

**COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR APPLICATIONS**

March 30, 2015

To: Mr. Robert Ortiz, GDC421584, Hays State Prison, Post Office Box 668, Trion, Georgia 30753

Docket Number: Style: Robert Ortiz v. The State

Your document(s) is (are) being returned for the following reason(s).

1. Your Application was not accompanied by the statutory filing fee, \$300.00 civil; \$80.00 criminal, or a sufficient pauper's affidavit. OCGA §5-6-4 and Rule 5 Please be advised that your pauper's affidavit should be notarized by a notary public.
2. Portions of the record included were not tabbed and indexed. Rules 30 (e) and 31 (c).
3. **A stamped "filed" copy of the trial court's order to be appealed was not attached to your Application. Rules 30 (b) and 31 (e)**
4. A stamped "filed" copy of the Certificate of Immediate Review was not attached to your Interlocutory Application. Rule 30(b)
5. Your document(s) was (were) not signed by counsel (No signatures with expressed permission are permitted). Rule 1 (a)
6. There were an insufficient number of copies of your document. Rule 6
7. No Certificate of Service accompanied your document(s). Rule 6 You should provide a copy of your filing to the District Attorney and include his/her name and address on your Certificate of Service.
8. Your Certificate of Service did not include the complete name and /or mailing address of each opposing counsel and pro se party. Rule 1(a) and 6
9. Your document exceeds page limits. Rules 24(f) , 30(e) and 31(c)
10. Your request for court action must be submitted in motion form. Rule 41 (a)
11. No extension of time for filing an interlocutory application will be granted . Rule 30 (g) . No extension of time will be granted for filing a discretionary application unless the motion for extension is filed on or before the due date of the discretionary application.
12. The type font was smaller than 10 characters per inch; type was not double-spaced or/and type was on both sides of the paper. Rules 1(c), 24(b), 37(a) and 41(b).
13. Your motions were submitted in an improper form (joint, compound, or alternative motions in one document). Rule 41 (b)
14. Margins were too small or paper size was incorrect. Rules 1(c), 24(c), 30(e), 31(c) and 41(b).
15. Your document was submitted for filing more than 30 days after the date of the order granting, denying or dismissing the application or the order granting, denying or dismissing the Motion for Reconsideration. Rules 30(j) and 31(j).
16. **Other:**

For Additional information, please go to the Court's website at: www.gaappeals.us

1 IN THE SUPERIOR COURT OF DEKALB COUNTY
2 STATE OF GEORGIA

3)
4)
5 The State (etc.))
6 vs.)

Case No. 95-CR-3061-1

7)
8)
9 Robert Ortiz)
10 Defendant)

RECEIVED
2015 MAR 27 AM 11:18
CLERK OF SUPERIOR COURT
COURT OF APPEALS OF GA

11 NOTICE OF APPEAL/NOTICE OF DISCRETIONARY APPEAL

12 Notice is hereby given that Robert Ortiz, defendant above-named hereby
13 appeals to the Court of Appeals from the judgment of conviction and sentence
14 herein on August 23, 1995

15 The offense(s) for which the defendant was/were convicted is/are Rape-
16 Burglary, Aggravated Sodomy, and the sentence(s) imposed is/are as follows:
17 He was sentenced to life without parole in prison.

18 A motion for re-sentencing under a substantive change in law was/were filed
19 and overruled on 5th day of February 2015.

20 The clerk will please omit the following from the record on appeal:

- 21 1. The clerk will please omit nothing

22 Transcript of evidence and proceedings will be filed for inclusion in the
23 record on appeal.

24 This court, rather than the (Court of Appeals or Supreme Court) has
25 jurisdiction of this case on appeal for the reason that this case does not
involve a capitol felony in which the Supreme court would have jurisdiction.

Date: March 17, 2015

Robert Ortiz
Pro-se

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Robert Ortiz,
vs.
The State

)
) Case No.: No.
)
) Lower Court Case No. 95-CR-3061-1
)
)
)
)
)

APPLICATION FOR DISCRETIONARY APPEAL

Comes now Robert Ortiz, defendant in the above styled cause and makes this, his application for discretionary appeal from the trial courts denial of defendant's motion for re-sentencing of defendant under a substantive change in the law. Pursuant to O.C.G.A. 5-6-34-35

HISTORY OF CASE

Defendant Ortiz was convicted by a jury of rape, burglary and aggravated sodomy on August 23, 1995. He was sentenced to life without parole in prison. Defendant moved the trial court to re-sentence him showing that there has been a substantive change in the law that allows the trial court to sentence him to less than the mandatory minimum sentence of life without parole. The trial court held that O.C.G.A. § 17-10-6.1 (e) enacted is not applicable in this case, as there has not been any agreement by the prosecutor and the statute is not applied retroactively.

ARGUMENT AND CITATION OF AUTHORITY

At the time of his trial, defendant was sentenced under O.C.G.A. 17-10-61.1, the applicable statute at the time.

1 law will have retroactive effect if it falls within one of the following two
2 exceptions: new rules that place certain conduct beyond the power of the
3 state to proscribe, that is, a change in substantive criminal law; and
4 watershed rules concerning procedures that are implicit in the concept of
5 ordering liberty and that implicate the fundamental fairness and accuracy of
6 the criminal proceeding."

7 Citing Enger v. Erwin, 245 Ga. 753, 367 S.E. 2d 25 (1980) and Davis v.
8 Lygenbell, 283 Ga. app. 642, 642 S.E. 2d 337 (2007), further clarifies the
9 difference stating that, "substantive law is that law which creates rights,
10 duties, and obligations", and "procedural law is that law which prescribes
11 the methods of enforcement of rights, duties, and obligations." Davis gives
12 the example of evidentiary changes as procedural.

13 The United States Supreme Court and the Georgia Supreme Court have
14 repeatedly held that a substantive changes in case law should be applied
15 retroactively and that a substantive change includes decisions that remove
16 certain conduct from the reach of criminal statutes. See Bousley v. United
17 States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); Luke v.
18 Battle, 275 Ga. 370 (2), 565 S.E. 2d 816 (2002); Brewer v. State, 271 Ga. 605
19 (1999).

20 Under the new sentencing provisions established by section 8 of House
21 Bill 349, the court does now have the discretion under O.C.G.A. 17-10-6.1 (e)
22 to depart from the mandatory minimum sentencing and the trial court's failure
23 to re-sentence defendant to a lesser sentence was an abuse of discretion that
24 violated defendant's right to equal protection and due process under the 5th
25 and 14th amendments to the United States Constitution and art. 1, sec. 1, par.

1 of the Georgia Constitution, as well as clearly established Federal Law as
2 determined by the Supreme Court of the United States.

3 Wherefore, defendant prays this Honorable Court set this matter down
4 for hearing and grant defendant's application for discretionary appeal. This
5 he will ever pray.

6
7
8 Respectfully submitted this 17th day of March 2015

9 Respectfully

10 Robert Ortiz
11 Robert Ortiz

12 GDC #421584
13 Hays State Prison
14 P.O. Box 668
15 Trion, Georgia 30753-0668
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and forgoing document(s) upon the person(s) listed below by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to ensure that it reaches its destination.

This 17th day of MARCH, 20 15.

Respectfully submitted,

Robert Ortiz

Robert Ortiz
GDC# 421584
Hays State Prison
P.O. Box 668
Trion, Georgia 30753-0668

Person(s) served:
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