

No. 2007-0325

In the

Supreme Court of Ohio

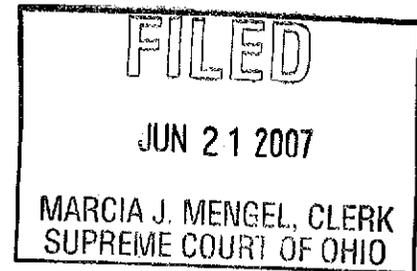
THE STATE OF OHIO,

Plaintiff-Appellee

vs.

ANDRE DAVIS,

Defendant-Appellant



Appeal from the Court of Appeals, Hamilton County, First Appellate District,
No. C 040665

MERIT BRIEF FOR DEFENDANT -APPELLANT ANDRE DAVIS

H. FRED HOEFLE, (1717)
[Counsel of Record]
810 Sycamore Street
Cincinnati, OH 45202
(513) 579-8700
FAX: (513) 579-8703
Counsel for Defendant-Appellant, Andre Davis

SCOTT M. HEENAN, (75734P)
Assistant Hamilton County Prosecutor
[Counsel of Record]
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202
(513) 946-3227; FAX: (513) 946-3021
Counsel for Appellee, the State of Ohio

DAVID H. BODIKER (16590)
Ohio Public Defender
STEPHEN P. HARDWICK
(Reg. No. 62932)
Assistant Public Defender
[Counsel of Record]
8 East Long Street - 11th Floor
Columbus, OH 43215
Counsel for Amicus
Office of the Ohio Public Defender

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STATEMENT OF THE CASE AND FACTS

Andre Davis, Appellant, was convicted of voluntary manslaughter in the death of Edmund Scott, who had been shot outside of Checquers night club in Springdale, Hamilton County, Ohio, on November 8, 2003. Both men were at the club and a confrontation occurred outside the club in the parking lot. Scott struck Davis over the head with a gun, and Davis pulled a gun and fired it twice. Several other men present in the parking lot also fired their guns at about the same time. Scott was hit twice and died shortly thereafter.

Davis was indicted for murder and having a weapon under disability. His case was tried to a jury, and Davis was acquitted of murder, but found guilty of voluntary manslaughter and of having a weapon under disability. Unfortunately, one of his trial counsel, Mr. Thomas Miller, died after the trial. Davis' other trial counsel, Ms. L. Beth Zahneis, represented him as sole appellate counsel in his direct appeal to the Court of Appeals for the First Appellate District. Davis' conviction was affirmed on appeal, *State v. Davis*, 1st Dist. C 040665, 2006-Ohio-3171. Davis then hired his present appellate counsel, who prepared and filed a timely direct appeal to this Court, Case No. 06-1487, and also a timely Application to Reopen Appeal under App. R. 26(B) in the court of appeals. For a period of time, both actions were simultaneously pending.

In both proceedings, Davis, pursuant to language from *State v. Murnahan* (1992), 63 Ohio St. 3d 60, 584 N.E.2d 1204, raised three issues which had not been raised in the direct appeal in the Court of Appeals by his counsel, who was also one of his trial counsel.

Davis claimed (1) that his trial was prejudicially infected by egregious prosecutorial misconduct; denying him due process of law under the Fourteenth Amendment; (2) that he received ineffective assistance of his trial counsel, both of whom failed to object to the prosecutorial misconduct, a violation of his right to counsel under the Sixth Amendment; and (3) that his Sixth Amendment right to effective assistance of appellate counsel was denied him by the failure of appellate counsel to raise on the appeal both the prosecutor's misconduct and the ineffectiveness of trial counsel.

The trial errors which were the foundation of the new claims was prosecutorial misconduct, of such egregiousness that Davis was denied the fair trial to which he is entitled by the due process clause of the Fourteenth Amendment. *Estelle v. Williams* (1976), 425 U.S. 501, 96 S.Ct. 1691, U.S. Const., Amend. XIV. At Davis' trial, the prosecutor alluded to matters not supported by admissible evidence, by attributing to Davis words -- inflammatory and incriminating words -- *which were never said*, according to the record, which is misconduct, *State v. Hart* (1994), 94 Ohio App.3d 665, 641 N.E.2d 755, appeal not allowed, 70 Ohio St.3d 1446, 639 N.E.2d 114. *State v. Daugherty* (1987), 41 Ohio App.3d 91, 93, 534 N.E.2d 888, 891. This prosecutor has committed similar misconduct in other cases, *State v. Neeley* (2001), 143 Ohio App.3d 606, 758 N.E.2d 745; *State v. Marcus Wilson* (1st Dist. C-000670), 2002-Ohio-1854.

The trial prosecutors accused defense counsel, his investigator, and the accused of "cooking up" their defense, thereby denigrating defense counsel, which is forbidden. *State*

v. Moore (1994), 97 Ohio App.3d 137, 143, 646 N.E.2d 470, *State v. Tolbert* (1990), 70 Ohio App.3d 372, 591 N.E.2d 325. The prosecutor employed appeals to law and order sentiments in his arguments to obtain a conviction, which is misconduct, *State v. Draughn* (1992), 76 Ohio App.3d 664, 602 N.E.2d 790, *United States v. Monaghan* (D.C. Cir. 1984), 741 F.2d 1434, cert. den. 470 U.S. 1085. And the prosecutor stated his opinion of the credibility of the accused, and also provided his opinion as to Appellant's guilt, both of which tactics are condemned as unfair and prejudicial prosecutorial tactics, *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883; *State v. LaFreniere* (1993), 85 Ohio App.3d 840, 621 N.E.2d 812.

To none of these instances of prejudicial prosecutorial misconduct did the defense object, nor did it move for mistrial, nor seek some other remedy for the egregious misconduct which deprived Appellant Davis of a fair trial and to due process of law under the Fourteenth Amendment. Moreover, these grievous violations of Davis' right to due process of law and a fair trial were not raised by his appellate counsel on the initial direct appeal to the First District, a separate instance of ineffective assistance under the Sixth Amendment, which guarantees to all defendants in criminal cases the right to the effective assistance of counsel at trial, and upon appeal from their convictions, *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830.

On October 18, 2006, this Court refused to hear Davis' direct appeal. His

Application to Reopen Appeal remained pending until January 8, 2007, when the Court of Appeals rejected it in a two page entry purporting to give its reasons for its decision. The Court refused to address the merits of Appellant's App. R. 26B claims, stating that all of his issues were res judicata because "[t]he appellant could have raised these matters in his appeal to the Ohio Supreme Court. And he does not now offer any reason why applying the doctrine of res judicata to bar his claims would be unjust."

And, with respect to the claim of ineffective trial and appellate counsel, the Court of Appeals held that, since "the same counsel represented the appellant at trial and in his direct appeal, '[appellate] counsel cannot realistically be expected to argue [on appeal] his own incompetence [at trial], [and therefore] this Court cannot say that appellate counsel was deficient in failing to assign as error her own ineffectiveness' at trial." (Entry, p.2), citing *State v. Cole* (1982), 2 Ohio St. 3d 112, 114, 443 N.E.2d 169, fn 1.

Appellant filed an application to reconsider the denial of the 26B application, pointing out, inter alia, that he actually did raise the issues in his appeal to this Court, filed August 7, 2006 (which one supposes the Court of Appeals ought to have known at the time it denied the 26B on res judicata grounds on January 8, 2007). He also pointed out to the Court of Appeals that the decision of the First District meant that Appellant would never get a ruling on the merits of his claims of prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel in *any* Ohio court. Davis asserted that the handling of the matter by the Court of Appeals worked a denial of Appellant's right to due

process of law under the Fourteenth Amendment to the U.S. Constitution, as well as the Sixth Amendment and separate Fourteenth Amendment due process violations set forth in his original Rule 26B Application to Reopen. The Court of Appeals overruled the Application for Reconsideration. Davis appealed to this Court, which accepted for review the Second Proposition of Law Propounded by Davis.:

“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).”

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1:

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. 26B).

Appellant Davis timely filed an application to reopen appeal pursuant to App. R. 26(B). Although it is “a basic tenet of Ohio jurisprudence that cases should be decided on their merits and not on mere procedural technicalities,” *Barksdale v. Van’s Auto Sales, Inc.* (1988), 38 Ohio St. 3d 127, 128, 527 N.E.2d 284, the Court of Appeals, denied the application without giving proper consideration of Davis’ claims.

Rather than rule on the merits of the Rule 26B application, the appellate court evaded its responsibility to decide all of those issues by conjuring up an unfounded res judicata argument, holding that since Appellant could have raised the issues in his direct appeal to this Court, the issues were res judicata, and the Court of Appeals dismissed the application to reopen on that spurious ground. But, of course, Appellant *did* raise the issues in his direct appeal to this Court, and in the 26(B) Application in the Court of Appeals. And he has yet to obtain a decision on the merits of the issues he raised in either court.

THE DECISION BY A COURT OF DISCRETIONARY REVIEW NOT TO ACCEPT AN APPEAL IS NOT RES JUDICATA AS TO ANY ISSUE IN THE CASE, OR AS TO ANY PARTY.

This Court has succinctly defined the doctrine of res judicata: “A valid, *final judgment* rendered *upon the merits* bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.* (1995) 73 Ohio St. 3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus (Emphasis added). The elements of res judicata are (1) the prior suit must end in a judgment on the merits; (2) the parties must be identical or in privity in both the prior and later proceedings; (3) both suits involve the same claim or cause of action; and (4) there must have been a full and fair opportunity to litigate the claim in the prior suit. *Nwosun v. General Mills Restaurant Inc.* (10th Cir. 1997), 124 F.3d 1255, 1257.

In criminal cases, under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant . . . “from raising and litigating in any proceeding, except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Szefcyk* 77 Ohio St.3d 93, 96. [1996-Ohio-337].” *State v. Spillan*, 10th Dist. 06AP-50, et al., 2006-Ohio-4788, ¶ 9.

But there is an important exception to this rule in situations in which the criminal defendant is represented on his direct appeal from his conviction by the same, or one of the same, attorneys who represented him at his trial. That exception applies in this case:

A. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL NOT PREVIOUSLY RAISED IN AN APPEAL WHERE THE DEFENDANT WAS REPRESENTED ON THAT APPEAL BY THE SAME ATTORNEY WHO ALLEGEDLY HAD PROVIDED THE INEFFECTIVE ASSISTANCE EVEN WHERE THE DEFENDANT WAS ALSO REPRESENTED ON THAT APPEAL BY ANOTHER ATTORNEY WHO HAD NOT REPRESENTED THE DEFENDANT AT THE TIME OF THE ALLEGED INEFFECTIVE ASSISTANCE.

The foregoing rule of law is, verbatim, the syllabus of the decision of this Court in *State v. Hutton*, 100 Ohio St. 3d 176, 2003-Ohio-5607, discussion at ¶¶ 36-42 (emphasis added).

The *Hutton* syllabus is squarely in point in this case, and compels the conclusion that the issues of prosecutorial misconduct, of the ineffective assistance of trial counsel (for failing to object to the misconduct) and of ineffective assistance of appellate counsel (in failing to raise on appeal the prosecutorial misconduct and the said ineffectiveness of trial counsel at trial), are not res judicata, and that the First District should be compelled to give full, fair and meaningful consideration to Davis' Application to Reopen Appeal.

Appellant's appellate counsel should have recognized the misconduct and ineffective assistance issues and should have raised them in the Court of Appeals. Appellant Davis here recognized the omission from his appeal of the claims of the prosecutor's misconduct, and of his trial and appellate counsel's ineffectiveness in failing to object at trial and to raise the

issue on appeal, within time to raise the issues in the two proceedings then available to him through Ohio law: a direct appeal to this Court, and an appellate postconviction proceeding [an Application to Reopen Appeal under App. R. 26(B)]. And, with new counsel, he did so; in both proceedings, and in timely fashion. He also recognized and acknowledged the fact in both courts that one of his trial counsel represented him in his direct appeal in the Court of Appeals. He has done all that is required to obtain merit review of his Application to Reopen under App. R. 26(B).

In addition to the principles recognized by the Court in *Hutton*, there are other reasons that the denial of that Application on res judicata grounds is erroneous.

B. THE PREREQUISITES TO THE OPERATION OF THE DOCTRINE OF RES JUDICATA ARE NOT MET WHERE THERE IS NO FINAL JUDGMENT ON THE MERITS, AND WHERE THE AGGRIEVED PARTY WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIMS.

The issues raised in Davis' Rule 26 (B) application cannot be subject to the effect of res judicata in this case because the issue of the ineffectiveness of appellate counsel had not been finally determined on the merits in a final judgment, a prerequisite to the application of res judicata. The underlying issues, prosecutorial misconduct and ineffectiveness of trial counsel, were contained within the claim of ineffectiveness of appellate counsel, and were thus also not finally determined in the appellate courts. *State v. Szefcyk, supra*. Thus, there was no final determination and no judgment where those claims were determined. Here, the

Court of Appeals ruled that the issues involving misconduct of the prosecutor and the ineffective response by Appellant's trial counsel (as well as by his appellate counsel on appeal) were res judicata even though when Appellant filed the 26 (B) application, this Court had yet to rule on whether it would hear his direct appeal, much less decide its merits. Thus, the first element of res judicata has not been satisfied, in that there is no final judgment or determination as to whether the prosecutor's conduct was prejudicial misconduct, and whether the failure of Appellant's counsel to object at trial, or to raise the issue of prosecutorial misconduct and ineffective assistance of trial counsel on appeal were themselves denials of Davis' Sixth Amendment right to the effective assistance of counsel both at trial, *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, and on appeal *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830.

The very treatment accorded to these significant issues by the Court of Appeals, denying the Application to Reopen the appeal because the issue *could* have been raised on the direct appeal to this Court, demonstrates that the Court of Appeals has no intention in this case (or in any other) to observe and respect App. R. 26(B) and to give full consideration to the exercise by an criminal appellant of the right of review provided by App. R. 26(B). The rationale employed by the Court of Appeals permits it (and any other court of appeals) to avoid deciding any application to reopen appeal under App. R. 26(B). Since it is possible in every case for an unsuccessful appellant to attempt a further appeal to the Supreme Court, then the use by the court of appeals of that possibility to invoke res judicata and thus to avoid

deciding such an application is possible in every case. And the denial of relief under Rule 26(B) is possible –and likely – in every case. Such a resolution of the claim of ineffective appellate counsel not only offends App. R. 26(B), it renders the Rule totally ineffective to protect the rights of appellants to the effective assistance of appellate counsel.

There has been no final ruling on the merits of these issues by the Court of Appeals, and that court refused to afford Appellant a full and fair opportunity to litigate the merits of his claims of prosecutorial misconduct. These are two of the essential elements of res judicata. *Nwosun v. General Mills Restaurant Inc., supra*. Res judicata therefore cannot constitute a bar to a merits decision of the issues raised in the Application to Reopen the Appeal.

C. IN A FELONY CASE, THE EXERCISE OF THE DISCRETION OF THE SUPREME COURT TO REFUSE TO ACCEPT AN APPEAL IS NOT A RULING ON THE MERITS OF THE CAUSE, BECAUSE THE COURT HAS NOT ACQUIRED JURISDICTION, AND IS THUS POWERLESS TO RULE ON THE MERITS.

The prerequisite to application of the doctrine of res judicata that the prior decision must be a final judgment on the merits can never apply to the decision of the Supreme Court of Ohio, a court of discretionary review, to refuse to accept an appeal, because the court never acquires jurisdiction unless and until it accepts the case for appellate review.

The Supreme Court has appellate jurisdiction in felony cases “on leave first obtained,” O. Const. Art. IV Sec. 2 (B)(2)(b). Consequently, where the Court refuses to accept an

appeal, it dismisses the appeal and the case is over. Under such circumstances, the Court has not granted leave. Since leave was not first obtained, the Court acquired no jurisdiction over the appeal. Without jurisdiction, there is no power to render a judgment, or any final determination on the merits. The requirement that, for res judicata to apply, the decision must be a final determination of the merits, cannot be met by the refusal of a court of discretionary review to entertain an appeal. There is no final decision, and there is no final determination of the merits of the case. And there is no possibility that the decision can support a lawful invocation of the doctrine of res judicata by a court of appeals, or any other court.

Courts which employ res judicata to avoid deciding issues which have not -- and have never -- been fully and fairly determined on their merits deny the litigants due process of law under the Fourteenth Amendment, *South Central Bell Telephone Co. v. Alabama* (1999), 526 U.S.160, 168. And that is what occurred here.

It is respectfully submitted that the opportunity to file a discretionary appeal in the Supreme Court of Ohio does not create a res judicata bar to an application to reopen appeal under App. R. 26(B). And this is because the Supreme Court of Ohio is a court of *discretionary* review. The refusal of the Court to accept a case for review is obviously not, and cannot be, a JUDGMENT on the merits. It is only a determination by the Supreme Court that the case presented is not one of public or great general interest. *Kern v. Contract Cartage Co.* (1936), 55 Ohio App. 481, 485, 9 N.E.2d 869. “[T]he sole issue for determination at the hearing upon such motion [for leave to appeal] is whether the cause

presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties.” *Williamson v. Rubich* (1960), 171 Ohio St. 253, 253-4, 168 N.E.2d 876. But, most significantly, the Supreme Court’s decision not to accept an appeal cannot support a res judicata finding because the Supreme Court never obtains jurisdiction over the felony appeal when it refuses to first grant leave to appeal. O. Const. Art. IV Sec. 2 (B)(2)(b). Consequently, that refusal cannot support the conclusion that it creates a res judicata bar to merit review of the claims of the aggrieved party.

It should be noted that this Court has held that “claims of ineffective assistance of appellate counsel should be considered and disposed of in the appellate court where the alleged error occurred. . . .” *Morgan v. Eads*, 104 Ohio St. 3d 142, 2004-Ohio-6110, 818 N.E.2d 1157. The overruling of Appellant’s 26(B) application by the Court of Appeals violated this principle. In fact, the *only* permissible basis of an App. R. 26(B) application *is* the ineffectiveness of appellate counsel in a criminal case before an intermediate appellate court. App.R. 26(B) does not apply to cases in the trial courts; it does not apply to cases in this Court. It applies ONLY to cases in the Court of Appeals. Obviously App. R. 26 (B) – and ONLY App. R. 26(B) – is the vehicle for raising and deciding the issues presented by a claim of ineffective assistance of appellate counsel. App. R. 26(B) did not exist when *State v. Murnahan, supra*, and *State v. Cole, supra*. were decided, and to the extent those cases differ from App. R. 26(B), they are not correct law and must be modified.

The *Murnahan* decision, which spawned App. R. 26(B), is being misused. *Murnahan*

itself limits the filing of an application to reopen an appeal only in situations where the time for reconsideration and an appeal to the Supreme Court has expired, *Murnahan*, 63 Ohio St. 3d at 66. That is not the case here, and Appellant ought not to be held bound by the dicta in *Murnahan* that he can raise the issues in his appeal to this Court.¹ The Court should recognize that *Murnahan* has been superseded by App. R. 26(B), and should rule that the Rule provides the only means to raise ineffective assistance of appellate counsel in a criminal case.

App. R. 26(B), however, permits the filing of the application to reopen both before and after the filing of an appeal in the Supreme Court. This means that the issues raised in the 26B application are different than those raised in a jurisdictional memorandum with the Court. See *Eads*, 2004-Ohio-6110, at ¶ 14. And here, it must be noted, Appellant did not sit on his rights, but filed both the Application to Reopen in the Court of Appeals, and his direct appeal to this Court, within the time provided by law.

It is axiomatic that where the law provides a right, it will provide a remedy for the breach of that right. Appellant has the right under the Sixth Amendment to the effective assistance of both trial and appellate counsel. He also has the right to fair and impartial

¹The court of appeals is in effect attempting to invest this Court with original jurisdiction to hear and decide claims of ineffective appellate counsel in criminal cases. The Ohio Constitution specifies the types of cases in which this Court has original jurisdiction, and the determination of whether appellate counsel rendered effective assistance to the client is not among them. To some it may appear that the appellate courts which attempt to employ the *res judicata* doctrine as it was employed here are more interested in passing the buck, and avoiding deciding very many very difficult cases.

enforcement of the rights granted him under the Due Process Clause of the Fourteenth Amendment. Since the promulgation of App. R. 26(B), the right to effective assistance of appellate counsel is secured to him by that Rule. But, since the law will not presume that appellate counsel will raise his or her own ineffectiveness, the poor defendant who is represented on appeal by his trial counsel is out of luck, according to the decision of the court of appeals.

It is respectfully submitted that the opportunity to file a discretionary appeal in the Supreme Court of Ohio does not create a res judicata bar to a timely application to reopen appeal under App. R. 26(B).

Because a timely-filed application pursuant to App. R. 26(B) gives an appellant the right to raise the issues, he has an enforceable right to do so, pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution, a right denied by the order of the Court of Appeals overruling his 26(B) application without even considering the merits of the claims which he raised therein, *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830.

THE COURT SHOULD CLOSE THE LOOPHOLE CREATED BY MURNAHAN WHICH ENABLES AND PERMITS COURTS OF APPEALS TO CIRCUMVENT THE ENFORCEMENT OF THE RIGHT GRANTED CRIMINAL APPELLANTS BY APP. R. 26(B) TO MEANINGFUL, MERIT REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN THEIR INITIAL, DIRECT APPEALS.

The Court has held that “claims of ineffective assistance of appellate counsel should be considered and disposed of in the appellate court where the alleged error occurred. . . .” *Morgan v. Eads*, 104 Ohio St. 3d 142, 2004-Ohio-6110, 818 N.E.2d 1157. The overruling of Appellant’s 26(B) application by the Court of Appeals violated this principle. In fact, the *only* permissible basis of an App. R. 26(B) application *is* the ineffectiveness of appellate counsel in a criminal case before an intermediate appellate court. To the extent that *Murnahan*, and *Cole*, differ from App. R. 26(B), they are incorrect statements of the law and must be modified.

A defendant cannot in the first instance raise ineffective assistance of appellate counsel in the initial appeal in the court of appeals, because it is trial counsel who was allegedly ineffective who is representing the Appellant on the first, direct, appeal. Logic and *State v. Eads, supra*, dictate that the effectiveness of appellate counsel can be determined only after the appeal is over and the court of appeals has rendered its written decision (how else could one argue or demonstrate prejudice without considering the decision of the Court of Appeals before which the case was pending?). The only proceeding available

to permit the adjudication of ineffectiveness of appellate counsel is, therefore, App. R. 26(B).

Some appellate districts properly follow the law and make decisions on the merits of claims raised in applications to reopen appeals brought pursuant to the statement in *Murnahan* and *Eads* that appellate courts should make the decision of claims that appellate counsel was ineffective, pursuant to App. R. 26(B). *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543, ¶¶ 30-31; *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165, ¶ 5. Others, such as the Court below in this case, twist the doctrine of res judicata beyond its proper scope in order to avoid deciding whether counsel in an appeal in their courts have rendered constitutionally ineffective assistance to their appellant - clients.

With the promulgation of App. R. 26(B), clearly in response to the concerns of the Court expressed in *Murnahan*, there should be no doubt that that Rule is the sole, proper means of raising the claim of ineffective assistance of appellate counsel. But evidently, some perceived that to follow App. R. 26(B) would result in a mountain of filings seeking to reopen cases which had been thought to have been finally disposed of.² Perhaps it was this concern that led imaginative courts to seek out a means of avoiding its import. Unfortunately, while invocation of res judicata would certainly lessen the work of the appellate courts, it would also result, as it did here, in the denial of meaningful merit review

²Those who were involved in the practice of criminal law, particularly appellate law, will recall the inundation descending upon the federal courts when the new statute of limitations on habeas corpus actions was about to expire one year after it became effective (which was the last date on which petitions could be filed for cases arising before the effective date.

of claims of ineffective assistance for untold numbers of wrongfully incarcerated prisoners.

In addition to resolving the conflict between several appellate districts, ruling for Appellant here will restore the effective enforcement of the Sixth Amendment right to the effective assistance of appellate counsel in criminal cases throughout Ohio. Once again, the right will have a remedy for its violation.

It is respectfully submitted that the Court should hold as follows:

1. That App. R. 26(B) provides the *sole* vehicle for raising issues on appeal which were not raised by appellate counsel.

2. That the fact that an unsuccessful appellant has an option to appeal to this Court does *not* render the issue of ineffectiveness of appellate counsel res judicata.

3. That the issue of ineffectiveness of appellate counsel may be raised on an Application to Reopen under App. R. 26(B).

4. That the issues allegedly omitted from the initial appeal by the initial appellate counsel are not res judicata, and may be raised on such Application to Reopen.

CONCLUSION

For the reasons stated, the Court is urged to reverse the decision below denying Appellant Davis' timely Application to Reopen Appeal, and to remand the cause to the First District for a merit decision on his claims.

Respectfully submitted,


H. FRED HOEFLE # 1717

810 Sycamore Street
Cincinnati, OH 45202
(513) 579-8700
FAX: (513) 579-8703

Attorney for Defendant-Appellant Andre Davis

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served on the 20 day of June, 2007, upon opposing counsel, the office of the Hamilton County Prosecutor, Mr. Scott Heenan, by Regular U.S. Mail directed to his office, 230 E. 9th Street, 9th Floor, Cincinnati, OH 45202.


H. FRED HOEFLE No. 1717
Attorney for Defendant - Appellant Andre Davis

APPENDIX

07-0325

No. _____

In the

Supreme Court of Ohio

THE STATE OF OHIO,

Plaintiff-Appellee

vs.

ANDRE DAVIS,

Defendant-Appellant

Appeal from the Court of Appeals, Hamilton County, First Appellate District,
Case No. C 040665

NOTICE OF APPEAL FOR DEFENDANT-APPELLANT ANDRE DAVIS

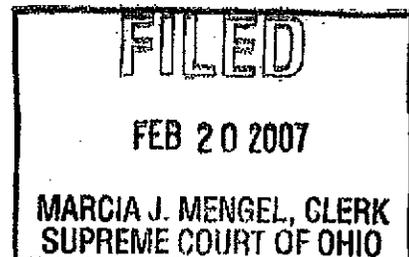
H. FRED HOEFLE, No. 1717

810 Sycamore Street
Cincinnati, Ohio 45202
(513) 579-8700; FAX: (513) 579-8703

Counsel for Defendant-Appellant, Andre Davis

SCOTT M. HEENAN No. 75734P
Assistant Hamilton County Prosecutor
4000 Taft Law Centre, 230 East Ninth Street
Cincinnati, Ohio 45202
(513) 946-3227; FAX: 946-3021

Counsel for the State of Ohio



Notice of Appeal of Andre Davis

Andre Davis, Appellant, through counsel, hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C 040665, on January 8, 2007.

This case raises a substantial constitutional question, is one of public or great general interest, and involves a felony.

Respectfully submitted,


H. FRED HOEFLE # 1717

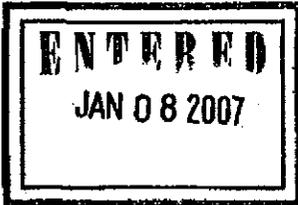
810 Sycamore Street
Cincinnati, OH 45202
(513) 579-8700
FAX: (513) 579-8703

*Attorney for Defendant-Appellant
Andre Davis*

CERTIFICATE OF SERVICE

I certify that a true copy of this document was served on opposing counsel, the Office of the Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, Ohio on the 19 day of February, 2007, by regular U.S. Mail service.


H. FRED HOEFLE
*Counsel for Defendant-Appellant
Andre Davis*



IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, : APPEAL NO. C-040665
Plaintiff-Appellee, :
vs. : *ENTRY OVERRULING*
ANDRE DAVIS, : *APPLICATION FOR*
Defendant-Appellant. : *REOPENING OF APPEAL.*



D71533688

This case is considered upon the appellant's App.R. 26(B) application to reopen this appeal and upon the state's response.

In his application, the appellant contends that he was denied the effective assistance of appellate counsel, when counsel failed to assign as error various instances of prosecutorial misconduct during closing argument and the trial court's failure to transmit to this court a complete trial record. The appellant could have raised these matters in his appeal to the Ohio Supreme Court. And he does not now offer any reason why applying the doctrine of res judicata to bar his claims would be unjust. The court, therefore, concludes that res judicata bars consideration of these claims upon the appellant's application to reopen his appeal.¹

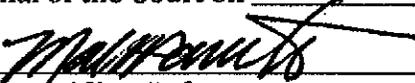
¹ See *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204.

OHIO FIRST DISTRICT COURT OF APPEALS

The appellant also contends that he was denied the effective assistance of appellate counsel, when counsel failed to assign as error her own ineffectiveness at trial in failing to object to the alleged prosecutorial misconduct. When, as here, the same counsel represented the appellant at trial and in his direct appeal, “[appellate] counsel cannot realistically be expected to argue [on appeal] his own incompetence [at trial].”² Thus, applying the standards set forth in *Strickland v. Washington*³ and *State v. Bradley*,⁴ the court cannot say that appellate counsel was deficient in failing to assign as error her own ineffectiveness in failing to offer timely objections to the closing comments of the assistant prosecuting attorney.

Based upon the foregoing, the court concludes that the appellant has failed to sustain his burden of demonstrating a genuine issue concerning whether he has a colorable claim of ineffective assistance of counsel on appeal.⁵ Accordingly, the court denies his application to reopen this appeal.

To the Clerk:

Enter upon the Journal of the Court on JAN - 8 2007
per order of the Court 
Presiding Judge

(COPIES SENT TO ALL PARTIES.)

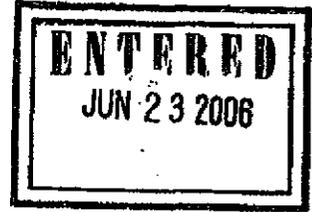
² *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169, fn. 1.

³ (1984), 466 U.S. 668, 104 S.Ct. 2052.

⁴ (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

⁵ See *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; *State v. Reed*, 74 Ohio St.3d 534, 535-536, 1996-Ohio-21, 660 N.E.2d 456.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



D68938275

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ANDRE DAVIS,

Defendant-Appellant.

APPEAL NO. C-040665

TRIAL NO. B-0400414

JUDGMENT ENTRY.

This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed for the reasons set forth in the Decision filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on June 23, 2006 per Order of the Court.

By: Therese A. Dean
Acting Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
JUN 23 2006

STATE OF OHIO, : APPEAL NO. C-040665
Plaintiff-Appellee, : TRIAL NO. B-0400414

vs. : *DECISION.*

ANDRE DAVIS, :
Defendant-Appellant. :

PRESENTED TO THE CLERK
OF COURTS FOR FILING

JUN 23 2006

Criminal Appeal From: Hamilton County Court of Common Pleas

COURT OF APPEALS

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 23, 2006

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

White, Getgey & Meyer Co., LPA, and *L. Beth Zahmeis*, for Defendant-Appellant.

ENTERED
JUN 23 2006

SUNDERMANN, Judge.

{¶1} Andre Davis appeals his conviction for voluntary manslaughter and for having a weapon under a disability. Because we conclude that Davis's assignments of error do not have merit, we affirm the judgment of the trial court.

Background

{¶2} On November 8, 2003, Davis went to Checquers nightclub in Springdale, Ohio. Edmund Scott was also at the club. That night, Davis and Scott had a confrontation outside the bar. According to witnesses, the two men began to argue. Scott then hit Davis over the head with a gun. Davis pulled a gun from his pocket and fired it twice. Scott was hit with two bullets and later died from his injuries.

{¶3} Davis was indicted for murder in violation of R.C. 2903.02(A), with a gun specification, and for having a weapon under a disability in violation of R.C. 2923.13(A)(3). The case was tried before a jury. At the conclusion of the trial, the jury found Davis not guilty of murder, but guilty of voluntary manslaughter and of having a weapon under a disability.

Expert Witness

{¶4} In his first assignment of error, Davis claims that the trial court erred when it refused to allow police officer Michael Gardner to testify as an expert on his behalf. At trial, Davis testified that there had been an ongoing dispute between a group from Evanston, where Davis lived, and a group from Madisonville, where Scott lived. He testified that he had had a previous encounter with Scott, during which Scott had shot at him while Davis was in his mother's car. According to Davis, he had purchased a gun to protect himself. Davis testified that, on November 8, he had believed that Scott was

going to kill him, and that he had fired his gun as he was running away from Scott. Davis sought to have Gardner bolster his self-defense claim by explaining that Davis had been acting in self-defense, even though Scott had been shot in the back.

{¶5} A witness who is qualified as an expert and whose testimony is based on reliable scientific, technical, or other specialized information may testify as an expert about “matters beyond the knowledge or experience possessed by lay people.”¹ We review a trial court’s decision to exclude evidence under an abuse-of-discretion standard.²

{¶6} Here, the trial court concluded that the decision about whether Davis had acted reasonably was the jury’s. We agree. During his testimony, Davis stated that Scott had had a gun on him, and that Davis had had nowhere to go to escape Scott. The jury was capable of determining whether Davis had acted reasonably without the aid of Gardner’s testimony. While the admission of Gardner’s testimony may not have risen to the level of plain error, as argued by the state, the trial court did not abuse its discretion in refusing to admit the testimony. The first assignment of error is without merit.

Voluntary Manslaughter

{¶7} Davis’s next two assignments of error relate to the voluntary-manslaughter conviction. Davis’s second assignment of error is framed in terms of the trial court’s failure to apply the law of *State v. Perdue*,³ which was decided by the Seventh Appellate District. We recast this assignment to reflect more appropriately the issues raised by Davis, that is, whether the trial court erred when it overruled his Crim.R. 29 motion, and whether the trial court erred when it refused to include a requested jury instruction. The third assignment of error is that the trial court erred when it instructed the jury on the

¹ Evid.R. 702.

² *State v. Withers* (1975), 44 Ohio St.2d 53, 55, 337 N.E.2d 780, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.

³ 153 Ohio App.3d 213, 2003-Ohio-3481, 792 N.E.2d 747.

ENTERED
JUN 23 2006

unindicted offense of voluntary manslaughter. We consider the assignments of error together.

{¶8} Davis argues that the trial court erred in denying his Crim.R. 29 motion because the state did not present sufficient evidence that he had acted under a sudden passion or a fit of rage. Davis contends that, at best, the evidence showed that he had acted in fear, and that, as the Seventh Appellate District held in *Perdue*, evidence of his fear alone was not sufficient to support a conviction for voluntary manslaughter.⁴

{¶9} Davis's motion was raised prior to the jury instructions. His counsel's arguments were directed to the murder charge. Because the trial court had not yet announced its decision to include voluntary manslaughter in the charge to the jury, the issue was not raised in Davis's Crim.R. 29 motion. The trial court's denial of the motion with respect to the murder charge is moot because the jury found Davis not guilty of that offense.

{¶10} Even if Davis had made a Crim.R. 29 motion with respect to voluntary manslaughter, the motion would have been properly denied by the trial court because the state had presented sufficient evidence to sustain a conviction for voluntary manslaughter.

{¶11} A person who, "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, * * * knowingly cause[s] the death of another * * *" is guilty of voluntary manslaughter.⁵ Witnesses testified that Davis and Scott had had a heated argument before Scott was shot, and that Scott had hit Davis over the head with his gun with enough force to break the

⁴ Id. at 217-218.

⁵ R.C. 2903.03(A).

ENTERED
JUN 23 2006

gun. Scott's action constituted serious provocation that could have reasonably incited Davis into using deadly force.

{¶12} Our conclusion that the state presented sufficient evidence of voluntary manslaughter to survive a Crim.R. 29 challenge leads us to conclude also that the trial court properly instructed the jury on the offense.

{¶13} Davis argues that he could not have been convicted of an offense for which he had not been indicted. But "[p]ursuant to R.C. 2945.74 and Crim.R. 31(C), a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses."⁶ Voluntary manslaughter is an offense of inferior degree to murder.⁷ The court was required to give an instruction on voluntary manslaughter because the state presented sufficient evidence so that the jury could have reasonably acquitted Davis of murder and found him guilty of voluntary manslaughter.⁸

{¶14} Davis next contends that even if the trial court correctly decided to charge the jury on voluntary manslaughter, it improperly refused to include a statement of the law that he had requested.

{¶15} The trial court's voluntary-manslaughter instructions included the following language: "An act committed while under sudden passion or in a sudden fit of rage, brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite a person into using deadly force[,] is an act done in the heat of blood,

⁶ *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph one of the syllabus.

⁷ *State v. Tyler* (1990), 50 Ohio St.3d 24, 36, 553 N.E.2d 576.

⁸ *Deem*, supra, at 211.

ENTERED
JUN 23 2006

without time to reflect or for passions to cool. In determining whether the defendant, Andre Davis, was under the influence of sudden passion or sudden fit of rage, either of which was brought on by serious provocation, you should consider any credible evidence, whether offered by the [s]tate or the defendant.” Davis requested that, at the end of this language, the trial court state that “[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or sudden fit of rage.” The trial court denied his request.

{¶16} We review a trial court’s refusal to include a requested jury instruction under an abuse-of-discretion standard.⁹ A requested jury instruction “need not be given where the general charge includes and covers the correct essential elements of the requested special instruction.”¹⁰ Davis’s counsel wanted it to be clear that the jury could not find him guilty of voluntary manslaughter merely because he had acted out of fear. The trial court’s instruction clearly defined what constituted an act done under sudden passion or fit of rage. Therefore, an additional instruction about fear was unnecessary. We conclude that the trial court did not abuse its discretion in refusing to give the requested instruction.

{¶17} The second assignment of error, as recast, and the third assignment of error are overruled.

Voir Dire

{¶18} In his final assignment of error, Davis asserts that the trial court erred when it allowed the state to use its peremptory challenges to strike three African-American jurors.

⁹ *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443.

¹⁰ *State v. Corkran* (1965), 3 Ohio St.2d 125, 209 N.E.2d 437, paragraph three of the syllabus.

{¶19} The use of peremptory challenges to discriminate based on race is prohibited by the Equal Protection Clause of the Fourteenth Amendment.¹¹ In *State v. White*, the Ohio Supreme Court discussed the three-step procedure for evaluating *Batson* challenges.¹² “First, the opponent of the strike must make a prima facie showing of discrimination. Second, the proponent must give a race-neutral explanation for the challenge. Third, the trial court must determine whether, under all the circumstances, the opponent has proven purposeful racial discrimination.”¹³ “A trial court’s finding of no discriminatory intent will not be reversed on appeal absent a determination that it was clearly erroneous.”¹⁴

{¶20} The state exercised its peremptory challenges to exclude potential jurors Napier, Griggs, and Berry. Upon defense counsel’s prima facie showing of discrimination, the prosecutor stated his reasons for exercising his challenges. With respect to Napier, he stated, “[I] think he and [defense counsel] had a very good rapport. He was vague about a lot of his answers. First he said he worked at UPS, and he had been there a very short time, I think he said a week. And then the more you got into it, he said he’d been going to college, which he never disclosed. And then he said that he quit college because he owed money. It seemed like he was not being forthcoming with his answers.” As to Griggs, the prosecutor sought to dismiss her because she had been to Checquers, which was where the incident had taken place. The prosecutor also cited the rapport that he believed that defense counsel had established with Griggs. Finally, the prosecutor exercised a peremptory

¹¹ *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

¹² 85 Ohio St.3d 433, 1999-Ohio-281, 709 N.E.2d 140. See, also, *State v. Jordan*, 1st Dist. No. C-040897, 2006-Ohio-2759.

¹³ *White*, supra, at 436, citing *Batson*, supra, at 96-98, *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, and *State v. Hernandez* (1992), 63 Ohio St.3d 577, 582, 589 N.E.2d 1310.

¹⁴ *State v. Johnson*, 88 Ohio St.3d 95, 116, 2000-Ohio-276, 723 N.E.2d 1054.

challenge to exclude Berry, stating that she was very young, that he believed she was immature, and that she had a lot of ties to Evanston, where Davis and his friends lived.

{¶21} A prosecutor's reasons for exercising a peremptory challenge "need not rise to the level of justifying exercise of a challenge for cause."¹⁵ Rather, the second step in the *Batson* inquiry merely requires that the explanation be race-neutral. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."¹⁶ None of the explanations given by the prosecutor in this case revealed a discriminatory intent.

{¶22} Upon the prosecutor's race-neutral explanation of his challenges to Napier, Griggs, and Berry, the inquiry moved to the third step—the trial court's determination of whether discriminatory intent had been proved. The burden of proving discriminatory intent fell upon Davis.¹⁷ And the trial court was in the best position to evaluate the exchange between the potential jurors and defense counsel and to determine whether the prosecutor's reasons were plausible or were fabricated to hide discriminatory intent. We conclude that the trial court's determination that there was no discriminatory intent was not clearly erroneous. The fourth assignment of error is overruled.

{¶23} Because Davis's assignments of error do not have merit, we affirm the judgment of the trial court.

Judgment affirmed.

DOAN, P.J., and HENDON, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁵ *Batson*, supra, at 97.

¹⁶ *Hernandez v. New York* (1991), 500 U.S. 352, 360, 111 S.Ct. 1859.

¹⁷ *Purkett*, supra, at 768.

Amendment VI.

CONSTITUTION OF UNITED STATES

AMENDMENTS - BILL OF RIGHTS

Amendment VI. Rights of Accused in Criminal Prosecutions

Amendment VI. Rights of Accused in Criminal Prosecutions

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 defence.

Amendment XIV.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

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.

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§ RULE 26

Ohio Court Rules

RULES OF APPELLATE PROCEDURE

TITLE III. GENERAL PROVISIONS

RULE 26 Application for Reconsideration; Application for Reopening

RULE 26. Application for Reconsideration; Application for Reopening

(A) Application for reconsideration.

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening.

(1) 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.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of

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appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App. R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

[Effective: July 1, 1971; amended effective July 1, 1975; July 1, 1993; July 1, 1994; July 1, 1997.]

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