found guilty of aggravated murder, in violation of R.C. 2903.01, for "unlawfully and purposely causing the death of another, to wit: Gary Reginald Lewis, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit, Kidnapping." He was found not guilty of the corresponding felony murder specification, as follows:

And the offense presented above was committed while the offender was committing, attempting to commit or fleeing immediately after committing or attempting to commit kidnapping and either the offender was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

Smith argues that because he was found not guilty of the felony murder specification, of which one of the elements was that the offense was committed contemporaneously with kidnapping, he was actually acquitted of aggravated murder. This requirement of contemporaneous commission was an essential element of aggravated murder. According to Smith, the finding of not guilty for the specification operates to negate that element in aggravated murder. Therefore, his first assignment of error alleges that one element of a specification for which he was found not guilty negates another element of an

offense for which he was found guilty. This claim is clearly barred by res judicata.

{¶12} In his second assignment of error, Smith argues that the trial court imposed a sentence contrary to law by failing to impose a mandatory consecutive sentence in compliance with former R.C. 2929.41(B)(3). Because the record reflects that the trial court imposed consecutive sentences for aggravated murder and kidnapping, we find this assignment of error meritless.

{¶13} Therefore, we affirm the trial court's denial of Smith's motion to correct void judgment.

{¶14} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

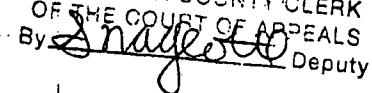


TIM McCORMACK, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and  
LARRY A. JONES, SR., J., CONCUR

FILED AND JOURNALIZED  
PER APP.R. 22(C)

JUL 26 2018

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By  Deputy

# APPENDIX

## H

(Court of the Common Pleas 1 page)



100924299

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO  
Plaintiff

WILLIE S SMITH  
Defendant

Case No: CR-95-325283-ZA

Judge: STEVEN E GALL

INDICT: 2903.01 AGGRAVATED MURDER W/FELONY  
MURDER & FIREARM SPECS  
2903.01 AGGRAVATED MURDER W/FELONY  
MURDER & FIREARM SPECS  
2923.13 HAVING WEAPON WHILE UNDER  
DISABIL. W/VIOL. W/FRM.

**JOURNAL ENTRY**

DEFENDANT'S MOTION TO CORRECT VOID JUDGEMENT IS DENIED.

10/13/2017  
CPROB 10/13/2017 14:06:18

Judge Signature

10/16/2017

HEAR  
10/13/2017

RECEIVED FOR FILING  
10/16/2017 08:49:15  
NAILAH K. BYRD, CLERK

# APPENDIX

## I

(Docket of Federal Proceedings History 3 pages)

**1:02-cv-00105-BYP** Smith v. Russell

Benita Y. Pearson, presiding

**Date filed:** 01/17/2002**Date terminated:** 04/24/2003**Date of last filing:** 02/04/2021

## History

Doc. No.	Dates	Description
<u>1</u>	<i>Filed:</i> 01/17/2002 <i>Entered:</i> 01/23/2002	3 Petition for Writ of Habeas Corpus (2254)
<u>2</u>	<i>Filed:</i> 01/17/2002 <i>Entered:</i> 01/23/2002	3 Random Assignment of Magistrate Judge
<u>3</u>	<i>Filed:</i> 01/17/2002 <i>Entered:</i> 01/23/2002	3 Administrative Track DCM Initial Order
<u>4</u>	<i>Filed:</i> 02/27/2002 <i>Entered:</i> 02/28/2002	3 Automatic Reference of Administrative Action
<u>5</u>	<i>Filed:</i> 02/27/2002 <i>Entered:</i> 02/28/2002	3 **DEACTIVATED** Notice of Placement in CM/ECF
<u>6</u>	<i>Filed:</i> 02/27/2002 <i>Entered:</i> 02/28/2002	3 Order
<u>7</u>	<i>Filed &amp; Entered:</i> 02/28/2002	3 Order
<u>8</u>	<i>Filed:</i> 03/08/2002 <i>Entered:</i> 03/09/2002	3 Certified Mail Receipt
<u>9</u>	<i>Filed:</i> 03/08/2002 <i>Entered:</i> 03/09/2002	3 Certified Mail Receipt
<u>10</u>	<i>Filed:</i> 03/11/2002 <i>Entered:</i> 03/13/2002	3 Certified Mail Receipt
<u>11</u>	<i>Filed &amp; Entered:</i> 04/25/2002 <i>Terminated:</i> 04/25/2002	3 Motion for extension of time (other)
<u>12</u>	<i>Filed &amp; Entered:</i> 04/25/2002	3 Order on Motion for extension of time
<u>13</u>	<i>Filed &amp; Entered:</i> 06/27/2002	3 Answer
<u>14</u>	<i>Filed &amp; Entered:</i> 06/27/2002	3 Notice
<u>15</u>	<i>Filed &amp; Entered:</i> 06/27/2002	3 Exhibits
<u>16</u>	<i>Filed:</i> 08/09/2002 <i>Entered:</i> 08/12/2002	3 Traverse to Return of Writ
<u>17</u>	<i>Filed &amp; Entered:</i> 03/03/2003	3 Report and Recommendation
<u>18</u>	<i>Filed:</i> 03/10/2003 <i>Entered:</i> 03/12/2003 <i>Terminated:</i> 04/01/2003	3 Motion for extension of time (other)
	<i>Filed &amp; Entered:</i> 04/01/2003	3 Order on Motion for extension of time
<u>19</u>	<i>Filed:</i> 04/14/2003	3 Objection to Report and Recommendation

	<u>Entered:</u>	04/15/2003	
<u>20</u>	<u>Filed &amp; Entered:</u>	04/17/2003	Response
<u>21</u>	<u>Filed &amp; Entered:</u>	04/24/2003	Memorandum Opinion and Order
<u>22</u>	<u>Filed &amp; Entered:</u>	04/24/2003	Order Dismissing Case
<u>23</u>	<u>Filed:</u>	05/05/2003	Motion for new trial
	<u>Entered:</u>	05/06/2003	
	<u>Terminated:</u>	06/03/2003	
<u>24</u>	<u>Filed &amp; Entered:</u>	05/13/2003	Opposition
<u>25</u>	<u>Filed &amp; Entered:</u>	06/03/2003	Order on Motion for new trial
<u>26</u>	<u>Filed:</u>	07/02/2003	Notice of Appeal
	<u>Entered:</u>	07/03/2003	
	<u>Terminated:</u>	12/05/2003	
<u>27</u>	<u>Filed:</u>	07/11/2003	Remark
	<u>Entered:</u>	07/22/2003	
<u>28</u>	<u>Filed:</u>	08/01/2003	Remark
	<u>Entered:</u>	08/02/2003	
<u>29</u>	<u>Filed &amp; Entered:</u>	12/05/2003	USCA Mandate
<u>30</u>	<u>Filed &amp; Entered:</u>	11/02/2007	Petition for Writ of Habeas Corpus (2241)
	<u>Terminated:</u>	11/02/2007	
<u>31</u>	<u>Filed &amp; Entered:</u>	03/14/2008	Remark
<u>32</u>	<u>Filed &amp; Entered:</u>	08/10/2012	Remark
<u>33</u>	<u>Filed:</u>	12/20/2019	Motion for relief
	<u>Entered:</u>	12/23/2019	
	<u>Terminated:</u>	08/31/2020	
<u>34</u>	<u>Filed:</u>	12/20/2019	Motion for order
	<u>Entered:</u>	12/23/2019	
	<u>Terminated:</u>	08/31/2020	
	<u>Filed &amp; Entered:</u>	01/02/2020	Utility Event
	<u>Filed &amp; Entered:</u>	04/08/2020	Remark re Pro Se Service
<u>35</u>	<u>Filed &amp; Entered:</u>	04/08/2020	Order
<u>36</u>	<u>Filed &amp; Entered:</u>	06/05/2020	Motion for order
	<u>Terminated:</u>	08/31/2020	
<u>37</u>	<u>Filed &amp; Entered:</u>	06/26/2020	Motion for extension of time (other)
	<u>Terminated:</u>	06/29/2020	
	<u>Filed &amp; Entered:</u>	06/29/2020	Order on Motion for extension of time
	<u>Filed &amp; Entered:</u>	06/29/2020	Remark re Pro Se Service
	<u>Filed &amp; Entered:</u>	07/09/2020	Remark re Pro Se Service
<u>38</u>	<u>Filed &amp; Entered:</u>	07/09/2020	Motion to substitute attorney
	<u>Terminated:</u>	07/09/2020	
<u>39</u>	<u>Filed &amp; Entered:</u>	07/09/2020	Order on Motion to substitute attorney
<u>40</u>	<u>Filed &amp; Entered:</u>	07/22/2020	Motion for extension of time (other)
	<u>Terminated:</u>	07/24/2020	
	<u>Filed &amp; Entered:</u>	07/24/2020	Remark re Pro Se Service
<u>41</u>	<u>Filed &amp; Entered:</u>	07/24/2020	Order on Motion for extension of time

<u>42</u>	Filed & Entered: 07/31/2020	Opposition
<u>43</u>	Filed & Entered: 08/17/2020	Response
	Filed & Entered: 08/31/2020	Remark re Pro Se Service
<u>44</u>	Filed & Entered: 08/31/2020	Order of Transfer to Sixth Circuit
	Filed & Entered: 09/03/2020	Remark
<u>45</u>	Filed & Entered: 02/04/2021	Remark

PACER Service Center			
Transaction Receipt			
02/22/2021 15:06:42			
PACER Login:	BF2451	Client Code:	
Description:	History/Documents	Search Criteria:	1:02-cv-00105-BYP
Billable Pages:	2	Cost:	0.20

# **APPENDIX**

## **J**

(Sixth Circuit Order 3 pages)

No. 20-3917

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**

Feb 03, 2021

DEBORAH S. HUNT, Clerk

In re: WILLIE S. SMITH,  
Movant.

)  
)  
)  
)  
)

O R D E R

Before: KETHLEDGE, DONALD, and LARSEN, Circuit Judges.

Willie S. Smith, a *pro se* Ohio prisoner, moves for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2244(b)(3)(B). He has also filed a motion to remand the case to the district court.

In 1995, a jury found Smith guilty of kidnapping and aggravated murder. He was sentenced to life in prison. The Ohio Court of Appeals affirmed, *State v. Smith*, Nos. 69799, 70451, 71643, 1997 WL 691187 (Ohio Ct. App. Nov. 6, 1997), and the Ohio Supreme Court denied leave to appeal, *State v. Smith*, 690 N.E.2d 1287 (Ohio 1998) (table).

In 2002, Smith filed a § 2254 petition, which the district court denied. The district court and this Court each denied Smith a Certificate of Appealability.

In December 2019, Smith filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(4), claiming that (1) the trial court's judgment of conviction, particularly with respect to his aggravated murder conviction, is a "nullity" and is "void" and (2) as a result, the district court's order that denied his § 2254 petition (which challenged his conviction and sentence) was "issued without jurisdiction" and thus is also "null[]" and "void." He also filed a "motion to recall the mandate."

The district court (1) denied Smith's Rule 60(b)(4) motion as untimely and on the merits to the extent that it challenged the integrity of the district court's order denying his § 2254 petition and (2) transferred Smith's Rule 60(b)(4) motion to this Court as a second or successive

§ 2254 petition to the extent that it challenged his underlying state-court judgment. The district court also transferred Smith's motion to recall the mandate to this Court. Smith then filed a corrected motion for authorization to file a second or successive § 2254 petition, in which he seeks to claim that (1) his conviction "was void from it's [sic] inception and any review of that conviction"—namely, the district court's order denying his habeas corpus petition—"is equally void" and (2) the "mandate" should be recalled due to fraud upon the court insofar as he "was in fact acquitted."

Smith has also filed a motion to remand the case to the district court, arguing that his Rule 60(b)(4) motion is not a second or successive habeas corpus petition because it seeks to challenge the district court's jurisdiction to review and rule upon his § 2254 petition.

As an initial matter, the district court properly construed Smith's Rule 60(b)(4) motion, in part, as a second or successive habeas petition because it sought to raise a new claim challenging his conviction. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–32 (2005) (holding that a Rule 60(b) motion constitutes a second or successive habeas corpus petition when it presents "one or more 'claims'" and that a "claim" is presented when a Rule 60(b) motion "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim on the merits"). True, Smith argued in his Rule 60(b)(4) motion that there was a defect in the integrity of his federal habeas proceedings (i.e., because the district court allegedly lacked jurisdiction and committed a fraud upon the court)—which can be raised in a Rule 60(b) motion, *see id.* at 532—but that argument necessarily relies upon his claim that the state court's judgment of conviction is void. In other words, because the portion of Smith's Rule 60(b)(4) motion that was transferred to this Court attacked his conviction and sentence as determined by the state court, it constitutes a second or successive § 2254 petition. *See id.* at 530, 532 ("[A] 'claim' . . . is an asserted federal basis for relief from a state court's judgment of conviction."). Accordingly, Smith must satisfy the gate-keeping requirements that apply to second or successive § 2254 petitions.

But Smith cannot meet these requirements. As he concedes, his proposed claims do not rely upon any newly discovered evidence or upon a new, retroactively applicable rule of constitutional law. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(C).

In addition, Smith's request to recall the "mandate" that he claims issued after the district court entered the order in 2003 that denied his petition is without merit because no mandate ever issued in connection with the appeal from this order or any other appeal in this case.

We therefore **DENY** the motion for authorization to file a second or successive § 2254 petition and **DENY** the motion to remand.

ENTERED BY ORDER OF THE COURT



---

Deborah S. Hunt, Clerk

# **APPENDIX**

# **K**

**(Sixth Circuit Mandate 3 pages)**

FILED

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

DEC 03 2003

LEONARD GREEN, Clerk

WILLIE SMITH,  
Petitioner-Appellant,  
v.  
HARRY K. RUSSELL, Warden,  
Respondent-Appellee.

ORDER 102cv105

KmD

03 DEC-5 RH 3:13  
CLERK'S OFFICE, COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO

Willie Smith, an Ohio prisoner, appeals a district court order dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The filing of the notice of appeal has been construed as an application for a certificate of appealability. *Cf.* Fed. R. App. P. 22(b).

On October 6, 1995, a jury convicted Smith of aggravated murder and kidnaping. He was sentenced to consecutive prison terms of life and 10-25 years. The Eighth District Ohio Court of Appeals affirmed Smith's conviction and sentence in an unpublished opinion, *see State v. Smith*, Nos. 69799, etc., 1997 WL 691187 (Ohio Ct. App. Nov. 6, 1997), and the Ohio Supreme Court denied leave to appeal. Smith subsequently filed a motion for a new trial and petition for post-conviction relief (PCR). The Ohio Court of Appeals affirmed the trial court's decision in part and reversed it in part, remanding the case for an evidentiary hearing on whether certain affidavits constituted new evidence warranting a new trial. *See State v. Smith*, No. 75178, 1999 WL 195662 (Ohio Ct. App. Apr. 8, 1999). On remand, the trial court again denied the motion and this time the

A TRUE COPY

**Attest:**

LEONARD GREEN, Clerk

By Joe Colegr Deputy Clerk

Ohio Court of Appeals affirmed. *See State v. Smith*, No. 78229, 2001 WL 498768 (Ohio Ct. App. May 10, 2001). The Ohio Supreme Court again denied leave to appeal.

In his federal habeas corpus petition, Smith presented nine grounds for relief: (1) he was denied a full and fair hearing concerning evidence seized pursuant to an unconstitutional search warrant; (2) trial counsel rendered ineffective assistance by failing to challenge the search warrant and admission of seized evidence together with the detective's testimony concerning those items; (3) the trial court improperly admitted hearsay testimony; (4) the trial court improperly admitted evidence of other alleged criminal acts and failed to limit the consideration of this evidence by the jury, which error was exacerbated by prosecutorial misconduct; (5) trial counsel rendered ineffective assistance by failing to object to improper and prejudicial evidence, improper closing argument, and the imposition of an excessive fine; (6) the trial court improperly accepted inconsistent verdicts; (7) the trial court improperly refused to instruct the jury upon a lesser included offense of kidnaping; (8) there was insufficient evidence to convict; and (9) the trial court improperly denied a new trial based on newly discovered evidence.

In a report filed on March 3, 2003, the magistrate judge recommended that Smith's § 2254 petition be dismissed in its entirety. The magistrate judge found that Smith had procedurally defaulted his issues numbered 1, 2, 4, 5, 7, and 8 by failing to present them to the Ohio Supreme Court, and failing to show cause and prejudice for the default. The magistrate judge further found that issue 9, alleging deficiencies in his PCR proceedings, was not cognizable in federal habeas corpus review. Issue 3, admission of alleged hearsay, was rejected on the ground that state evidentiary rulings generally do not warrant habeas relief, and the trial court's admission of the evidence under the co-conspirator exception to the hearsay rule was neither contrary to nor an unreasonable application of clearly established constitutional law as determined by the Supreme Court. Finally, the magistrate judge found that issue 6 did not warrant relief because the Supreme Court has held that inconsistent verdicts among multiple criminal counts should be upheld. The district court overruled Smith's objections, adopted the magistrate judge's report, and dismissed the

§ 2254 petition in an opinion and order entered on April 24, 2003. Smith's motion to alter or amend the judgment was denied on June 3, 2003.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *cf. Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The Supreme Court recently held that “[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

In addition, before a court may issue a certificate of appealability in a case where the § 2254 petition has been denied on a procedural ground without reaching the underlying constitutional claims, the court must find that the petitioner has demonstrated that reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right *and* that reasonable jurists could debate whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

Upon consideration, the court concludes that Smith has not met this standard. Accordingly, Smith's application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

Jeffrey D. Green  
Clerk

# **APPENDIX**

## **L**

(Ohio Revised Code §2903.01 1 page)

## ORC Ann. 2903.01

### Copy Citation

Current through File 3 (SB 22) of the 134th (2021-2022) General Assembly.

- Page's Ohio Revised Code Annotated
- Title 29: Crimes — Procedure (Chs. 2901 — 2981)
- Chapter 2903: Homicide and Assault (§§ 2903.01 — 2903.44)
- Homicide (§§ 2903.01 — 2903.10)

§ 2903.01 Aggravated murder.

- 
- (A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.
- (B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.
- (C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.
- (D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.
- (E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:
- (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
- (2) It is the offender's specific purpose to kill a law enforcement officer.
- (F) No person shall purposely cause the death of a first responder or military member whom the offender knows or has reasonable cause to know is a first responder or military member when it is the offender's specific purpose to kill a first responder or military member.
- (G) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
- (H) As used in this section:
- (1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code and also includes any federal law enforcement officer as defined in section 2921.51 of the Revised Code and anyone who has previously served as a law enforcement officer or federal law enforcement officer.
- (3) "First responder" means an emergency medical service provider, a firefighter, or any other emergency response personnel, or anyone who has previously served as a first responder.
- (4) "Military member" means a member of the armed forces of the United States, reserves, or Ohio national guard, a participant in ROTC, JROTC, or any similar military training program, or anyone who has previously served in the military.

# **APPENDIX**

# **M**

(Ohio Revised Code §2929.04(A)(7) 3 pages)

**ORC Ann. 2929.04**

**Copy Citation**

Current through File 3 (SB 22) of the 134th (2021-2022) General Assembly.

- **Page's Ohio Revised Code Annotated**
- **Title 29: Crimes — Procedure (Chs. 2901 — 2981)**
- **Chapter 2929: Penalties and Sentencing (§§ 2929.01 — 2929.72)**
- **Penalties for Murder (§§ 2929.02 — 2929.07)**

**Notice**

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This section has more than one version with varying effective dates.

**§ 2929.04 Criteria for imposing death or imprisonment for a capital offense. [Effective until April 12, 2021]**

**(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:**

**(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.**

**(2) The offense was committed for hire.**

**(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.**

**(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or intellectual disabilities facility unless at the time of the commission of the offense either of the following circumstances apply:**

- (a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.
- (b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.
- (5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
- (6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.
- (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.
- (8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.
- (9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.
- (10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.
- (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
  - (1) Whether the victim of the offense induced or facilitated it;
  - (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
  - (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

#### History

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134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 147 v S 32 (Eff 8-6-97); 147 v H 151 (Eff 9-16-97); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002; 2016 hb158, § 1, effective October 12, 2016.

#### Annotations

Page's Ohio Revised Code Annotated

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# **APPENDIX**

# **N**

(Ohio Revised Code §2941.14 1 page)

[Copy](#) [Citation](#)

Current through File 3 (SB 22) of the 134th (2021-2022) General Assembly.

- [Page's Ohio Revised Code Annotated](#)
- [Title 29: Crimes — Procedure \(Chs. 2901 — 2981\)](#)
- [Chapter 2941: Indictment \(§§ 2941.01 — 2941.63\)](#)
- [Form and Sufficiency \(§§ 2941.01 — 2941.35\)](#)

**§ 2941.14 Allegations in homicide indictment.**

- (A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.
- (B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.
- (C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

SPECIFICATION (or, SPECIFICATION 1, SPECIFICATION TO THE FIRST COUNT, or SPECIFICATION 1 TO THE FIRST COUNT). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (10) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same).

[History](#)

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GC § 13437-13; 113 v 123(166), ch 16, § 13; Bureau of Code Revision, 10-1-53; 134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 147 v S 32 (Eff 8-6-97); 149 v S 184. Eff 5-15-2002.

# APPENDIX

## O

(Supreme Court Rule 20 2pages)

Current through changes received March 8, 2021.

[USCS Federal Rules Annotated](#)

[Rules of the Supreme Court of the United States](#)

[Part IV. Other Jurisdiction](#)

## Rule 20. Procedure on a Petition for an Extraordinary Writ

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1. Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.
2. A petition seeking a writ authorized by 28 U.S.C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).  
3.
  - (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the petition.
  - (b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.
4.
  - (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

**(b)** Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, or in a capital case, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

**5.** The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

**6.** If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

# **APPENDIX**

## **P**

(USC 14 Amendment 1page)

# USCS Const. Amend. 14, Part 1 of 15

Current through the ratification of the 27th Amendment on May 7, 1992.

[United States Code Service](#)

[Amendments](#)

[Amendment 14](#)

## Amendment 14

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**Sec. 1. [Citizens of the United States.]** 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.

# APPENDIX

## Q

(USC 8 Amendment 1page)

# USCS Const. Amend. 8, Part 1 of 4

Current through the ratification of the 27th Amendment on May 7, 1992.

[United States Code Service](#)

[Amendments](#)

[Amendment 8 Bail—Punishment.](#)

## Amendment 8 Bail—Punishment.

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Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

# **APPENDIX**

# **R**

(USC 6 Amendment 1page)

# USCS Const. Amend. 6, Part 1 of 17

Current through the ratification of the 27th Amendment on May 7, 1992.

[United States Code Service](#)

[Amendments](#)

[Amendment 6 Rights of the accused.](#)

## Amendment 6 Rights of the accused.

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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.

# APPENDIX

# S

(USC 5 Amendment 1page)

# USCS Const. Amend. 5, Part 1 of 13

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service

Amendments

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.