

IN THE SUPREME COURT OF OHIO

State of Ohio, :  
 :  
 Plaintiff-Appellee, : Case No. 2007-325  
 :  
 v. : On Appeal from the Hamilton  
 : County Court of Appeals,  
 Andre Davis, : First Appellate District,  
 : Case No. C-040665  
 Defendant-Appellant. :

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE  
OFFICE OF THE OHIO PUBLIC DEFENDER AND  
OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF APPELLANT ANDRE DAVIS**

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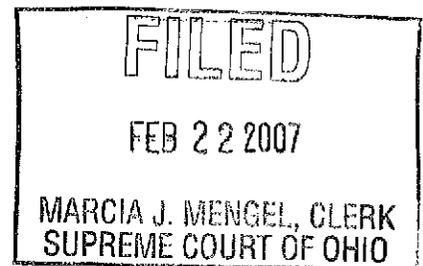
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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

**I. Introduction**

This case is about the right, power, and duty of courts of appeals to resolve issues concerning the effectiveness of lawyers appearing before them. As this Court has ruled, court of appeals judges “are in the best position to recognize, based upon the record and conduct of appellate counsel, whether such counsel was adequate in his or her representation before that body. . . .” State v. Murnahan (1992), 63 Ohio St.3d 60, 65, 584 N.E.2d 1204.

But under doctrine of the First Appellate District, courts of appeals will almost never be allowed to decide, “based upon the record and conduct of appellate counsel, whether such counsel was adequate in his or her representation before that body. . . .” *Id.* Instead, this Court will have to make those decisions based on unsupported allegations in a memorandum in support of jurisdiction. If this Court declines to hear a case (and this Court declines to hear the vast majority of cases presented to it), then federal courts will review the claims de novo in habeas proceedings. Maples v. Stegall (C.A. 6, 2003), 340 F.3d 433, 436-37, citing Wiggins v. Smith (2003), 539 U.S. 510, 534-35. Federal litigation delays resolution of ineffectiveness claims, denies finality for the victims, and could make any retrials more difficult for the State.

This Court was right to rule that courts of appeals are in the best position to judge claims of ineffective assistance of appellate counsel. Murnahan at 65. Court of appeals judges are familiar with the standard of

performance of attorneys before them. They also have read the record and have generally heard an oral argument from the lawyer.

Mr. Davis's case is worthy of this Court's time because it concerns 1) a conflict in practices of the appellate court, as well as in the practices of this Court, and 2) the allocation of responsibility among Ohio's Courts of Appeals, this Court, and the federal courts.

Specifically, this Court should receive briefs and hear argument on Mr. Davis's second proposition of law:

**Appellant's Proposition of Law No. II:**

**The opportunity to file a discretionary appeal in the Supreme Court of Ohio does not create a bar to a merit ruling on a timely filed application to reopen appeal under App.R. 26(b).**

**II. Discussion**

**A. The practice of the First and Eighth Appellate Districts improperly transfers the responsibility to decide whether appellate counsel is ineffective from Ohio's courts of appeals to this Court and the federal courts.**

The issue in this case is which court should decide the merits of claims of ineffective assistance of appellate counsel. The decision below permits courts of appeals to punt claims of ineffective assistance of appellate counsel to this Court for discretionary review (which will almost always be summarily denied) and to federal court for a full de novo review. But this Court is not a court of error, and routine de novo review in federal court delays justice and harms the comity between state and federal courts.

***Courts of appeals are best suited to judge the effectiveness of a lawyer who appears before them.***

Just as a trial judge is best qualified to decide the evidence presented in his or her court room, courts of appeals are best suited to decide whether appellate counsel performed adequately. As this Court has ruled, court of appeals judges “are in the best position to recognize, based upon the record and conduct of appellate counsel, whether such counsel was adequate in his or her representation before that body. . . .” State v. Murnahan (1992), 63 Ohio St.3d 60, 65, 584 N.E.2d 1204. Following the Murnahan syllabus, the Third District recognized that appellate ineffectiveness claims are “properly raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court. . . .” State v. Longworth, Allen App. No. 1-02-28; 2002-Ohio-4602, at ¶15.

This Court is wise to defer to the judges of the courts of appeals. First, the court of appeals reviews the briefs and the record and frequently hears oral argument from the allegedly ineffective lawyer. The court of appeals is therefore in a better position than any other court to determine whether counsel’s performance, when taken as a whole, met professional standards. By contrast, this Court receives two short jurisdictional memoranda with no supporting documentation.

A recent decision from the Twelfth District demonstrates why courts of appeals should decide timely appellate ineffectiveness claims. That court reopened an appeal based on an allegation that appellate counsel failed to challenge a search based on an unsigned search warrant. The State responded

by claiming that the warrant was indeed signed. The court of appeals was able to review the copy of the warrant attached to the application to reopen, as well as the copy in the record, to verify that the alleged warrant was not signed. State v. Carpenter (Jan. 18, 2007), Butler App. No. CA 2005 11 0494, Entry Granting Application for Reopening. If the Twelfth District had followed the First District's res judicata bar, the application would have been denied summarily. The defendant could have filed a discretionary appeal to this Court both of the original judgment and the denial of reopening, but this Court would have been left with no record to resolve the conflicting representations of counsel. The issue would likely have been left to the federal courts for a de novo review. Instead, the Twelfth District is now receiving briefs on the merits. The Twelfth District, not the Sixth Circuit, will likely be the final arbiter of Mr. Carpenter's ineffectiveness claim.

***The Hamilton County Court of Appeals is the court best suited to determine whether the prosecutor in this case committed misconduct.***

In his motion to reopen, Mr. Davis claims that the prosecutor in his case has a history of similar misconduct. The Hamilton County Court of Appeals is in a better position than this Court to judge such claims. This Court reviews relatively few criminal cases. In 2006, the First District reached eighty-eight merits decisions in reported criminal cases, plus countless other unreported memorandum decisions.<sup>1</sup> By contrast, this Court decided only one criminal case out of Hamilton County in the same time period. Smith v. Leis, 111 Ohio

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<sup>1</sup> Search terms: name(state) & court(hamilton) & prosecuting attorney.

St.3d 493, 2006-Ohio-6113. The Hamilton County Court of Appeals is the court best suited to judge the professionalism of counsel on both sides. But that court's res judicata doctrine deprives it of that opportunity. Mr. Davis asks only that this Court require the First District to do its job by reviewing (and sometimes rejecting) timely applications to reopen on their merits.

***“Heads I win, tails you lose.”***

Under the doctrine of the First and Eighth Districts, defendants always lose an application to reopen regardless of whether they file a discretionary appeal to this Court of the original court of appeals judgment. If they don't file, the courts of appeals claim that they could have. If they do file a discretionary appeal raising appellate ineffectiveness, the courts of appeals treat this Court's refusal to hear the appeal as a merits ruling. In, State v. Keith (May 12, 2006), Cuyahoga App. No. 83686, appeal not accepted, 110 Ohio St.3d 1468, 2006-Ohio-4288, the Eighth District denied an application to reopen based on res judicata. Mr. Keith had raised appellate ineffectiveness in his original discretionary appeal to this Court. This Court accepted the appeal, but then dismissed it as improvidently allowed. State v. Keith, 105 Ohio St.3d 1463, 2005-Ohio-1024, In re Criminal Sentencing Statutes Cases, 109 Ohio St.3d 313, 2006-Ohio-2109, at ¶175. The Eighth District treated this Court's decision to dismiss the case as a ruling on the merits:

In the present case Keith appealed to the Supreme Court of Ohio, and that court explicitly considered the principles of ineffective assistance of counsel and rejected the appeal. Under such circumstances the application of res judicata is more than appropriate.

State v. Keith (May 12, 2006), Cuyahoga App. No. 83686.

In December 2006, this Court voted 4-3 not to hear a similar case out of the same court. Over the dissents of the Chief Justice, as well as Justices Lundberg Stratton and Lanzinger, this Court declined to hear the appeal of Michael White. State v. White, 112 Ohio St.3d 1422, 2006-Ohio-6712, at pp. 18-9. Mr. Davis's case is stronger than Mr. White's because unlike Mr. White, Mr. Davis raised appellate ineffectiveness in his discretionary appeal to this Court from the original court of appeals judgment, but this Court declined to hear the appeal.

**B. There is a split in the way this courts have treated the responsibility of courts of appeals to review applications to reopen.**

This Court should also accept this Case because, unlike the First Appellate and Eighth Appellate Districts, the Sixth and Twelfth Districts have accepted their role as courts of error. The Twelfth District granted relief in a motion to reopen after this Court had previously declined to hear a discretionary appeal raising the same issues. State v. Prom, 98 Ohio St.3d 1411, 2003-Ohio-60, 781 N.E.2d 1019 (declining to hear a discretionary appeal of a court of appeals judgment); State v. Prom, 12th Dist. No. CA2002-01-008, 2003-Ohio-6543, at ¶30. Likewise, the Sixth District Court of Appeals has declined to follow the First District's lead. The court reopened an appeal and decided the case without relying on res judicata. State v. Comer (Jan. 29, 2001), 6th Dist. No. L-99-1296. This Court had previously declined to hear the discretionary appeal from the original appellate decision affirming the

conviction of Jerry Comer. State v. Comer (2001), 91 Ohio St. 3d 1428; 741 N.E.2d 892. This Court did not find fault with the Sixth District's process when this Court later granted Mr. Comer relief based on the issue he raised in his reopened appeal. State v. Comer, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

The Sixth District also ignored the State's express request to apply the Cuyahoga County rule in State v. Goodell, 6th Dist. No. L-02-1133, 2004-Ohio-2676. The State asked the Sixth District to deny the motion to reopen because Mr. Goodell had not filed an appeal in this Court. State's Memorandum Opposing Reopening at 4. The Sixth District overruled the State's position sub silentio. The split among Ohio's appellate districts provides another reason for this Court to grant jurisdiction and hear the merits of this case.

***This Court has not created clear law for the courts of appeals to follow.***

State v. Houston (1995), 73 Ohio St.3d 346, 652 N.E.2d 1018, does not provide binding case law, but the court of appeals continues to rely on dicta from the 1995 per curiam decision presented by a pro se criminal defendant who filed an untimely application to reopen. In Houston, this Court noted that Mr. Houston's claim in an untimely application to reopen was barred by res judicata. No court should rely on Houston to create a near-blanket bar on timely applications to reopen for three reasons:

1. The critical language was dicta on an issue that was uncontested by the parties. The language concerning res judicata was dicta because Mr. Houston failed to demonstrate good cause as to why his motion to reopen was filed late, so the discussion of res judicata was not essential

to the outcome. Further, Mr. Houston did not contest that res judicata applied to his motion to reopen. He argued only that the application of res judicata would be unjust. Brief of Appellant Darrell Houston, Filed Mar. 23, 1995, Case No. 95-600.

2. Mr. Houston was a prisoner filing pro se, which limited the quality of the argument that led to the per curiam decision;
3. This Court noted that Mr. Houston had “prior opportunities to challenge the effectiveness of his appellate counsel[,]” but this Court did not say what those “prior opportunities” were, but they could have included a timely application to reopen.

The Houston per curiam dicta conflicts with this Court’s practice in at least one recent case. This Court granted relief in State v. Comer, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, even though this Court had previously declined to hear an appeal in the case. If the Comer approach is correct, this Court should accept jurisdiction to stop courts of appeals from using res judicata to bar virtually all motions to reopen. If the Houston approach is correct, this Court should accept jurisdiction to prevent litigants in the Sixth and Twelfth Districts from receiving relief in motions to reopen after this Court declines to hear their discretionary appeals. State v. Prom, 12th Dist. No. CA2002-01-008, 2003-Ohio-6543, at ¶30 (appellate counsel was ineffective for filing an Anders brief).

This Court’s approach in Comer is preferred because the courts of appeals are best suited to judge claims of appellate ineffectiveness. Appellate Rule 26(B) was specifically crafted to give that authority and that duty to the courts of appeals. The First District is shirking that duty by an inappropriate use of res judicata, a practice which is regularly followed only in the First and

Eighth appellate districts. This Court should accept jurisdiction to provide a uniform manner for Ohio's courts of appeals to review and decide applications to reopen appeals.

### **STATEMENT OF THE CASE AND THE FACTS**

Amicus adopts the Appellant's statement of the case and the facts.

### **ARGUMENT**

#### **Appellant's Proposition of Law No. II:**

**The opportunity to file a discretionary appeal in the Supreme Court of Ohio does not create a bar to a merits ruling on a timely filed application to reopen appeal under App.R. 26(b).**

The First District's position would defeat the reasoning behind both Appellate Rule 26(B) and State v. Murnahan (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204. In Murnahan, this Court recognized that appellants often need time beyond the 45 days for filing a discretionary appeal to this Court to identify ineffective-assistance-of-counsel claims:

Since claims of ineffective assistance of appellate counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted for reconsideration in the court of appeals or appeal to this court, it may be necessary for defendants to request delayed consideration.

Murnahan, 63 Ohio St.3d at 65-66.

It was for this specific reason that this Court recommended that a new rule be enacted to govern such claims:

In light of the fact that Ohio has no statutory authority or court rules dedicated to the procedure to be followed by defendants who allege ineffective assistance of appellate counsel, we recommend

that the Rules Advisory Committee appointed by this court review whether an amendment to App.R. 14(B) or a new rule should be adopted to better serve claimants in this position.

Murnahan, 63 Ohio St.3d at fn 6.

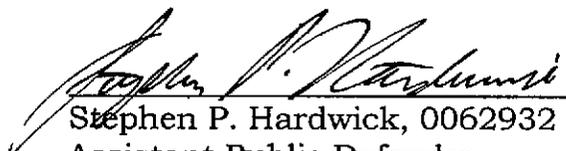
Forcing appellants to resolve all ineffective assistance of counsel arguments in a discretionary appeal defies this Court's clearly expressed reasoning in State v. Murnahan.

### CONCLUSION

This Court should accept jurisdiction, reverse the decision of the court of appeals, and remand this case so that the court of appeals can decide whether Mr. Davis received the effective assistance of appellate counsel.

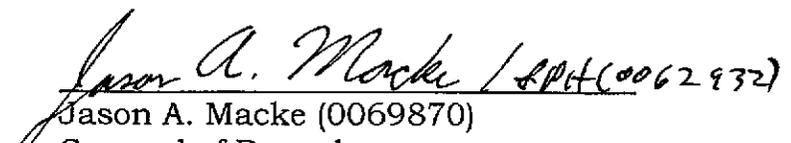
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify a copy of the foregoing has been sent by regular U.S. mail, postage-prepaid, to Fred Hoefle, Esq., 810 Sycamore Street, Cincinnati, Ohio 45202 and to Scott Heenan, Assistant Hamilton County Prosecuting Attorney, Suite 4000, 230 E. 9<sup>th</sup> Street, Cincinnati, Ohio 45202 this 22nd day of February, 2007.

  
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