

No. 2007-0325

In the

Supreme Court of Ohio

THE STATE OF OHIO,

Plaintiff-Appellee

vs.

ANDRE DAVIS,

Defendant-Appellant

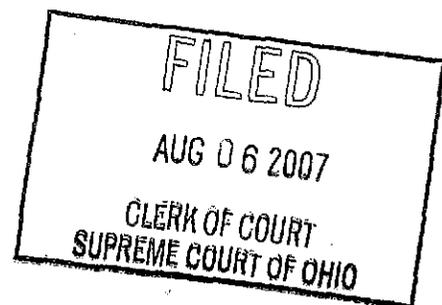
Appeal from the Court of Appeals, Hamilton County, First Appellate District,
No. C 040665

REPLY 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*



**IN THE
SUPREME COURT OF OHIO**

THE STATE OF OHIO,

Plaintiff-Appellee

vs.

No. 2007 - 0325

ANDRE DAVIS,

Defendant-Appellant

**MERIT REPLY BRIEF FOR
DEFENDANT-APPELLANT ANDRE DAVIS**

This Court saw a need for App. R. 26(B) when it decided *State v. Murnahan* (1992), 63 Ohio St. 3d 60. The Court stated there, and again in *Morgan v. Eads*, 104 Ohio St. 3d 142., 2004-Ohio-6110, at ¶ 6, that issues of ineffective representation of a criminal defendant in the initial appellate proceedings should, in the first instance, be determined by the Court of Appeals where the ineffective representation occurred. And that is why we now have App. R. 26(b). When a Court of Appeals avoids making a decision on the merits of whether the Appellant received in the first instance the effective assistance of appellate counsel secured to him by the Sixth and Fourteenth Amendments, *Evitts v. Lucey* (1985) 469 U.S. 387, 105 S.Ct. 830, the accused has been denied anew his Fourteenth Amendment right to due process of law.

Appellant will not here rehash the arguments, not addressed by the state, that a

judgment may not be used to support a res judicata finding when the court which is held by the Court of Appeals to have rendered the decision obviating the necessity of its ruling on a 26B application, this Court, does not even acquire jurisdiction to do so unless and until it grants leave to appeal a felony case to this Court.

The state has examined the prior decisions of the First District, and has cited some cases in which the Court of Appeals did not dismiss a 26B application as barred by res judicata. Apparently, the state would have it that, since the Court of Appeals has the power and authority to hear some cases and to refuse to hear other such cases on res judicata grounds, its decision that a 26B application is barred by res judicata disposes of the matter, whether or not the Appellant includes the new issue of ineffective appellate counsel in his jurisdictional memorandum in this Court, the decision of the Court of Appeals to refuse to hear the application is final. Period. And the right granted by this Court in App. R. 26(B), can thus be erased by fiat by the lower court, the Court of Appeals.

There is a good reason for App.R. 26(b). It conveys a right upon a convicted criminal defendant. The effectiveness of that right depends -- and depends here -- on a principled ruling by a court of law, the proper court of law, the Court of Appeals. Appellant's constitutional right to be heard on the merits of his 26B application should not be granted or denied -- as it was here -- upon judicial whimsy.

The state, while denying that Appellant suffered a violation of his rights (indeed, the state denies that he has *any* enforceable right to a merit determination of his claim),

nevertheless proceeds to argue the merits of his 26B application before this Court. While this course is consistent with the implication of the state's argument that this Court is the body required to address and decide the issue of whether Appellant was denied the Sixth Amendment right to effective appellate representation, it is not correct. The lower court should decide the merits of a question before the higher court may consider it.

If the Court is inclined to consider and rule on the merits of this particular 26(B) application, it should reverse the decision below and remand to the Court of Appeals with instructions to consider and rule on Appellant's Application to Reopen Appeal.

Appellant Andre Davis stands on the arguments in his Merit Brief.

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 4th day of July, 2007, upon opposing counsel, Scott Heenan, Ass't Hamilton County County Prosecutor, by Regular U.S. Mail at his office, 230 E. 9th Street, Cincinnati, OH 45202, and Counsel for Amici, Mr. S. Hardwick, 8 E. Long St. Columbus OH 43215.



H. FRED HOEFLE

No. 1717

Attorney for Defendant - Appellant

APPENDIX

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.



§ 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 by the court 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 facts 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 law, rules, 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 file an original and copy of the application to the clerk of the court of

15 2

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.]

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

76 3