

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. :

**MERIT BRIEF OF AMICI CURIAE
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IN SUPPORT OF APPELLANT ANDRE DAVIS**

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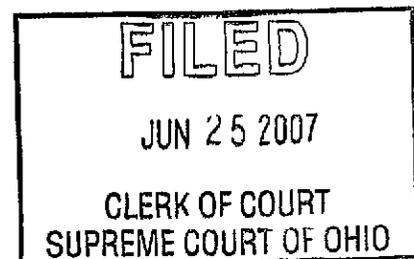
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STATEMENT OF THE CASE AND THE FACTS

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

SUMMARY OF ARGUMENT

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, cited in Morgan v. Eads, 104 Ohio St.3d 142, 2004-Ohio-6110, at ¶6.

But the res judicata doctrines of the First and Eighth Appellate districts assure that courts of appeals will almost never rule on a claim of ineffective assistance of appellate counsel. If the applicant has filed a discretionary appeal, the First and Eighth Districts will treat the denial of the appeal as a ruling on the merits. If the applicant does not ask this Court to hear a discretionary appeal, the First and Eighth Districts will refuse to consider the application.

The res judicata doctrine of the First and Eighth Districts defies the holding of Murnahan and the purpose of Appellate Rule 26(B). Further, the doctrine encourages a practice that this Court wishes to discourage—the filing of discretionary appeals to correct error.

This Court should restore meaning to Appellate Rule 26(B). This Court should reverse the decision of the court of appeals.

ARGUMENT

Proposition of Law:

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 an appeal under Appellate Rule 26(B).

I. The Supreme Court of Ohio is not a court of error correction.

The First District Court of Appeals concluded that res judicata bars the reopening of a direct appeal pursuant Appellate Rule 26(B) when a criminal defendant does not seek discretionary review by this Court or when this Court denies discretionary review.¹ The appellate court's inspiration for this conclusion appears to be the Eighth District Court of Appeals, which has issued similar holdings in many cases. See State v. Castrataro, Cuyahoga App. No. 81268, 2004-Ohio-45; State v. House, Cuyahoga App. No. 80939, 2003-Ohio-5066; State v. Jackson, Cuyahoga App. No. 75354, 2002-Ohio-5817; State v. O'Neal, Cuyahoga App. No. 83393, 2005-Ohio-3568; State v. Jones, Cuyahoga App. No. 83852, 2005-Ohio-1494.

All of these cases are misguided. First, it is rare that this Court would grant jurisdiction to hear arguments presented for the very first time. See, e.g., State v. Martello, 97 Ohio St.3d 398, 2002-Ohio-661 at ¶41 fn.2. More importantly, requiring defendants to present claims of ineffective appellate counsel to this Court before presenting them in the court of appeals rests on

¹ For the purposes of this brief, it is unnecessary to distinguish between discretionary appeals and claimed appeals as of right.

the flawed theory that a discretionary appeal to this Court is the same as a direct appeal to an intermediate court of appeals.

A direct appeal as of right and a discretionary appeal, however, are dramatically different. The Supreme Court of Ohio “sits to settle the law, not to settle cases,” and does not engage in “‘error correction’ regarding the application of settled law” to the facts of a particular case. Baughman v. State Farm Mut. Auto. Ins. Co. (2000), 88 Ohio St.3d 480, 492 (Cook, J., concurring and citing Oh. Const. Art. IV Sec. 2). This Court is one of limited jurisdiction, and does not pass upon the merits of every discretionary appeal in which its jurisdiction is sought. Instead, the Court hears only those appeals that present “substantial” constitutional questions or questions of “public or great general interest.” Sup. Ct. Prac. R. III Sec. 6; Oh. Const. Art. IV Sec. 2(B).

In fact, this Court has previously observed “that the sole issue for determination at the hearing [on a motion for jurisdiction] is whether the cause presents a question or question of public or great general interest as distinguished from questions of interest primarily to the parties.” Williamson v. Rubich (1960), 171 Ohio St. 253, 254. See also Paul M. Herbert (1966), “Obtaining Certification in the Supreme Court of Ohio: Cases of Public of Great General Interest,” 18 W. Res. L. Rev. 32, 36 (citing Williamson and noting that “[t]he supreme court has failed to provide any rules or guidelines to assist the lawyer in determining whether his case merits certification”).

Because of the limited scope of the question before the Court, the record at the jurisdictional memorandum phase is minimal. The rules of this Court

specifically forbid the attachment of supplemental materials to a memorandum in support of jurisdiction, see S. Ct. Prac. R. III (1)(D), and the trial record is not transmitted until the Court accepts jurisdiction. S. Ct. Prac. R. V(3)(A). Moreover, the effect of a decision to decline jurisdiction is negligible, since “the refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an adjudication of the question by this court [sic] as an established precedent for future cases.” Village of Brester v. Hill (1934), 128 Ohio St. 343, 353. Accord Leighton v. Hower Corp. (1948), 149 Ohio St. 72, 75, quoting Swetland v. Evatt, Tax Com’r (1941), 139 Ohio St. 6, 18. Further, “the overruling by the Supreme Court of [a motion to accept jurisdiction over a discretionary appeal] does not amount to an affirmance of the [court of appeals’ judgment], but only amount[s] to the determination by the Supreme Court that the case presented was not one of great public or general interest. . . .” Kern v. Contract Cartage Co. (1936), 55 Ohio App. 481, 486.

Despite the limited nature of both the question and the record before this Court at the jurisdictional stage, at least two district courts of appeals have concluded that the issues to be raised in an Appellate Rule 26(B) motion to reopen must first be raised in a jurisdictional memo to this Court, or be barred by res judicata. This unfounded conclusion can only be based in a severe misunderstanding of the role of jurisdictional decisions in Ohio jurisprudence.

II. The court of appeals' application of res judicata is wrong.

Reliance upon res judicata to bar claims under Appellate Rule 26(B) is a misuse of the doctrine. Res judicata has only limited application in criminal cases, and there is no persuasive reason to apply it in this situation. But nothing in this Court's rules of practice or in Appellate Rule 26(B) requires the application of res judicata in the circumstances presented in this case.

In enunciating the rule of res judicata, this Court has held that “[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, syllabus, 653 N.E.2d 226. Res judicata assumes as one of its fundamental premises that the party against whom it is being asserted has had a full and fair opportunity to present the substantive merits issue to the original tribunal. Parklane Hosiery Co., Inc. v. Shore (1979), 439 U.S. 322, 326-28; Warren Freedman (1988), *Res Judicata and Collateral Estoppel* at 17-19. Properly applied, res judicata “fosters respect for the determinations of the original tribunal, for it enhances the predictability and consistency of those determinations.” *Id.* at 11. But improper reliance on res judicata to avoid addressing the merits of a claim that has never been fully and fairly litigated deny litigants due process. South Central Bell Telephone Co. v. Alabama (1999), 526 U.S. 160, 168 (holding that application of res judicata by state supreme court was denial of due process).

Moreover, a state's application of res judicata in a criminal case is not always a bar to consideration of claims in a federal habeas corpus action, and postconviction claims of ineffective assistance that state courts have deemed to be barred by res judicata may yet be heard in federal habeas review. See, e.g., Patrasso v. Nelson (C.A. 7 1997), 121 F.3d 297, 301-02, and Waley v. Johnson (1942), 316 U.S. 101, 105 ("The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner"). See also Robert C. Casad and Kevin M. Clermont (2001), *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* at 205. Cf. Monzo v. Edwards (2002), 281 F.3d 568, 568-77 (noting that postconviction claims under R.C. 2953.21 could be barred by res judicata and examining circumstances where such proceedings might present a ground for preclusion of habeas review).

Instead of encouraging finality, the application of res judicata to claims such as those raised by Mr. Davis virtually ensures that his claims of error in "the determinations of the original tribunal" will be examined for the first time not by a state court, but by a federal habeas court.

III. Res judicata does play a role in applications to reopen.

Amici are certainly not arguing that traditional principles of res judicata must be completely ignored in Appellate Rule 26(B) proceedings. Cf. State v. Williams, 99 Ohio St.3d 179, 2003-Ohio-3079 at ¶10 (applying res judicata to bar relitigation of effective assistance of appellate counsel claim, when that claim had already been directly addressed in an earlier proceeding before Supreme Court). For example, res judicata may bar successive and untimely

applications. State v. Murnahan (1992), 63 Ohio St.3d 60, 66 (where circumstances do not render its application unjust, res judicata may bar a delayed motion for reconsideration). However, the role of the doctrine in all criminal cases—including Appellate Rule 26(B) proceedings—is limited, because it is subsumed within the concepts of double jeopardy and due process. See Casad, supra, at 22-27 and Freedman, supra, at 06-08.

To apply a res judicata bar in this case, where both a timely appeal to this Court and a timely Appellate Rule 26(B) motion were filed, threatens to loose the doctrine from its conceptual moorings, and quite frankly, to preclude Appellate Rule 26(B) proceedings altogether and render the rule a dead letter. In at least one case, the Eighth District has held that this Court’s decision denying discretionary review where a claim of ineffective assistance of appellate counsel was actually argued to this Court created a res judicata bar to an Appellate Rule 26(B) motion presenting the issue. See State v. Castrataro, Cuyahoga App. No. 81268, 2004-Ohio-45, at ¶5. In fact, the First District Court of Appeals came to a similar judgment in this case when it overruled Mr. Davis’ motion to reconsider the denial of his Appellate Rule 26(B) application. See, e.g., Merit Brief for Defendant-Appellant Andre Davis at 4 (noting that Mr. Davis “actually did raise the [ineffective appellate counsel] issues in his appeal to [the Supreme Court],” which was filed several months prior to the appellate court’s decision to overrule his application to reopen).

The First and Eighth Appellate Districts have apparently concluded that the mere opportunity to present a claim to this Court, irrespective of whether

or not this Court voices any opinion regarding the merits of that claim, creates a res judicata bar to any further consideration of that claim by Ohio's state courts. This rule does not comport with the view of res judicata expressed by this Court in Murnahan, Grava, or any other case, and is not a consistently applied state rule entitled to respect by a reviewing federal habeas court.

IV. Should claims of ineffective assistance of appellate counsel be resolved in the court of appeals, this Court, or the federal courts?

A key issue in this case is which court should decide the merits of claims of ineffective assistance of appellate counsel. This Court has twice held that courts of appeals are best suited to judge claims that the lawyers appearing before them are ineffective. State v. Murnahan (1992), 63 Ohio St.3d 60, 65, (courts of appeals "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. . . ."), cited in Morgan v. Eads, 104 Ohio St.3d 142, 2004-Ohio-6110, at ¶6.

A. 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. State v. Murnahan (1992), 63 Ohio St.3d 60, 65, 584 N.E.2d 1204. The deference to court of appeals judges is wise. 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 unsigned warrant was not part of the record. 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 indeed part of the record. 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.

This case presents another example of the importance of allowing courts of appeals to review claims of appellate ineffectiveness. 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 100 merits decisions in reported criminal cases, plus countless other unreported memorandum decisions.² By contrast, this Court decided only one criminal-related case out of Hamilton County in the same time period. Smith v. Leis, 111 Ohio St.3d 493, 2006-Ohio-6113.

The Hamilton County Court of Appeals is the court best suited to judge the performance of counsel on both sides. But the First District's res judicata doctrine deprives it of the 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.

B. 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 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.

² Lexis search terms: "(state) & court (hamilton) & prosecuting attorney and date (geq (1/1/2006) and leq (12/31/2006)" (search performed June 21, 2007).

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. State v. Murnahan (1992), 63 Ohio St.3d 60, 65, 584 N.E.2d 1204, cited in Morgan v. Eads, 104 Ohio St.3d 142, 2004-Ohio-6110, [n.e.] at ¶6. 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.

Claims of ineffective assistance of appellate counsel will have a merits determination somewhere. The First District’s doctrine ensures only that the merits judgment will not be in the court most qualified to make it—the court of appeals.

C. This Court should resolve its facially conflicting precedents in favor of allowing courts of appeals to decide applications to reopen.

The courts of appeals have incorrectly relied on several per curiam decisions that this Court issued in pro se cases shortly after this Court promulgated Appellate Rule 26. For example, 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. See also, State v. Dehler (1995), 73 Ohio St. 3d 307, 652 N.E.2d 987 and State v. Terrell (1995), 72 Ohio St. 3d 247, 648 N.E.2d 1353 (summary adoption of court of appeals decisions denying applications to reopen based on res judicata).

In Houston, this Court noted that Mr. Houston's claim in an untimely application to reopen was barred by res judicata, but 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.

Terrell, Dehler, and the Houston per curiam dicta conflict 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, even though this Court had previously declined to hear an appeal in the case.

This Court's approach in Comer comports with the doctrine that courts of appeals are best suited to judge claims of appellate ineffectiveness. State v. Murnahan, at 65, Morgan v. Eads, at ¶6. This Court crafted Appellate Rule 26(B) specifically 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.

V. The First District's practice creates absurd results.

A. "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 do not file, the courts of appeals claim that they could have, and this creates a bar. 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, also creating a bar. These conclusions place a flawed view of res judicata ahead of both substantive justice and the text and intent of Appellate Rule 26(B).

1. "Heads, I win."

The First and Eighth Districts apply a res judicata bar on all applications to reopen when a defendant has not filed a discretionary appeal in this Court. State v. White (Jun. 13, 2006), Hamilton App. No. C-040770, discretionary appeal denied, 112 Ohio St.3d 1422, 2006-Ohio-6712 (Chief Justice Moyer, and Justices Lundberg Stratton and Lanzinger dissenting). State v. House,

Cuyahoga App. No. 80939, 2003-Ohio-5066; State v. Jackson, Cuyahoga App. No. 75354, 2002-Ohio-5817; State v. O’Neal, Cuyahoga App. No. 83393, 2005-Ohio-3568; State v. Jones, Cuyahoga App. No. 83852, 2005-Ohio-1494.

2. “Tails you lose.”

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. See, also State v. Castrataro, Cuyahoga App. No. 81268, 2004-Ohio-45 at ¶5 (res judicata bars claim that was raised or could have been raised in the Supreme Court of Ohio); State v. Frazier (Jun. 4, 2001), Cuyahoga App. No. 76775.

3. This case: “Heads I win” and “tails you lose.”

In this case, the First District followed both the “heads I win” and “tails you lose” aspects of its flawed res judicata jurisprudence. The First District

initially denied Mr. Davis' application to reopen based on the assertion that Mr. Davis could have raised appellate ineffectiveness in an appeal to this Court. State v. Davis (Jan. 8, 2007), Hamilton App. No. C-040665, Appellant's Merit Brief, Apx. at A-3. On reconsideration, Mr. Davis explained that he had presented his claims of appellate ineffectiveness to this Court. The First District denied the motion without explanation. State v. Davis (Feb. 8, 2007), Hamilton App. No. C-040665.

So if a defendant asks this Court to hear a claim of appellate ineffectiveness, the claim is barred. If a defendant does not ask this Court to hear a claim of appellate ineffectiveness, the claim is barred. "Heads I win. Tails you lose."

B. The First District's res judicata doctrine defeats the purpose for which this Court created Appellate Rule 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.

The First District's res judicata doctrine defies the principles this Court settled in Murnahan. Parties do not need to file a discretionary appeal in this Court to get a merits ruling on a claim of appellate ineffectiveness. This Court should reverse the decision of the court of appeals and put the responsibility for resolving appellate ineffectiveness claims where it belongs—in the court of appeals.

CONCLUSION

Appellate Rule 26(B) exists for a reason—to permit courts of appeals to resolve timely filed claims of appellate ineffectiveness. The First and Eighth Appellate districts have effectively written the rule off the books. Instead of resolving the claims, the First and Eighth Districts have punted their responsibility to this Court and to the federal courts.

This Court should restore meaning to Appellate Rule 26(B). This Court should reverse the decision of the court of appeals.

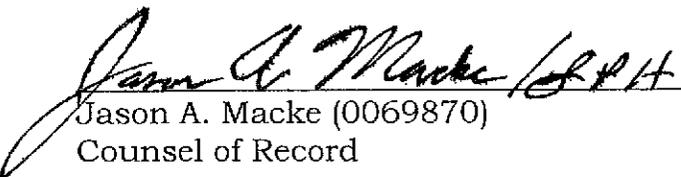
Respectfully submitted,

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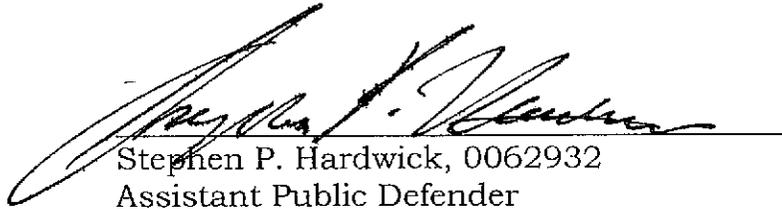

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CERTIFICATE OF SERVICE

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. 9th Street, Cincinnati, Ohio 45202 this 25th day of June, 2007.



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