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

WHY THIS CASE SHOULD BE ACCEPTED FOR REVIEW

The Supreme Court of Ohio should accept the Appellant's case for review because the case presents a substantial constitutional question regarding the Appellant's constitutional rights under the due process clause of the Fourteenth Amendment to the United States Constitution, and Section 3, Article IV to the Ohio Constitution, to effective assistance of counsel on a first appeal as of right. Evitts v. Lucey (1985), 469 U.S. 387, 396.

In Ohio, the right to a first appeal is guaranteed under Section 3, Article IV, to the Ohio Constitution. Proper appellate review is necessary to ensure that a criminal conviction has been obtained through a reliable process. Evitts v. Lucey at 399-400; Griffin v. Illinois (1956), 351 U.S. 12, 18. An important element of that process is the effective assistance of appellate counsel.

Counsel is ineffective if the representation is constitutionally deficient, and the deficiency prejudices the appellant. Strickland v. Washington (1984), 466 U.S. 668, 687; State v. Reed (1996), 74 Ohio St.3d 534, 535. The Strickland analysis "is the appropriate level of review to determine whether an appellant has raised a 'genuine issue' in an application for reopening under Appellate Rule 26(B)(5)." State v. Reed, 74 Ohio St,3d at 535.

Appellate counsel has a duty to review the record of the trial court proceedings. Counsel "is first required to conduct 'a conscientious examination' of the case." Person v. Ohio (1988), 488 U.S. 75, 80, quoting Anders v. California (1967), 386 U.S. 738. While appellate counsel does not need to raise every nonfrivolous argu-

ment on appeal, counsel must exercise reasonable professional judgment. Jones v. Barnes (1983), 463 U.S. 745, 753, 754. The failure to raise a constitutional claim that has a reasonable probability of success constitutes ineffective assistance of appellate counsel. See Reed, 74 Ohio St.3d at 535-536; See also, Mapes v. Coyle (C.A. 6, 1999), 171 F.3d 408, 427-429, cert. denied (1999), 528 U.S. 946.

The Supreme Court of Ohio is presented with the opportunity to address the legal issues of ineffective assistance of appellate counsel on direct appeal when counsel omits stronger legal arguments on the records that could have been raised on appeal that were clearly significant and obvious that had a reasonable chance of success on direct appeal.

The Supreme Court of Ohio will have the opportunity to review appellate counsel's unprofessional performance of failing to raise the following stronger legal arguments in the trial court's records:

(1) Whether appellate counsel was ineffective for not arguing the trial court erred ruling that Detective Martínez could not testify that Haershel Durssell told her during her investigation the purported crime that he had seen the fight and indicated that there was no gun involved in the fight, and that the victim's ear had been bitten off.

(2) Whether appellate counsel was ineffective for not arguing that trial counsel was ineffective at trial for not subpoenaing Hearshel Drussell to testify for the defense that he saw the fight and there was no gun involved.

(3) Whether appellate counsel was ineffective for not arguing that trial counsel was ineffective at trial for not admitting the first track of the 911 tapes into evidence at trial that indicated the victim telling the 911 operator that his ear had been bitten off.

In this case, appellate counsel breached his duty when he failed to raise the meritorious constitutional issues of ineffective assistance of trial counsel in

violation of the appellant's Sixth Amendment rights under the United States Constitution, and when he failed to raise the meritorious issue of the trial court's error of ruling the Detective's testimony was inadmissible hearsay, contrary to the Ohio Supreme Court's ruling in State v. Thomas (Ohio 1980), 61 Ohio St,2d 223, 400 N.E.2d 401.

The decision by the Court of Appeals for the Second Appellate District threatens the Appellant's constitutional rights to relief under Ohio Appellate Rule 26(B) due to a colorable claim of ineffective assistance of appellate counsel on direct appeal as of right.

Accordingly, the Court of Appeals' decision must be reversed and this case remanded for a new direct appeal, with effective representation. This Supreme Court of Ohio must grant jurisdiction to hear this case and review the erroneous decision by the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

On December 8, 2007, the Appellant Michael Cleaver hereinafter referred to as "Appellant" filed his Appellate Rule 26(B) application for re-opening his direct appeal set forth colorable claims of ineffective assistance of appellate counsel.

Appellant claimed his appointed appellate counsel's performance was deficient on appeal in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Section 10 and 16 of Article I, of the Ohio Constitution. When appellate counsel on appeal omitted three stronger legal issues and errors that were clearly significant and obvious on the trial court's records and raised two weaker legal issue and errors that had no chance of success on appeal.

Appellant asserted that his appellate counsel's performance on appeal was clearly deficient and unreasonable under the professional norms when he failed to raise the following:

- (1) THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29 WERE THE EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS INSUFFICIENT TO SUSTAIN A CRIMINAL CONVICTION FOR FELONIOUS ASSAULT WITH A RELATED FIREARM SPECIFICATION BEYOND A REASONABLE DOUBT. (See Tr. Pages 150-152).
- (2) THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN THE COURT RULED THAT DETECTIVE MARTINEZ'S TESTIMONY AT TRIAL WAS INADMISSIBLE HEARSAY CONCERNING WHAT HER INVESTIGATIVE INTERVIEW INDICATED WHAT MR. HAERSHEL DURSEL TOLD HER BY TELEPHONE THAT HE SAW THE FIGHT AND THERE WAS NO GUN INVOLVED. (See Tr. Pages 123, 124, 128 and 129).
- (3) THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN HIS TRIAL COUNSEL FAILED TO CONSULT AND SUBPOENA POTENTIAL WITNESSES FOR THE DEFENSE WHO WOULD HAVE PROVIDED EXCUPATORY TESTIMONY AT TRIAL THAT WOULD HAVE BEEN HELPFUL TO DEFENDANT'S DEFENSE OF FELONIOUS ASSAULT WITH A RELATED FIREARM SPECIFICATION. (See Pages 159, and 160, also see a copy of the police investigation report).

Appellant supported his application to re-open with the trial transcripts of his bench trial that clearly demonstrated the significant and obvious errors in the trial court's records that were much stronger and had a reasonable chance of success on appeal.

The Second Appellate District Court of Appeals should have grant his application to re-open his appeal under Appellate Rule 26(B) because of his appellate counsel's unprofessional decision in omitting the above three errors from his appeal that was supported by the trial court's undermined his constitutional rights to effective assistance of appellate counsel on direct review of his criminal case. Appellate counsel rendered deficient and prejudicial performance in this case on appeal.

The Appellant in support of his position on these issues present the following arguments:

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: WHEN APPELLATE COUNSEL MAKES NUMEROUS SERIOUS ERRORS IN HANDLING THE CRIMINAL APPELLANT'S ONE AND ONLY DIRECT APPEAL, INCLUDING FAILING TO RAISE SIGNIFICANT AND OBVIOUS MERITORIOUS ISSUES ON THE TRIAL COURT'S RECORDS, APPELLATE COUNSEL PROVIDES CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL, AND THE APPELLANT IS ENTITLED TO A NEW DIRECT APPEAL, WITH EFFECTIVE REPRESENTATION. FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION; SECTION 10 AND 16, ARTICLE I, OHIO CONSTITUTION.

Appellant's proposition of law claims that his appellate counsel on direct appeal was ineffective in omitting three stronger errors that were clearly obvious on the trial court's records. In the Appellant's application to re-open his direct appeal he raised the following claims of ineffective assistance of appellate counsel for omitting the three stronger assignments of error that were clearly obvious on the trial court records:

- (A) THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29 WERE THE EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS INSUFFICIENT TO SUSTAIN A CRIMINAL CONVICTION FOR FELONIOUS ASSAULT WITH A RELATED FIREARM SPECIFICATION BEYOND A REASONABLE DOUBT (See Tr. Pages 150 and 152).
- (B) THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN THE COURT RULED THAT DETECTIVE MARTINEZ'S TESTIMONY AT TRIAL WAS INADMISSIBLE HEARSAY CONCERNING WHAT HER INVESTIGATIVE INTERVIEW INDICATED WHAT MR. HAERSHEL DURSEL TOLD HER BY TELEPHONE THAT HE SAW THE FIGHT AND THERE WAS NO GUN INVOLVED. (See Tr. Pages 123, 124, 128, and 129).
- (C) THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN HIS TRIAL COUNSEL FAILED TO CONSULT AND SUBPOENA POTENTIAL WITNESSES FOR THE DEFENSE WHO WOULD HAVE PROVIDED EXCULPATORY TESTIMONY AT TRIAL, THAT WOULD HAVE BEEN HELPFUL TO DEFENDANT'S DEFENSE OF FELONIOUS ASSAULT WITH A RELATED FIREARM SPECIFICATION. (See Tr. Pages 92, 129, 158, 159, and 160).

A defendant alleging ineffective appellate assistance must establish (1) deficient performance, and (2) a reasonable probability that the outcome of the proceeding would have been different. Strickland v. Washington (1984), 466 U.S. 668, 687, 697. Under the Strickland standard, courts must apply "a heavy measure of deference to counsel's judgments." *Id.*, at 691.

In the instant case, Appellant claims in the application to re-open that his appellate counsel was constitutionally ineffective because he failed to raise an specific assignment of error in his direct appeal that the trial court ruling that Detective Martinez's testimony at trial was inadmissible hearsay, was error and contrary to the Supreme Court of Ohio's decision in State v. Thomas (1980), 61 Ohio St.2d 223, 400 N.E.2d 401 that held statements which are offered at trial to explain an officer's conduct while investigating a purported crime are not hearsay.

Also, Appellant claims that his appellate counsel was constitutionally ineffective because he failed to raise an specific assignment of error in his direct appeal that he was denied the constitutional right to effective assistance of trial counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

When counsel failed to consult and subpoena potential witnesses for his defense at trial who would have provided exculpatory testimony at trial that would have been helpful to the defense of felonious assault with a gun specification.

The Appellant proved that his counsel on appeal was deficient for failing to raise the issues on appeal supported by the records and that there was a reasonable probability of success had those claims been presented on his direct appeal.

CONCLUSION

For the reasons discussed above, this case involves matter of public and great general interest and substantial constitutional question. The appellate requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,


Michael Cleaver, Inmate #508-808

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum In Support of Jurisdiction was sent by U.S. Mail to counsel for appellee, Carley J. Ingram, Assistant Prosecuting Attorney at P.O. Box 972, 301 W. Third St., Dayton, Ohio 45422 on this 2nd day of March 2007.


Michael Cleaver

FILED
COURT OF APPEALS
2007 FEB -8 PM 2:19
DAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff- Appellee : C.A. Case No. 21387
vs. : T.C. Case No. 05-CR-2928
MICHAEL L. CLEAVER :
Defendant-Appellant :

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DECISION AND ENTRY

Rendered on the 8th, day of February, 2007.
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PER CURIAM:

Michael Cleaver appeals from the trial court's denial of his application to reopen his appeal pursuant to App.R. 26(B). We affirmed Cleaver's convictions for felonious assault with a firearm specification and having a weapon while under a disability on November 9, 2006.

Cleaver contends his appellate counsel was constitutionally ineffective for failing to argue that the trial court erred in denying his Crim.R. 29 motion, made at the conclusion of the State's case. The State argues that counsel was not ineffective because this court held that Cleaver's convictions were not against the manifest weight

of the evidence, and that finding necessarily includes a finding that the convictions were based on sufficient evidence. We agree. The fact that a judgment is based on sufficient evidence does not preclude this court from finding that a defendant's convictions were against the manifest weight of the evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380. It is more difficult to prevail upon a Crim.R. 29 motion than a manifest weight assignment in an appeal. There was certainly evidence from which a reasonable juror could conclude that Appellant shot Herman Hicks with a loaded weapon.

Cleaver contends his appellate counsel was ineffective for not arguing that the trial court erred in ruling that Detective Martinez could not testify that Haershel Drussell told her that he had seen the fight and indicated that there was no gun involved in the fight, and that the victim's ear had been bitten off. We agree with the State that Drussell's alleged statement to Detective Martinez was hearsay and was properly ruled inadmissible, therefore appellate counsel was not ineffective in making a contrary argument.

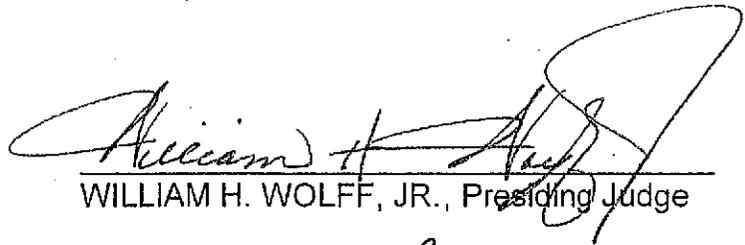
He also contends appellate counsel was ineffective for not arguing that trial counsel was ineffective for not subpoenaing Hearshel Drussell to testify in his defense. In support of this argument, he attached a copy of the police investigation report where Drussell told Officer John Riezel of the Dayton Police Department that he saw the fight and there was no gun involved.

This argument has no merit in a claim of ineffective assistance of appellate counsel because trial counsel may have interviewed Drussell and concluded his testimony was not credible or helpful. However, Cleaver's argument may have merit

in a post-conviction proceeding where the reason for trial counsel's not calling Drussell as a defense witness could be pursued. See R.E. 2953.21(A)(1).

Cleaver's application for reopening his direct appeal pursuant to App.R. 26(B) is Denied.

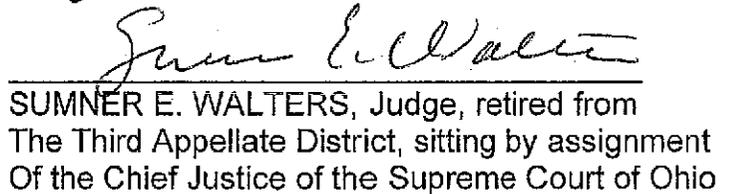
SO ORDERED.



WILLIAM H. WOLFF, JR., Presiding Judge



JAMES A. BROGAN, Judge



SUMNER E. WALTERS, Judge, retired from
The Third Appellate District, sitting by assignment
Of the Chief Justice of the Supreme Court of Ohio

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