

No. 22-7563

ORIGINAL

Supreme Court, U.S.
FILED

MAY 10 2023

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph I. Wilkes — PETITIONER
(Your Name)

vs.

State of Ohio — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth District Court of Appeals, Stark County Ohio
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph I. Wilkes
(Your Name)

P.O. Box 57 # 385-989
(Address)

Marion Ohio 43301
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

Question I:

Whether the Fifth and Fourteenth Amendment to the United States Constitution were violated when a request for delayed appeal was denied for a defendant who had not been notified of his appellate rights by the court nor counsel.

Question II:

Whether the Fifth and Fourteenth Amendments to the United States Constitution were violated when a request for delayed appeal was denied that contained an error in the exercise of trial court jurisdiction which may only be presented on appeal.

Question III:

Whether the Fifth and Fourteenth Amendment to the United States Constitution were violated when the Court of Appeals went beyond the plain language of Oh. R. App. P. 5 and denied the request for delayed direct appeal after making a sufficiency determination on reasons given for the delay.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

RELATED CASES

- State of Ohio v. Joseph I. Wilkes, 1999 CR 0842, Common Pleas Court for Stark County Ohio. Judgment entered on Oct. 7, 1999.
- Joseph I. Wilkes v. State of Ohio, CA 00095, Fifth District Court of Appeals, Stark County Ohio. Judgment entered Sept. 12, 2022.
- Joseph I. Wilkes v. State of Ohio, 22-1261, Supreme Court of Ohio, Judgment entered April 11, 2023.

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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

☐ For cases from federal courts:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from state courts:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Court of Appeals for the Fifth District of Ohio court appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was April 11, 2023.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fifth Amendment

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.

Fourteenth Amendment

Section 1

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

Ohio revised code section 2929.03(D)(1)

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense or raised the matter of the offender's serious mental illness at the time of the commission of the offense pursuant to section 2929.025 of the Revised Code and was found under that section to be ineligible for a sentence of death due to serious mental illness. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon

request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation. The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

Ohio revised code section 2945.06

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the

composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

Ohio revised code section 2953.08

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum definite prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code or, with respect to a non-life felony indefinite prison term, the longest minimum prison term allowed for the offense by division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code, the maximum definite prison term or longest minimum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum definite prison term or longest minimum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing. If the court specifies that it found one or more of the factors in division (B)(1)(b) of section 2929.13 of the Revised Code to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of definite terms listed in section 2929.14 of the Revised Code or, with respect to a non-life felony indefinite prison term, the longest minimum prison term allowed for the offense by division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted or, with respect to a non-life felony indefinite prison term, exceed the longest minimum prison term allowed by division (A)(1)(a) or (2)(a) of that section for the most serious such offense. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections

2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 of the Revised Code, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is

not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.
- (H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.
- (I) As used in this section, "non-life felony indefinite prison term" has the same meaning as in section 2929.01 of the Revised Code.

Ohio rules for Appellate procedure Rule 3

(A) Filing the notice of appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or consolidated appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Cross appeal.

(1) When notice of cross-appeal required. Whether or not an appellee intends to defend an order on appeal, an appellee who seeks to change the order or, in the event the order is reversed or modified, an interlocutory ruling merged into the order, shall file a notice of cross appeal with the clerk of the trial court, and may also file a courtesy copy of the notice of cross appeal with the clerk of the appellate court, within the time allowed by App.R. 4. The clerk of the trial court shall process the notice of cross-appeal in the same manner as the notice of appeal.

(2) When notice of cross appeal not required; cross-assignment of error never required. A person who intends to defend an order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the order is not required to file a notice of cross-appeal or to raise a cross-assignment of error.

(D) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof

appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(E) Service of the notice of appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where required by local rule, a docketing statement, by mailing, or by facsimile transmission, a copy to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at the party's last known address. The clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries, together with a copy of all filings by appellant pursuant to App.R. 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or a party's counsel. The clerk shall note in the docket the names of the parties served, the date served, and the means of service.

(F) Amendment of the notice of appeal.

(1) When leave required. A party may amend a notice of appeal without leave if the time to appeal from the order that was the subject of the initial notice of appeal has not yet lapsed under App.R. 4. Thereafter, the court of appeals within its discretion and upon such terms as are just may allow the amendment of a notice of appeal, so long as the amendment does not seek to appeal from a trial court order beyond the time requirements of App.R. 4.

(2) Where filed. An amended notice of appeal shall be filed in both the trial court and the court of appeals.

(G) Docketing statement

(1) If a court of appeals has adopted an accelerated calendar by local rule pursuant to **Rule 11.1**, the appellant shall file a docketing statement with the Clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

(a) No transcript is required (e.g., summary judgment or judgment on the pleadings); delay; (b) The length of the transcript is such that its preparation time will not be a source of

(c) An agreed statement is submitted in lieu of the record;

(d) The record was made in an administrative hearing and filed with the trial court;

(e) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or

(f) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding. The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the

appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to App.R. 15(B) filed within seven days after a case is placed upon the accelerated calendar, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar

(2) If the appeal is expedited under App.R. 11.2, the appellant shall file a docketing statement with the clerk of the trial court with the notice of appeal indicating the category of case under App.R. 11.2 and the need for priority disposition.

[Effective: July 1, 1971; amended effective July 1, 1972; July 1, 1977; July 1, 1982; July 1, 1991; July 1, 1992; July 1, 1994; July 1, 2013; July 1, 2015; July 1, 2019; July 1, 2020.]

Ohio rules for Appellate procedure Rule 5

(A) Motion by defendant for delayed appeal.

(1) After the expiration of the thirty day period provided by App. R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

(a) Criminal proceedings;

(b) Delinquency proceedings; and

(c) Serious youthful offender proceedings.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

(B) Motion to reopen appellate proceedings. If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

(C) Motion by prosecution for leave to appeal. When leave is sought by the prosecution from the court of appeals to appeal an order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the order sought to be appealed (or, if that order is not a final order, within thirty days of the final order into which it merges) and shall set forth the

errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims.

Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

(D)(1) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C). When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C), a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

(D)(2) Leave to appeal consecutive sentences incorporated into appeal as of right. When a criminal defendant has filed a notice of appeal pursuant to App.R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and this assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

(E) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(F) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right

in criminal cases, except as otherwise specifically provided in these rules.

[Effective: July 1, 1971; amended effective July 1, 1988; July 1, 1992; July 1, 1994; July 1, 1996; July 1, 2003; July 1, 2019.]

**Staff Note for the Amendment to
Ohio Rule of Appellate Procedure 5**

7-1-94 AMENDMENT

RULE 5(A) MOTION AND NOTICE OF APPEALS.

The 1994 amendment dictates a requirement that persons seeking leave to file a delayed appeal in criminal cases must set forth the errors claimed to have occurred and the evidence relied upon to show the probability that the errors claimed did in fact occur.

Although there also concern about the fairness of requiring usually indigent, and frequently unrepresented, criminal defendants to demonstrate (often without the benefit of a transcript) the probability of error, the primary reason for the amendment is judicial economy. Denial of leave to file a delayed appeal for failure to demonstrate the probability of error usually leads to subsequent litigation of the issue by direct appeals to the Ohio and United States Supreme Courts, petitioners to vacate sentence under R.C. 2953.21, et seq., and appeals thereon, and/or federal habeas corpus petitions and appeals. Review of the merits by the courts of appeals upon the initial direct (albeit delayed) appeal would thus avoid the presentation of the probability of error issue to as many as nine subsequent tribunals. The amendment leaves intact the requirement that the would-be appellant set forth reasons for having failed to perfect a timely appeal. The current standard for waiver of the right to appeal is set forth in *State v. Sims*, 27 Ohio St. 2d 79

**OHIO RULE OF CRIMINAL PROCEDURE 11
SECTION (C)(3)**

Pleas, rights upon plea

(C) Pleas of guilty and no contest in felony cases.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any./ A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense, and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

OHIO RULE OF CRIMINAL PROCEDURE 32

Sentence

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing a sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

STATEMENT OF THE CASE

On July 14, 1999 Petitioner was arrested and charged with Aggravated murder and capital death specification.

On July 23, 1999 Petitioner was indicted for the offenses of Aggravated murder and capital death specification.

On September 8, 1999 the defense filed a motion for appointment of psychologist/psychiatrist requesting mental examination.

On September 27, 1999, a plea of guilty was entered to the indictment as charged, for the offenses of aggravated murder with capital death specification; the death specification was not deleted from the indictment, and a single judge accepted the plea and waived the mandatory requirements of R.C. 2945.06 and Crim. R. 11(C)(3) for a three judge panel in the capital case. (Transcript of plea and sentence, pages 6, 37, 54-60; Plea of guilty, Judgment entry, change of plea, pages 1, 2).

In March, 2022, Petitioner discovered, by the help of another prisoner, that though court and counsel stated no appeal could ever be filed that an appeal could actually be filed and identified issues of error in the exercise of trial court jurisdiction, no mental examination prior to plea and sentence though mandatory when requested by the defense (R.C. 2929.03(D)(1), and ineffective assistance of counsel.

In June of 2022 a motion for delayed appeal, Memorandum in support and an affidavit in support were filed. The Court of Appeals for the Fifth District of Ohio, Stark County denied the request for delayed appeal on September 12, 2022.

On January 27, 2023, Memorandum in support of jurisdiction was filed with the Ohio Supreme Court and that court denied jurisdiction to hear the appeal on April 11, 2023.

Petitioner now files this Petitioner for a Writ of Certiorari, presenting three questions.

REASONS FOR GRANTING THE PETITION

Question I:

Whether the Fifth and Fourteenth Amendments to the United States Constitution were violated when a request for delayed appeal was denied for a defendant who had not been notified of his appellate rights by the court nor counsel.

1. There is a right to appeal from a criminal conviction in the State of Ohio. Crim. R. 32, R.C. 2953.08. Criminal Rule 32(B) gives the procedure for notifying a defendant of the right to appeal. None of what is set forth in the rule happened; Petitioner was not notified of his right to appeal and did not have personal knowledge of the right to appeal.
2. In fact, Petitioner was told by the trial judge, defense counsel, and it was stated in the written plea agreement that he could not file an appeal for any reason. (Transcript of plea and sentence, pages 7, 37, 46-49; Plea Agreement pages 5, 7).
3. Once the state grants the right to appeal it must follow procedures comporting with the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 393, 403, 83 L.Ed. 2d 821, 105 S.Ct. 830 (1985). This court has addressed the procedural requirements for indigent defendants in the appellate process on several occasions, some decisions relied on for the instant case are: Griffin v. Illinois, 351 U.S. 12, 18, 100 L.Ed. 891, 76 S.Ct. 585 (1956), Douglas v. California, 372 U.S. 353, 365-367, 91 L.Ed. 2d 811, 83 S.Ct. 814 (1963), and Evitts, supra.
4. At no time was Petitioner actually told he had a right to appeal from a criminal conviction if he proceeded to trial and would have been convicted; he was only told he could not appeal for any reason. There was no mention that

such an appeal would need to be filed within 30 days, and counsel would be appointed to represent him on appeal. None of that was said. Instead, the single trial judge told him he could not ever file any appeal for any reason. (Plea and sentence transcript, pages 7, 37, 46-49; plea agreement pages 5, 7).

5. The procedural protections this court put in place for indigent defendants include the right to a transcript, Griffin, supra, the right to appellate counsel, Douglas, supra, and the right to have that counsel provide effective assistance with the appeal. Evitts, supra. These protections all assume the defendant knows of his right to appeal.

6. "Because notice is more basic than the rights granted in Supreme Court precedent and is a foundation of Supreme Court case law, precedent mandates that due process is violated when a defendant is not informed of his right to appeal by the trial court or by his counsel." Korbel v. Jeffreys, 2007 U.S. Dist. LEXIS 79362, 11-15, citing Wolfe v. Randle, 267 F. Supp. 2d 743, 746-48 (S.D. Ohio 2003).

7. "[i]t is well settled that the Constitution is violated if a criminal defendant is denied an appeal 'by reason of his lack of knowledge of the right and the failure of his counsel or the court to advise him of his right to appeal with the aid of counsel.'" Warren v. Warden, Noble Corr. Inst., 2008 U.S. Dist. LEXIS 29525. See also, Goodwin v. Cardwell, 432 F.2d 521, 522-523 (6th Cir. 1970).

8. The only time the court comes close to notice is seen on pages 46-49 of the plea and sentence transcript where the judge asks if the defendant knows he is giving up his right to appeal. That's pretty much all there is to it; There is no wording informing him he has the absolute right to file an appeal from a criminal conviction, if he were to be convicted of a crime after trial, and that an attorney would be appointed to prepare and file the appeal, that

there is 30 days after conviction to file a notice of appeal, and that transcripts would be prepared, all at state expense if he is found to be indigent, and if he wished to appeal from the conviction. Those words were not spoken by the trial judge, and not by counsel.

9. Further, counsel and the court were aware that Petitioner suffered multiple deficiencies of mental, educational, and emotional nature, and there was an unfulfilled request for mental examination (R.C. 2929.03(D)(1)) (Docket sheet, 1999CR0842, Motion for appointment of psychiatrist/psychologist pages 1-4) which is a mandatory examination in a capital case when requested by the defendant. It follows that due process and equal protection guarantees would cause the court to take steps to ensure someone with mental, emotional and educational deficits are given proper notice of appeal rights.

10. The Court of Appeals failed to make a factual determination, supported by the evidence in the record, that the defendant, who was and is indigent, knowingly and intelligently waived his right to appeal and to appointed counsel. See, State v. Sims, (1971), 27 Ohio St. 2d 79, 56 Ohio Op. 2d 45, 272 N.E. 2d 87.

11. Due Process and Equal Protection were offended by the Petitioner not being given notice of his rights of appeal. This court is asked to Grant a Writ of Certiorari.

Question II:

Whether the Fifth and Fourteenth Amendments to the United States Constitution were violated when a request for delayed appeal was denied that contained an error in the exercise of trial court jurisdiction which may only be presented on appeal.

12. In Ohio, there is a jurisdictional bar to a single judge accepting a guilty plea when a capital specification exists. R.C. 2945.06, Crim. R. 11(C)(3).

13. "Section 2945.06 requires that '[i]f the accused pleads guilty to aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.'" (Emphasis added). See also State v. Green, 81 Ohio St. 3d 100, 1998-Ohio-454, 689 N.E. 2d 556, 559 (Ohio 1998); Ohio Criminal rule 11. Under this law, an Ohio trial court must determine whether the accused is guilty beyond a reasonable doubt when accepting his guilty plea." Frazier v. Moore, 252 Fed. Appx. 1, 5 (6th Cir. 2007), citing Green, supra, 689 N.E. 2d at 559.

14. In Green, the Ohio Supreme Court held, "... when a defendant pleads guilty to aggravated murder in a capital case, a three-judge panel is required to examine witnesses and to hear any other evidence properly presented by the prosecution in order to make a Crim. R. 11 determination as to the guilt of the defendant. Following the presentation of evidence, pursuant to R.C. 2945.06, a three judge panel must unanimously determine whether the defendant is guilty beyond a reasonable doubt of aggravated murder or of a lesser offense. This finding of guilt must be properly journalized to constitute a valid conviction." Green, 81 Ohio St. 3d at 104-105.

15. In this case, on September 27, 1999, a plea of guilty was entered to the

indictment as charged, for the offense of aggravated murder with death penalty specification; the death specification was not deleted from the indictment. A single judge accepted the plea and waived requirements of R.C. 2945.06 and Crim. R. 11(C)(3) for the mandatory three judge panel in a capital case, before imposing sentence. (Transcript of plea and sentence, pages 6, 37, 54-60; Plea of guilty, judgment entry, change of plea, pages 1, 2). This was an error in the exercise of trial court jurisdiction and such errors may only be presented on appeal. State v. Pless, (1996), 74 Ohio St. 3d 333, par. 2 of syllabus; State v. Filiaggi, (July 29, 1999), 86 Ohio St. 3d 230, See also Green, supra.

16. Because this error may only be presented in an appeal, due process and equal protection were violated.

Question III:

Whether the Fifth and Fourteenth Amendments to the United States Constitution were violated when the Court of Appeals went beyond the plain language of Ch. R. App. P. 5 and denied the request for delayed direct appeal after making a sufficiency determination on reasons given for the delay.

17. Ohio's appellate Rule 5(A)(2) states:

A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

18. Petitioner fully complied with requirements of the rule. A copy of the motion, memorandum in support and the affidavit in support of the motion are attached as an appendix.

19. Discretion of the court of appeals for granting or denying a motion under this rule is in determining whether requirements of the rule had been met. Nothing within the rule allows the court of appeals to go past the plain language of the rule to make a sufficiency determination for reasons given for the delay in seeking an appeal. Doing so violates separation of powers.

20. Reasons for the delay were plainly presented within the Memorandum and Affidavit in support of the motion.

21. Further, App. R. 5(E) states:

Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

22. App. R. 5(E) limits the court's review of the request for delayed appeal to the documents filed. Nothing in this part, nor any other part of the rule allows for an Orwellian sufficiency determination for reasons given. Further,

the State did not file an opposition and no reply to Petitioner's request for delayed appeal. The court of appeals, pursuant to App. R. 5(E) was to determine the motion based on documents filed. This review is for determining whether the movant fulfilled requirements listed within rule 5(A)(2).

23. Ohio legislators did not write the power to determine sufficiency of reasons given for delay into the rule.

24. Ohio legislators, in 1994, amended App. R. 5. The staff note to the 7-1-1994 amendment gives us a look at the intent of the legislature when amending the rule, and further support for Petitioner's position in this action. Even more clarification on the topic is found within the multiple Dissenting opinions written by Judge Colleen Mary O'Toole through cases such as State v. Funk, 2015-Ohio-813, par. 16-24; State v. Gibbs, 2014-Ohio-5772, par 16-24; and State v. Fernandez, 2017-Ohio-7968, par. 9.

25. The rules of appellate procedure are meant to provide a framework for the orderly disposition of appeals. In re Beck, 2002-Ohio-3460, par. 29. However, "[o]nly a flagrant disregard for the court rules can justify a dismissal on procedural grounds." Id at par. 28, quoting, DeHart v. Aetna Life Ins. Co., (1982) 69 Ohio St. 2d 189, 193.

26. The Staff note for the 1994 amendment to App. R. 5 also indicates that the rule is to be given a flexible, liberal interpretation. Id; Gibbs, *supra*, at Par. 21. The amendment merely retained the requirement that the would be appellant set forth reasons for the delay. Id.

27. In this case, Petitioner Wilkes fulfilled requirements of Ap. R. 5(A) and it should be noted that the State did not file any response and no opposition to the delayed appeal request. Not only was a notice of appeal, Motion, and affidavit filed, setting forth ample reasons for the delay, but the court of appeals specifically asked for a completed docketing statement to be filed, and Wilkes immediately complied. Reasons for the delay were well demonstrated

through supporting documents, such as the October 1999 trial court judgment entry with its annexed copy of the plea agreement, and copy of the plea and sentencing transcript. (Appendix)

28. Because the Court of Appeals for the Fifth District of Ohio went outside the language of Appellate Rule 5, and exceeded its authority when making a sufficiency determination and then denying the request for delayed direct appeal when requirements of the rule were satisfied, the Fifth and Fourteenth amendments to the United States Constitution were violated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Joseph I. Wilkes

Date: May 8 2023