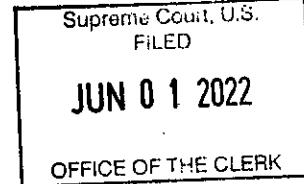


No. 22-5312

Original

IN THE
SUPREME COURT OF THE UNITED STATES



CARL A. NELSON, SR.,--PETITIONER

vs.

OHIO PAROLE BOARD, et. al, --RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SIX CIRCUIT FEDERAL COURT OF APPEALS
PETITION FOR WRIT OF CERTIORARI

CARL A. NELSON, SR., #199-605
Grafton Correctional Institution
2500 S. Avon-Belden Rd
Grafton, Ohio 44044
440-748-1161

QUESTION(S) PRESENTED

- (1) When a sentencing judgment entry of commitment is legally invalid, according to state and clearly established federal law as determined by this court in *Hill v. Wampler (1936)*, 298 U.S. 460, 56 S.Ct. 76, 1936 U.S. LEXIS 716, is a habeas corpus still the remedy to correct the judgment entry of commitment when considering the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of April 24, 1996?
- (2) Does an administrative agency, such as Ohio's Parole Board, have jurisdiction to deprive a United States Citizen (state prisoner) of liberty based on a void invalid journal entry of commitment?

LIST OF PARTIES

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Ohio Parole Board

Annette Chambers-Smith, Director of Ohio Department of Rehabilitation and Corrections

Keith J. Foley, Warden of Grafton Correctional Institution

RELATED CASES

State Cases

State v. Nelson, Cuyahoga C/A App. No. 95420, 2010-Ohio-6032. Judgment entered December 9, 2010.

State v. Nelson, Ohio Supreme Court declines jurisdiction, 128 Ohio St.3d 1428, 2011-Ohio-1049, 943 N.E.2d 574. Judgment entered March 16, 2011.

State ex rel. Nelson v. Russo, Cuyahoga C/A App. No. 96706, 2011-Ohio-3698, Id at, [*P4], 2011 Ohio App. LEXIS 3134. Judgment entered July 26, 2011.

State ex re. Nelson v. Russo, Ohio Supreme Court affirmed, 131 Ohio St.3d 51, 2011-Ohio-652, 960 N.E.2d 488. Judgment entered December 22, 2011.

State, v. Nelson, Cuyahoga C/A App. No. 106798, 2018-Ohio-4794, 2018 Ohio App. LEXIS 5112. Judgment entered November 29, 2018.

State v. Nelson, Ohio Supreme Court declines jurisdiction , 2019-Ohio-1205, 2019 Ohio LEXIS 635. Judgment entered April 3, 2019.

State ex rel. Nelson v. Russo, Cuyahoga C/A App. No. 108531, 2019-Ohio-3895, 2019 Ohio App. LEXIS 3952. Judgment entered September 23, 2019,

State ex rel. Nelson v. Russo, Affirmed by Ohio Supreme Court, 2020-Ohio-1541, 2020 Ohio LEXIS 972.
Judgment entered April 22, 2020.

Federal Cases

Nelson v. Ohio Parole Bd. et al., 1:20 CV 2743, 2021 U.S. Dist. LEXIS 68149. Judgment entered on April 8, 2021.

Nelson v. Ohio Parole Bd., 2022 U.S. App. LEXIS 92, (6th Cir. 2022). Judgment entered on January 3, 2022.

Rehearing en banc denied, Id at, Nelson v. Ohio Parole Bd., 2022 U.S. App. LEXIS 9433, (6th Cir. 2022). Judgment entered April 7, 2022,

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STATUES AND RULES

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Sixth and Fourteenth Amendments to the United State Constitution

Ohio Constitution, Article I, Section 1

JURISDICTION

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[x] reported at Nelson v. Ohio Parole Board, 2022 U.S. App. LEXIS 92 (6th Cir. 2022),
rehearing en banc denied, Nelson v. Ohio Parole Board, 2022 U.S. App. LEXIS
9433, (6th Cir. 2022).

The opinion of the United States district court appears at Appendix C to the petition and is

[x] reported at Nelson v. Ohio Parole Bd. et al., Case No. 1:20 CV 2743, decided U.S. Dist.
LEXIS 6814.

[x] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[x] reported at Nelson v. Russo, Affirmed by Ohio Supreme Court, decided April 22, 2020,
cited at, 2020-Ohio-1541, 2020 Ohio LEXIS 972.

The opinion of the court of appeals Eighth Appellate District court appears at Appendix E to the petition and is

[x] reported at State ex rel. Nelson v. Russo, C/A Case No. 108531, 2019-Ohio-3895,
2019 Ohio App. LEXIS 3952.

STATEMENT OF THE CASE

After being found guilty and convicted by a jury in an Ohio Court of Common Pleas, the Petitioner (Nelson) was sentenced on October 28, 1987 to 5 counts, 15-25 year terms; however, the sentencing judge denied consecutive on each count. When the judgment entry of commitment was filed on November 2, 1987, it reflected consecutive sentences.

In June 2010 Petitioner (Nelson) filed a motion to amend sentencing journal entry (nunc pro tunc), pursuant to Ohio Crim. R. 36, to make the sentencing journal entry conform to the original judgment imposed in court on October 28, 1987. This particular motion was filed with Petitioner's understanding that the November 2, 1987 journal entry of commitment, that increased Petitioner's penalty, was in fact simply a clerical error that could have been corrected at any time, pursuant to Ohio Crim. R. 36, **simply by the court issuing a nunc pro tunc entry.** Without any comment the trial court denied Petitioner's motion. The Ohio Eighth Appellate District Court affirmed the denial finding that, "Even if Nelson's claim were not barred by res judicata, we do not find that the sentencing journal entry was a clerical error." See, *State v. Nelson, Cuyahoga C/A App. No. 95420, 2010-Ohio-6032*, declined jurisdiction on appeal, *128 Ohio St.3d 1428, 2011-Ohio-1049, 943 N.E.2d 488.*

Subsequently, Petitioner filed a mandamus; however, this time in ruling on the mandamus the Ohio Eighth Appellate District Court in *State ex rel. Nelson v. Russo, Cuyahoga C/A App. No. 96706, 2011-Ohio-3698*, Id at, [*P4] found that: (Tr.18), "Thus, the consecutive sentences were inconsistent with the pronouncement at the hearing. Indeed, the imposition of consecutive sentences was a clerical

error which pursuant to Crim. R. 36 the trial court could correct at any time. The trial court denied the motion.”

The Eighth District Court of Appeals denied the mandamus and the Ohio Supreme Court Affirmed, *131 Ohio, St.3d 51, 2011-Ohio-652, 960 N.E.2d 488*. Hence, the appeals court acknowledged the inconsistency between the Judge’s oral pronouncement on October 28, 1987 and the journal entry of commitment filed November 2, 1987, that increased the Petitioner’s penalty outside of his presence without counsel. Despite the many attempts to correct the error, the state courts unreasonably refused to adhere to the clearly established state and federal law applicable to Petitioner’s issue, thereby placing Petitioner in the unfortunate position of having his liberty decided by Ohio’s Parole Board on a legally invalid journal entry of commitment that has no legal binding effect. It is worth noting that Ohio’s Parole Board members are the most powerful civil service employees in the nation; therefore, without this court’s intervention and a corrected journal of commitment Petitioner’s liberty would be indefinitely jeopardized due to Ohio Parole Board’s unbridled discretionary authority.

Still frustrated with Petitioner’s unsuccessful attempts of having this sentencing issue resolved before seeing the Parole Board in July 2020, Petitioner filed a motion back into the trial court on January 9, 2018 entitled, “Defendant’s Motion to Vacate Void Sentencing Journal Entry,” and for purposes of seeking an order to be re-sentenced to correct the invalid journal entry of commitment. The following day, with total disregard to well settled clearly established federal law and state court decisions, the trial court unreasonably denied Petitioner’s motion without comment. A timely appeal was perfected into the Cuyahoga County Eighth Appellate District Court of Appeals and the

judgment was affirmed, *State v. Nelson, Motion No. 106798, 2018-Ohio-4794, 2018 Ohio App. LEXIS 5112*. The Ohio Supreme Court denied jurisdiction, *State v. Nelson, 2019-Ohio-1205, 2019 Ohio LEXIS 635*.

Petitioner filed a petition for writ of mandamus and once again, with total disregard to the facts, state law, and clearly established federal law, Petitioner's mandamus request was unreasonably denied, *State ex rel. Carl A. Nelson, Sr. v. Court of Common Pleas Judge Nancy Russo, C/A Case No. 108531, 2019-Ohio-3895, 2019 Ohio App. LEXIS 3952*, and affirmed by the Ohio Supreme Court in *State ex rel. Carl Nelson, Sr., v. Court of Common Pleas Judge Nancy M. Russo, 2020-Ohio-1541, 2020 Ohio LEXIS 972*.

After fully exhausting all available state court procedural remedies, Petitioner filed a habeas corpus petition into the United States District Court for the Northern District (Eastern Division), *Nelson v. Ohio Parole Board et al., 1:20 CV 2743 2021 U.S. Dist. LEXIS 68149*, filed April 8, 2021 and decided April 8, 2021, challenging the Ohio Parole Board's September 17, 2020 denial of parole. Additionally, Petitioner challenged the collateral attack denial of an appeal of the state court mandamus, that challenged the clerk and /or trial court's lack of jurisdiction and authority to increase Petitioner's penalty outside of his presence in the November 2, 1987 journal entry of commitment. The case was decided by the Ohio Supreme Court on April 22, 2020, Id. at case no. *2019-1455, 160 Ohio St.3d, 2020-Ohio-1541*.

The aforementioned habeas corpus sought relief from the ongoing state and federal constitutional infringements of Petitioner's guaranteed rights. Petitioner's habeas also challenged the Ohio Parole Board's September 17, 2020 denial of parole where Ohio's Parole Board exercised

unbridled discretion on the state's legally invalid journal entry of commitment that increased Petitioner's penalty outside of his presence. Technically, Ohio's Parole Board was without discretionary authority to hold the hearing that resulted in Petitioner receiving an additional three year continuance on 9/17/20.

On April 8, 2021, the U.S. Northern District Court denied Petitioner's petition for habeas corpus relief disposing of all claims that were presented for review. Petitioner then filed a motion for issuance of a Certificate of Appealability back into the U.S. Northern District Court, (Eastern Division). The court denied the motion on April 22, 2021. Petitioner then filed a motion for issuance of a Certificate of Appealability into the Sixth Circuit Federal Court of Appeals and a timely Notice of Appeal on April 23, 2021 back into the district court. The Sixth Circuit denied Petitioner's request for a Certificate of Appealability on Jan. 3, 2022, *Nelson v. Ohio Parole Bd., 2022 U.S. App. LEXIS 92, (6th CIR. 2022)*. Petitioner then filed for a rehearing en banc that the court denied, *Nelson v. Ohio Parole Bd., 2022 U.S. App. LEXIS 9433, (6th Cir. 2022)*. This timely Petition for Writ of Certiorari into this Honorable Court now follows.

REASONS FOR GRANTING THE PETITION

Without this Courts intervention and discretionary acceptance of jurisdiction of this case, precedent as determined by this Court eighty six years ago in *Hill v. United States ex rel. Wampler, (1936), 298 U.S. 460, 56 S.Ct. 76, 1936 U.S. LEXIS 716*, will be ignored, thereby permitting state administrative agencies, like Ohio's Parole Board, with unconstitutional authority to deprive citizens of their fundamental rights to life, liberty, and the pursuit of happiness, based on a legally invalid void judgment entries of commitment that a state refuses to correct.

It's obvious that Ohio's courts have ignored the law and failed to apply to Petitioner's case the United States Supreme Court precedent of clearly established federal law as determined by this Court in *Hill v. United States ex re. Wampler, supra*, which holds that:

"the addition of a clause in a commitment which imposed an increased penalty on the defendant was void because such penalty was not included as a part of the trial judge's oral pronouncement of sentence," citing *Miller v. Alderhold, 288 U.S. 206, 53 S.Ct. 325, (1933)*, "the sentence is the judgment."

Furthermore, well settled state law from the Eighth District Court of Appeals and other Ohio appellate courts mandate that:

"In order to modify a sentence pronounced in open court, it is necessary for the modification to be formalized in a journal entry, even though the original sentence was not."

See, *State v. Sweeney, 1982 Ohio App. LEXIS 15360*.

In the instant case, the prior state and federal court decisions placed a stamp of approval upon the deprivation of Petitioner's fundamental rights to due process, and conflicts with a decision from the Court in the case of *Hill v. United States ex rel. Wampler, supra*. Also the *Wampler* court further held that:

"Being void and not merely irregular, its nullity may be established upon a Writ of Habeas Corpus."

The factual predicate of Petitioner's claim pertains to his parole denial and how an invalid journal entry of commitment was and continues to be used and executed by Ohio's Parole Board when it is not legally binding entry of commitment that reflects the actual penalty imposed in Petitioner's presence in open court. Petitioner submits that 28 U.S.C. 2241 is the appropriated statute to challenge how a sentence is being executed; however, the federal courts failed to acknowledge it.

The Sixth Circuit Court's decisions construing Nelson's application for a certificate of appealability as a motion for authorization to file a second or successive habeas corpus is contrary to a previous decision rendered by the Sixth Circuit in *Ali v. Tenn. Bd. Of Pardon and Paroles*, 431 F.3d 896, (6th Cir. 2005), where the Court held that:

"The statute of limitations according to (AEDPA), 28 U.S.C. 2244(d)(1), is one year," and determined that: "the language of the provision appears to apply to a habeas challenge to a state parole denial." (Emphasis added)

It is not necessary that Petitioner first seek permission from the Sixth Circuit Court before challenging his parole denial. Petitioner submits that his habeas petition was filed within one year from the September 17, 2020 denial of parole, and challenges the denial based on the fact that the Parole Board lacked jurisdiction and discretionary authority to deny, grant parole, or even conduct a parole suitability hearing derived from an invalid journal entry of commitment that increased the penalty outside of Petitioner's presence and differs from the oral pronouncement.

Furthermore, jurist of reason could debate and would agree that even though Petitioner does not have a constitutional liberty interest in parole, he does in fact, have an expectation in finality of a judgment and liberty interest in a valid journal entry of commitment. Nothing more, nor can anything less be expected. This is a fundamental right guaranteed by the United States Constitution.

This Court can only agree that there is no expectation or finality of judgment, nor a liberty interest, in a void and invalid journal entry of commitment that increased the penalty for the crime

outside of Petitioner's presence, and of which is being used by Ohio's Parole Board to determine continuations regarding Petitioner's liberty.

Petitioner understands that he has no constitutional or inherent right to be constitutionally released before the expiration of his valid sentence, See, *Greenholtz v. Neb. Penal & Corr. Complex*, **442 U.S. 1,799 S.Ct. 2100 (1979)**; however, jurist of reason would agree that Petitioner's sentence in the November 2, 1987 journal entry of commitment, according to state and clearly established federal law, is void and not legally binding because it differs from the judge's spoken words and was either changed by the Clerk of Courts or the court. Therefore, according to *Wampler*, supra, Petitioner's claim is cognizable in a habeas corpus, especially when it challenges denial of parole. See, *Ali v. Tenn, Bd. Of Pardons and Paroles*, supra.

Decisions regarding Petitioner's liberty are being made by Ohio's Parole Board (an administrative agency); however, their jurisdiction will always be questionable because it was obtained from an invalid journal entry of commitment that does not reflect the actual sentence imposed in open court in Petitioner's presence. Without this Court's intervention the question remains whether or not Petitioner's liberty will eventually be restored, if ever, if the invalid journal entry of commitment is not corrected to reflect the actual judgment of sentence imposed in open court.

Undoubtedly, Petitioner has a legitimate expectation of finality in the actual judgment of sentence pronounced in his presence in open court October 28, 1987, which includes a liberty interest in its' finality. See, *United States v. DiFrancesco*, **449 U.S.117, 101 S. Ct 426 (1980)**. The penalty being executed on Petitioner, according to the invalid November 2, 1987 journal entry of commitment that increased Petitioner's penalty outside if hi presence, is being used by Ohio's Parole Board, justifying the three year continuance regarding his liberty in 2020. Are the eyes if justice closed? Clearly, Ohio's Parole Board and the Ohio Department of Rehabilitation and Corrections obtains its'

jurisdiction and discretionary authority to detain Petitioner from the journal entry of commitment sent by the court. See, *Wampler*, supra. Therefore, if that entry differs from the oral pronouncement and is invalid or void pursuant to the law in effect when Petitioner was charged, tried, convicted, and sentenced, then it is a fact that jurisdiction and lack of unbridled discretionary authority does not exist from the invalid journal entry of commitment, because it has no legal binding effect.

The finality of judgments is a key element of the American system of justice. See, *Teague v. Lane*, 489 U.S. 288, 309 109 S.Ct. 1060 (1989). This is especially true for defendants in criminal cases, where the enhancement of a sentence in a subsequent proceeding can violate the defendant's right to due process of law. As the United States Supreme Court has held :

"When the Government has already imposed a penalty and seeks to impose an additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is dissatisfied with the sanction obtained in the first proceeding."

See, *United States v. Halper*, 490, U.S. 435, 451 n. 10, 109 S.Ct. 1892 (1989), abrogated on other grounds by *United States v. Nursery*, 518 U.S. 267, 116 S.Ct. 2135 (1996).

Petitioner submits that the relevant question is whether the additional penalty that was journalized out of his presence upset his legitimate expectation of finality. If it did, than an increase in the sentence is prohibited. Petitioner submits that he has a legitimate expectation of finality in the original judgment of sentence that was imposed in open court October 28, 1987. the United States Supreme Court has long held that the oral pronouncement of a sentence in the defendant's presence is the judgment. See, *Wampler*, supra, citing *Miller v. Alderhold*, supra.

In the instant case, Ohio's Parole Board was and remains without jurisdiction and lacks discretionary authority to deny, grant parole, or even hold a parole hearing based on the November 2, 1987 journal entry of commitment that increased Nelson's penalty from concurrent to consecutive, thereby causing the journal entry of commitment to be legally void. Ohio's courts are in accord with

Wampler, *supra*; however, Ohio's courts refuse to give Petitioner relief. A case in point is *State v. Dixon*, 2016-Ohio-955, 2016 Ohio App. LEXIS 85, Id at [*P22], [*23], holding that:

"if the sentence set forth in the judgment entry differs from that pronounced in the defendant's presence, the judgment entry is invalid."

See, also, *State v. Sweeney*, *supra*, holding that:

"In order to modify a sentence pronounced in open court, it is necessary for the modification to be formalized in a journal entry, even though the original sentence was not."

Also see clearly established law as determined by this Court in *Wampler*, *supra*.

Although it is unclear whether the Clerk of Courts changed the journal entry of commitment increasing the Petitioner's penalty, like what occurred in the *Wampler* case, or whether the court changed the penalty, the fact remains that Petitioner was not present for the increased penalty contained in the journal entry of commitment, and continues to suffer prejudice by Ohio's Parole Board from this uncorrected constitutional violation, that increase the penalty outside Petitioner's presence without counsel.

Another case on point is, *State v. Dickens*, 41, Ohio App.3d 354,535 N.E.2d 727, 1987 Ohio App. LEXIS 10818, Id at par. 3 of syllabus, where the Ninth Appellate District held that:

"As a general rule of a trial court does not have authority to tamper with discretionary orders of the Adult Parole Authority. It may do so where the exercise of discretion was based upon a void sentencing order by that trial court."

The *Dickens*' court placed much emphasis on the fact that since *Dickens*' parole eligibility was determined upon a void sentencing order, the decision to grant *Dickens* parole was, itself, void. This is distinguishable because Petitioner was continued by Ohio's Parole Board based off a legally void journal entry of commitment as determinedly state decision law and this Court.

It has long been established that when a penalty for a crime is imposed, the right to be present with counsel is a fundamental right guaranteed by the Ohio Constitution, Article I, Section 10, and the

Due Process Clause of the Fourteenth Amendment to the United States Constitution. See, *Kentucky v. Stincer*, 482 U.S. 730, 745 107 S.Ct 2658 (1987), observing that:

“due process guarantee[s] the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.”

The Ohio Rules of Criminal Procedure prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction. See, *State v. Mead*, (8th Dist. 1996), 1996 Ohio App. LEXIS 1962, Id at paragraphs 6 and 7, and *State v. Reed*, 2019-Ohio-4068, Id at paragraphs 21, 22, and 23.

Under Ohio law, the criminal rules are to be followed when a court exercises criminal jurisdiction. See, *State v. Battle*, (9th Dist.), 2007-Ohio-2475, and *State v. Koziol*, (11th Dist.) 1997 Ohio App. LEXIS 3877, Id at paragraph 11. Criminal jurisdiction under Ohio and clearly established federal law mandates the presence of a criminal defendant when the penalty is imposed. See, also, *United States v. Gagon*, 105 .S.Ct. 1482 and *Bartone v. United States* (1963), 375 U.S. 52, 84 S.Ct 21.

It has long been determined that a state court's lack jurisdiction over a criminal case can actually provide a basis for a state prisoner to obtain habeas corpus relief in the federal court. See, *Steel Co. v. Citizens for a Better Env't*, (1993) 523 U.S. 83, 118 S.Ct 1003, 1998 U.S. LEXIS 1601; see, also, *Pratt's Hurley*, 102 Ohio St.3d 81, 83 citing *Steel Co. v. Citizens for a Better Env't*, supra. Also see, *Rhode v. Olk-Long*, 84 F.3d 284, 287 (8th Circ.1996) citing *Kazio v. Henry*, 211 U.S. 146, 148, 29 S.Ct. 41: *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 375, (1879).

Petitioner understands that he has no constitutional or inherent right to be conditionally released before the expiration of his valid sentence. See, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*; however, jurist of reason surely would agree that Nelson has a fundamental constitutional right to finality in a valid journal entry of commitment, especially when decisions regarding his liberty are continuously made by Ohio's Parole Board that determines whether or no Petitioner's liberty will eventually be restored.

CONCLUSION

It is respectfully requested that this Court intervene and grant this Petition of Writ of Certiorari, because without serious consideration of the actual record, facts, criminal procedures, case law, and the Constitution of the United States, Petitioner's eventual liberty is in the hands of an administrative agency whom has obtained and maintains jurisdiction and unbridled discretionary authority solely on a void and invalid journal entry of commitment; therefore, the Ohio's Parole Board is able to construe the sentence from the legally invalid judgment entry of commitment and deprive Petitioner of his liberty. The petition for the Writ of Certiorari should be granted.

Respectfully submitted,

Carl A. Nelson, pro se

Date: August 3, 2022