

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. :

**REPLY BRIEF OF AMICI CURIAE
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OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT ANDRE DAVIS**

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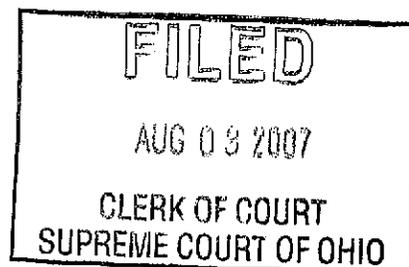
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REPLY ARGUMENT

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. Introduction:

The State's arguments turn this Court into a court of error and all but eliminate the role of Ohio's courts of appeals in resolving questions of appellate effectiveness. The State proposes a novel standard—a court of appeals should grant relief only in cases of “blatant” error that causes an “unjust” result. But the State fails to define what makes an error “blatant” or “unjust.” Further, the United States Supreme Court has set the standard for resolving claims of ineffective assistance of appellate counsel, and the standard makes no reference to “blatant” error that causes an “unjust” result.

II. Discussion:

The State's arguments rest on the flawed assumption that a memorandum in support of jurisdiction to this Court is an opportunity for the defendant to argue the underlying issues of a case. The State blithely ignores this Court's long line of cases holding that the only question a litigant may present in a request to hear a discretionary appeal is whether the case is sufficiently important for this Court to hear. Williamson v. Rubich (1960), 171 Ohio St. 253, 254; 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. Accordingly, before Mr. Davis

filed his Appellate Rule 26(B) application in the court of appeals, the only question he could present to this Court is whether his original appeal presented an issue of great importance.

The State's argument would turn this court into a court of error. The State contends that Appellate Rule 26(B) should be available only "when a defendant [does not] know of the ineffective assistance or [is] unable to properly bring that claim to this Court." Brief at 11. Under the State's theory, this Court would be the court-of-first-resort for claims of ineffective assistance of appellate counsel, and a defendant could bring an ineffectiveness claim in the court of appeals only if the court of appeals were somehow unavailable. But courts of appeals do not exist merely to fill in where this Court is unavailable. Ohio's appellate system is structured so that the courts of appeals handle routine cases, and this Court steps in only where needed.

The State also attempts to graft two new elements onto ineffectiveness claims by asserting that Appellate Rule 26(B) should be available "when appellate counsel missed such a blatant error that their performance must be ineffective." State's Brief at 11. The State also asserts that the "blatant" error must render the original decision "unjust." State's Brief, *passim*. But in reviewing claims of ineffective assistance, the United States Supreme Court has never required proof of "blatant" error causing an "unjust" result. Instead, that court requires a finding that counsel's deficient performance prejudiced the defendant. Roe v. Flores-Ortega (2000), 528 U.S. 470; Strickland v. Washington (1984), 466 U.S. 668.

The State has not demonstrated a single instance where the First or Eighth Appellate District applied the State's proposed standard of "blatant" error which renders the initial decision "unjust." In the appeals which the First District reopened, the court merely ignored claims of res judicata and ruled on the merits. State v. French (Hamilton App. No. C050375), May 8, 2007; State v. Garrett (Hamilton App. No. C050482), Jan. 19, 2007; State v. Brady (Hamilton App. No. C050295), Jan. 18, 2007; State v. Young (Hamilton App. No. C030345), Aug. 13, 2004; State v. Fuller (Hamilton App. No. C040318), Jan. 24, 2006; State v. Green (Hamilton App. No. C030514), Apr. 28, 2004; State v. Coulibaly (Hamilton App. No. C010788), Apr. 16, 2003; State v. Smith (Hamilton App. Nos. C020336, C020337, and C020341), Feb. 27, 2003.

The Tenth District's decision in State v. Aponte (2001), 145 Ohio App.3d 607, cited in the State's brief, raises a question that the State does not answer—what criteria should a court use in measuring an "unjust" result? Aponte does not define "unjust." Instead, the court essentially conflates an "unjust" result with a meritorious issue: "Sentences based upon such pleas are deemed to be void. Thus, under the circumstances of this case, we find that the application of res judicata would not be just. . . ." Aponte at 615.

The Aponte court's rule would have silly consequences. Instead of simply deciding whether an applicant presented a genuine issue of the ineffectiveness of counsel, courts would first apply a res judicata bar. The courts would then ask whether the application of that bar was unjust. In deciding whether the result would be unjust, the court would look at whether the applicant

presented a genuine issue of ineffectiveness. The Aponte “unjust” rule adds two meaningless steps to get every litigant where they would be without the analysis. In short, the Aponte rule makes no sense.

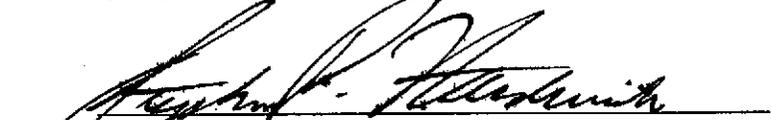
III. Conclusion

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, cited in Morgan v. Eads, 104 Ohio St.3d 142, 2004-Ohio-6110, at ¶6. Under the res judicata doctrine of the First and Eighth Districts, courts of appeals will almost never decide whether appellate “counsel was adequate in his or her representation before that body. . . .” Instead, the decision will fall to this Court or to a federal district court.

This Court should reaffirm the primary role of Ohio’s courts of appeals in determining claims of ineffective assistance of appellate counsel. Amici respectfully request this Court to reverse the decision of the court of appeals and remand this case so that the court of appeals can resolve Mr. Davis’ claim under the correct standard.

Respectfully submitted,

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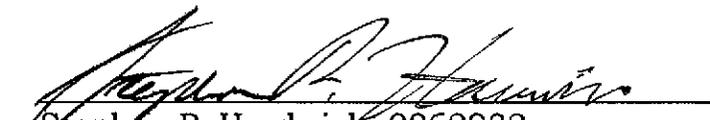

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I certify a copy of the foregoing has been sent by regular U.S. mail, , to
Fred Hoefle, Esq., 810 Sycamore Street, Cincinnati, Ohio 45202 and to Scott
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