

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

GRACSHAWN THOMAS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ohio has Appellate Rule 26(B) which allows a criminal defendant to challenge the effective assistance of appellate counsel in two different ways:

1. A timely application within 90 days of judgement or
2. A delayed application after 90 days with “good cause” shown for the delay.

Thomas filed a pro se application that was not timely and offered no good cause; it was denied as untimely by the Ohio courts; Thomas filed it pro se because a lawyer he hired took his \$7400 and did not file the application; then, Thomas hired new counsel and filed a delayed application and offered “good cause” concerning previous counsel’s theft of Thomas’ money and failure to file the application. The Ohio courts labeled the delayed application a “successor”; refused to consider the merits; and refused to determine whether “good cause” existed for the delayed application. Appellate counsel failed to raise Question III below on direct appeal as required under Ohio law.

- I. Has Thomas been denied access to the Ohio courts to litigate his claim of ineffective assistance of appellate counsel on direct appeal under the Sixth and Fourteenth Amendments of the federal Constitution?
- II. Did Thomas demonstrate “good cause” for his delayed application?
- III. Was Thomas denied the effective assistance of counsel on appeal and at trial when trial counsel presented an “expert witness” (his son who was a law student) concerning cell phone records that he believed before trial were labeled in the Eastern Time Zone when they were in fact labeled in the Central and Pacific Time Zones thus undermining completely the alibi offered in defense counsel’s opening statement and theory of the case?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gracshawn Thomas respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Ohio.

OPINION BELOW

The order declining jurisdiction by the Supreme Court of Ohio is *State v. Thomas*, Case No. 2017-1614 and is reproduced at Pet. App. 1a. The Ninth District, Summit County, opinion denying relief is reported at *State v. Thomas*, C.A.27405 and is reproduced at Pet. App. 2a.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Ohio was entered February 14 , 2018 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ohio Rule of Appellate Procedure 26(B)(1)

Application for reopening.

A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

Sixth Amendment of U.S. Constitution

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 defense.

Fourteenth Amendment of U.S. Constitution

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.

SUMMARY OF ARGUMENT

Mr. Thomas is serving a life sentence for Aggravated Murder and other felonies; he has attempted to litigate the constitutional effectiveness of his appellate counsel but the Ohio Court of Appeals refused to address his applications filed under Ohio App. R. 26(B).

Mr. Thomas had a jury trial and testified he did not kill the victim in a drive by shooting; a jury convicted him nonetheless. Appellate counsel was appointed. However, Thomas timely hired counsel to perfect his appeal who took his money (\$7400) and abandoned him; retained counsel failed to timely file any brief; after Thomas lost his appeal filed by appointed counsel, retained counsel then promised to file a timely 26(B) application but failed to do that too. Out of desperation, Thomas filed a pro se 26(B) application but it was untimely. No good cause was offered for its untimeliness. The Court of Appeals “denied” the application because it was untimely and no good cause was offered.

Thomas then hired different counsel who properly filed a delayed 26(B) application with good cause offered which centered on retained counsel’s abandonment of Thomas. The Court of

Appeals refused to consider the “good cause” offered and denied the application as “successive”.

Thomas has been denied access to the courts to litigate his 26(B) application. Ohio has enacted Ohio App R 26(B) to guarantee litigants one full and fair opportunity to challenge appellate counsel’s constitutional effectiveness. The 26(B) application can be timely or it can be delayed with “good cause” offered for the delay. Any other type of application is a nullity. Once a 26(B) application has been considered by the Court of Appeals in compliance with 26(B), only then does the successor doctrine apply.

In this case, Thomas has been completely denied access to the Ohio courts to litigate his 26(B) application. Thomas has been denied his one full and fair opportunity to litigate the constitutional effectiveness of his appellate counsel.

Thomas was denied the effective assistance of counsel on appeal and at trial when trial counsel presented an “expert witness” (his son who was a law student) concerning cell phone records that he believed before trial were labeled in the Eastern Time Zone when they were in fact labeled in the Central and Pacific Time zones thus destroying completely the alibi offered in defense counsel’s opening statement and theory of the case.

Appellate counsel had a duty to raise this issue on direct appeal under Ohio law but failed to do so. Thomas has been denied the opportunity to litigate the effective assistance of counsel at trial and on appeal.

STATEMENT OF THE CASE

Mr. Thomas timely appealed from his Aggravated Murder conviction (a drive-by shooting) and life sentence after a jury trial.

Mr. Thomas' family hired attorney Gary Levine to represent him on appeal in April 2014 and Mr. Thomas received a visit in prison from Mr. Levine on Thomas' birthday November 26, 2014. (All exhibits and affidavits referenced herein are on the docket and available on the Ohio Ninth District Court of Appeals website as public records) Mr. Levine promised to file the appellate brief and spoke to Thomas approximately ten times by phone. (See affidavit, Ex. 1, para. 5-8)(See affidavit, Ex. 2, of Dora Thomas aka Rice; Levine hired April 2014; Levine's handwritten receipts for \$7400 attached to affidavit).

Mr. Levine did not timely enter a notice of appearance or file a brief. The convictions were affirmed June 17, 2015.

Mr. Levine then told Thomas he would file a App R 26(B) and they discussed it several times by phone. (See affidavit, Ex. 1, para. 9.) Mr. Levine even told Mr. Thomas he had "mailed it" to the Court but it was never filed. (See affidavit, Ex. 1, para. 10) Mr. Levine had then promised to drive it to the Court himself but that also was not done. (See affidavit, Ex. 1, para. 11-12) Mr. Thomas felt Mr. Levine "abandoned me and left me out to dry." (See affidavit, Ex. 1, para. 12)

Mr. Thomas was forced to mail a pro se App R. 26(B) application. The pro se application was filed September 16, 2015. (See docket) The Court of Appeals denied the application on March 30, 2016 because it was untimely and no good cause was offered for its untimeliness. (See docket)

Mr. Thomas hired new counsel to file a delayed application under App R. 26(B) and offered as “good cause” for the delay the unprofessional conduct of Mr. Levine in failing to file the appellate brief that he was hired to file as well as his complete failure to file the App R 26(B) application; equitable tolling principles favor Thomas, Holland v. Florida, 130 S. Ct 2549 (2010), at 2562-63; Thomas was diligent; counsel’s unprofessional conduct is an extraordinary circumstance beyond his control. Mr. Levine misled, lied to and abandoned Thomas and kept his \$7400.

The delayed 26(B) filed with good cause was denied in a one paragraph order as a “successive” application and the Court held that res judicata barred the litigation of counsel’s ineffectiveness. However, the pro se delayed application was a nullity and was not denied on the merits; it did not bar the court’s proper consideration of the delayed application with “good cause” offered for the delay.

Thomas has never had the opportunity to litigate the constitutional effectiveness of his trial and appellate lawyers. His trial lawyer presented an alibi defense based on telephone records that were kept in the Central and Pacific Time Zones that destroyed his alibi; counsel and his “expert witness” (his law school son) wrongly understood the records to be in the Eastern Time Zone. Appellate counsel had a duty under Ohio law to raise this issue of trial counsel’s ineffectiveness on direct appeal yet he never did raise it.

PROCEEDINGS BELOW

Thomas had a jury trial where he was convicted of Aggravated Murder (drive-by shooting) and sentenced to life in prison. His defense counsel presented an alibi and told the jury in opening statement the telephone records would prove his innocence. The defense presented an “expert witness” (defense counsel’s law school son) who testified he thought the records were labeled in the Eastern Time Zone until the day before his testimony when he learned the records were in Central and Pacific Time Zones; the alibi presented was thus destroyed.

Thomas paid a lawyer \$7400 to file an appeal; the lawyer never did file the appeal. Instead, appointed counsel filed an appeal which failed to raise the constitutional effectiveness of trial counsel with respect to the misunderstood phone records. The Court denied the appeal filed by appointed counsel.

Previously retained counsel promised Thomas he would file a Rule 26(B) application attacking appellate counsel’s constitutional effectiveness. Retained counsel filed nothing. Thomas filed a pro se application but it was untimely and without good cause. It was denied.

Thomas hired new counsel who filed a delayed 26(B) application as provided for in Ohio law and offered good cause for the delay retained counsel’s unprofessional conduct where he took the \$7400 and filed nothing. Ohio courts denied the delayed application as a “successor” and failed to rule on the “good cause” offered.

Thomas has been denied the opportunity to litigate his trial and appellate counsel’s constitutional ineffectiveness. This Petition follows:

REASONS FOR GRANTING THE WRIT

Ohio has failed to provide Thomas the opportunity to challenge his appellate counsel's constitutional effectiveness (and in turn trial counsel's constitutional effectiveness) in violation of the Sixth and Fourteenth Amendments of the federal Constitution.

I. Denial of Access to the Courts

Thomas has been denied a full and fair opportunity to litigate the effective assistance of appellate counsel and in turn the effective assistance of trial counsel. Ohio must provide a corrective process to address the ineffective assistance of appellate counsel under the Sixth and Fourteenth Amendments of the federal Constitution. Duckworth v. Serrano, 454 U.S. 1 (1981). The delayed 26(B) application in this case is such a corrective process. However, even though the delayed application was the only application that was rule compliant, Ohio has refused to consider it.

Under Ohio law, the App R 26(B) application is the first opportunity to raise the ineffective assistance of appellate counsel for not raising ineffective assistance of trial counsel. It is Thomas' first and only opportunity to raise such a claim and it is considered to be a "collateral post conviction remedy"; Morgan v. Eads, 104 Ohio St.3d 142 (2004); Thomas is entitled to the constitutionally effective assistance of counsel. Strickland, Evitts, and Martinez v. Ryan, 132 S. Ct. 1309 (2012).

In this case, Ohio has denied Thomas due process, i.e., the opportunity to be allowed to substantiate a claim before it is rejected. See Ford v. Wainwright, 477 U.S. 399, 414 (1986)

(plurality opinion); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) (protecting the “elementary rights of men” requires “fairness” and “[a]n opportunity to be heard”); Mathews v. Eldridge, 424 U.S. 319 (1976) (setting forth test for procedural due process compliance).

It also denied the fundamental constitutional right of access to the courts. See, e.g., Bounds v. Smith 430 U.S. 817, 828 (1977). That right of access to the courts is the right to “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.” Lewis v. Casey, 518 U.S. 343, 351 (1996).

Thomas has not had a full and fair adjudication of his federal constitutional claims. See Rose v. Lundy, 455 U.S. 509 (1982). Thomas is entitled to the effective assistance of counsel at trial, on direct appeal and in his initial post conviction challenge to the effectiveness of trial and direct appeal counsel’s constitutional effectiveness. See Strickland, Evitts v. Lucey, 469 U.S. 387 (1985), Martinez v. Ryan, *supra*.

Thomas has not has an adequate and effective means of vindicating his constitutional rights under the application of Ohio App R. 26(B)

II. Good Cause Offered for the Delayed Application

Thomas offered as good cause for the delayed application the unprofessional conduct of Mr. Levine who took \$7400 from Thomas and his family and then filed nothing to protect Thomas’ rights as he had promised. See Holland v. Florida, 130 S. Ct 2549 (2010). The Ohio courts would not even consider or address the unprofessional conduct of Mr. Levine. Thomas submits he has shown good cause and the delayed application had to be addressed on the merits.

III. Counsel's misunderstanding of the telephone records that destroyed the alibi presented was constitutionally deficient performance that prejudiced Thomas and appellate counsel's failure to raise such issue on direct appeal as required under Ohio law was also deficient performance that prejudiced Thomas.

Counsel filed a Notice of Alibi on April 28, 2014 approximately one month after receiving discovery. The Notice of Alibi states that the victim was killed at about 8:33 a.m. but Thomas was not "at or around the area" of the shooting which was Waterloo Road and Brown Street in Akron, Ohio on September 18, 2013. Instead, Thomas was at 869 Hartford Avenue, Akron, Ohio until about 8:35 a.m.

The state relied on two types of evidence to prove Thomas' guilt: 1. The cell phone records of Thomas put him in the area of the Aggravated Murder at the time of the crime; 2. Surveillance videos suggest the SUV Thomas was driving several minutes after the crime is the same SUV used in this drive-by shooting.

Before and even during the trial, defense counsel did not understand the State's evidence as it relates to the cell phone records/texts. In fact, many of the records used by the State were kept in Central Time Zone and/or Pacific Time Zone rather than Eastern Time Zone. (See Ex. 5-1 to 5-3) The defense "expert" on the phone records was a son of one of the attorneys who freely acknowledged his misunderstanding of the records during his testimony. See cross examination of Colin Meeker, TR 939-41; 950-51. Defense counsel's fundamental misunderstanding of the phone/text records destroyed the alibi defense. This fundamental misunderstanding reflects deficient performance of counsel's duties under Strickland and prejudiced the defense severely. The so called defense expert (who was the son of one of the defense attorneys) was incompetent

in front of the jury when he acknowledged he didn't know about his misunderstanding of the records until the day before his testimony and well into the trial of the case.(TR 940) Counsel is ultimately responsible with understanding the evidence and did not in this case. In this circumstantial evidence case, the credibility of the defense was thus destroyed.

Mr. Thomas testified on his own behalf denying any involvement in this killing. (TR 834-920) However, the credibility of the defense was destroyed by counsel's failure to understand the critical cell phone records. Prejudice is self evident; the lawyers didn't understand evidence that the alibi was based on; in opening statements, the State argued the phone records put the defendant in the area of the shooting (TR 240); the defense argued that phone calls proved he could not have done the shooting.(TR 258) Now, Thomas is doing a life sentence when his trial counsel did not understand the critical cell phone records and appointed appellate counsel never raised the issue of counsel's ineffectiveness. Moreover, Ohio won't allow a meaningful opportunity to attack appellate counsel's constitutional effectiveness.

Conclusion

For the foregoing reasons and pursuant to Sup Ct. R. 10, the petition for writ of certiorari should be granted.

Respectfully submitted,



/s/John P. Parker *

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Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served by regular U.S. Mail postage prepaid to Richard S. Kasay, Assistant Summit County Prosecutor, Summit County Safety Building, 53 University Avenue, Akron, Ohio 44308 and Mike De Wine, Ohio Attorney General, 30 E. Broad Street, 14th floor, Columbus, Ohio 43215 this 10th Day of May 2018.



/s/ John P. Parker

The Supreme Court of Ohio

FILED

FEB 14 2018

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2017-1614

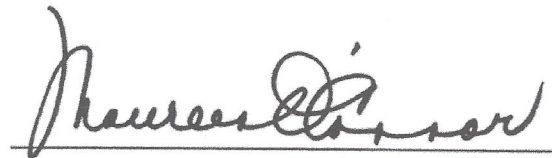
v.

ENTRY

Gracshawn Thomas

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).

(Summit County Court of Appeals; No. C.A.NO. 27405)



Maureen O'Connor
Chief Justice

Appx. 1-a

STATE OF OHIO)
)ss: COUNTY OF SUMMIT)

COURT OF APPEALS
SANDRA KURT

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2017 OCT -2 AM 8:41
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

C.A. No. 27405

Appellee

v.

GRACSHAWN THOMAS

JOURNAL ENTRY

Appellant

Appellant Gracshawn Thomas has applied for reopening of his appeal under Appellate Rule 26(B). He previously applied for reopening in September 2015, which this Court denied. The Ohio Supreme Court has held that "there is no right to file successive applications for reopening" under Rule 26(B). *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, ¶ 12. In addition, "[o]nce ineffective assistance of counsel has been raised and adjudicated, *res judicata* bars its relitigation." *Id.* at ¶ 10, quoting *State v. Cheren*, 73 Ohio St.3d 137, 138 (1995); *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, ¶ 6. Mr. Thomas's application for reopening is denied.



Judge Jennifer Hensal

Concur:

Carr, J.

Schafer, J.

Appx. 2-a