

1 The State of Ohio, Appellee, v. Williams, Appellant.

2 [Cite as *State v. Williams* (1996), \_\_\_\_\_ Ohio St.3d \_\_\_\_\_.]

3 *Appellate procedure -- Application for reopening appeal from*  
4 *judgment and conviction based on claim of ineffective*  
5 *assistance of appellate counsel -- Claims asserting ineffective*  
6 *assistance of appellate counsel in capital cases must be*  
7 *raised in the first appeal as of right in the Supreme Court.*

8 (No. 95-906--Submitted November 7, 1995--Decided February 7,

9 1996)

10 Appeal from the Court of Appeals for Cuyahoga County, No. 47853.

11 In 1983, appellant, Lewis Williams, Jr., was convicted of aggravated  
12 murder with aggravated robbery and firearm specifications, and aggravated  
13 robbery, and was sentenced to death. The Court of Appeals for Cuyahoga  
14 County affirmed the convictions and sentence. *State v. Williams* (Oct. 25,  
15 1984), Cuyahoga App. No. 47853, unreported. We affirmed the  
16 convictions. *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13, 490  
17 N.E.2d 906.

18 On June 30, 1993, one day before App.R. 26(B) became effective,  
19 appellant filed a motion for delayed reconsideration in the court of appeals.

1    However, he filed the motion in the appellate case that appealed from the  
2    denial of postconviction relief under R.C. 2953.21, not from the direct  
3    appeal of his criminal convictions. On August 1, 1994, the court of appeals  
4    dismissed the motion because it had been filed in the wrong case. On  
5    October 27, 1994, appellant filed an application to reopen his appeal under  
6    App.R. 26(B), presenting nine assignments of error allegedly constituting  
7    ineffective assistance of appellate counsel, and arguing as good cause for  
8    not filing within ninety days of journalization of the judgment sought to be  
9    reopened, as required by App.R. 26(B)(2)(b), the delay occasioned by filing  
10    the motion for delayed reconsideration in the wrong case.

11            The court of appeals rejected the good-cause argument, stating that  
12    counsel's negligence in filing in the wrong case could not constitute good  
13    cause. Moreover, the court of appeals noted that appellant had waited  
14    nearly three months after his motion for delayed reconsideration had been  
15    dismissed to file his application for reopening. The court of appeals also  
16    held that the issues raised were *res judicata*, as appellant had changed  
17    counsel on appeal to this court from the judgment of the court of appeals

1 affirming the convictions and could have raised claims of ineffective  
2 assistance of appellate counsel in this court.

3 Appellant appeals from this judgment.

4 *Stephanie Tubbs Jones*, Cuyahoga County Prosecuting Attorney, and  
5 *Karen L. Johnson*, Assistant Prosecuting Attorney, for appellee.

6 *David H. Bodiker*, Ohio Public Defender, *Stephen A. Ferrell* and  
7 *Richard J. Vickers*, Assistant Public Defenders, for appellant.

8 *Per Curiam*. In his first proposition of law, appellant argues that  
9 good cause was shown for the nearly three-month delay between dismissal  
10 of the motion for delayed reconsideration and the filing of the motion for  
11 reopening because the public defender's office was extremely busy and the  
12 second motion had to be newly researched. We reject this argument. Ten  
13 years elapsed since journalization of the appellate judgment sought to be  
14 reopened and the filing of the motion for reopening. But relief had been  
15 available during that time under former App.R. 14(B) and 26, see *State v.*  
16 *Reddick* (1995), 72 Ohio St.3d 88, at 90, 647 N.E.2d 784, at 786, and had  
17 been expressly available under *State v. Murnahan* (1992), 63 Ohio St.3d 60,  
18 584 N.E.2d 1204, since February 1992, over one year prior to the

1 application for delayed reconsideration. There is no good cause for delay  
2 here.

3 Moreover, we affirm the judgment of the court of appeals and hold  
4 that issues of ineffective assistance of appellate counsel must be raised at  
5 the first opportunity to do so. Thus, in capital cases in which the death  
6 penalty has been imposed for offenses committed before January 1, 1995,  
7 such issues must be raised in the first appeal as of right in this court, unless,  
8 because of unusual circumstances, applying the doctrine of *res judicata*  
9 would be unjust. See *State v. Murnahan, supra*, 63 Ohio St.3d at 66, 584  
10 N.E.2d at 1209.

11 Accordingly, the judgment of the court of appeals is affirmed.

12 *Judgment affirmed.*

13 MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER  
14 and COOK, JJ., concur.

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