

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Supreme Court #: 2007-1854
APPELLEE, : On Appeal from the Crawford
vs. : County Court of Appeals, Third
KEVIN KEITH, : Appellate District
APPELLANT. : Court of Appeals No. 98-AP-0005
Case No. 94-CR-0042
This is a Capital Case

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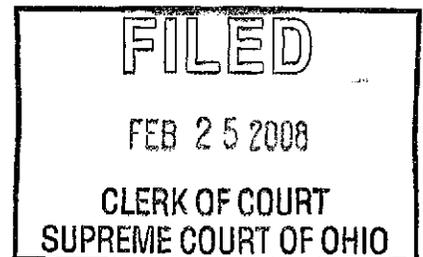


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STATEMENT OF THE CASE

Procedural Posture

The Appellant, Kevin Keith, (hereinafter “Appellant” or “Keith”) was tried and convicted by a Crawford County Jury on May 26, 1994 on three counts of aggravated murder all of which contained death penalty specifications. Keith’s conviction and sentence of death were affirmed by the Ohio Third Appellate District Court of Appeals in an opinion filed on April 5, 1996. *See State v. Keith* (April 5, 1996) Crawford Appellate # 3-94-14, unreported.

The Ohio Supreme Court unanimously affirmed both Keith’s conviction and sentence of death upon the direct appeal to the Ohio Supreme Court by decision rendered on October 1, 1997. *See State v. Keith*, 684 N.E.2d 47 (Ohio 1997). Keith’s motion for reconsideration of this unanimous decision was overruled by the Ohio Supreme Court on November 12, 1997. *See State v. Keith*, 686 N.E.2d 276 (Ohio 1997). Execution of the death sentence was stayed pending the exhaustion of Keith’s state post conviction litigation. *See State v. Keith*, 686 N.E.2d 524 (Ohio 1997).

Keith thereafter filed for post conviction relief pursuant to Ohio Revised Code Section 2953.21. By Judgment Entry of February 4, 1998 the Trial Court denied this Petition without an evidentiary hearing. Keith appealed this Judgment Entry through appeal to all levels without success. Keith also appealed his conviction collaterally through the Federal Courts without success.

On August 19, 2004 Keith filed a second petition for post conviction relief. The State responded by filing a motion for summary judgment. The Court set the motion for an Oral hearing on November 2, 2006. On February 13, 2007 the Court issued an Opinion in excess of thirty five pages granting the State’s motion for summary judgment and dismissing the second petition for

post-conviction relief. Keith thereafter filed an Appeal to the Third District Court of Appeals. Contemporaneously, Keith obtained new counsel from the Ohio Public Defender's Office. Multiple filings thereafter proceeded to reopen his direct appeal to the Third District Court of Appeals; and for a new trial to the Trial Court and to supplement the record. The instant appeal is claimed by right by Keith's Counsel to re-open his original direct appeal to the Third District Court of Appeals which denied such relief by Judgment Entry dated August 6, 2007.

Statement of the Facts

On the night of February 13, 1994, Keith arrived at 1712-B Marion Road, and talked with murder-victim Linda Chatman outside of Ms. Chatman's apartment. Subsequently, Keith entered the apartment, engaged in further conversation, and then sprayed six people, including three children, with bullets from a Tech 9 semiautomatic handgun. Marichell Chatman, age 24, her daughter, Marchae Chatman, age 4, and the child's aunt, Linda Chatman, age 39, were later found dead of multiple gunshots at the apartment. Keith additionally inflicted multiple gunshot wounds upon Richard Warren, Quanita Reeves, age 7, and her brother Quinton Reeves, age 4, all of whom survived.

Keith was arrested on February 15, 1994, and charged with three counts of aggravated murder, each count carrying a specification of engaging in conduct involving the purposeful killing of two or more persons, plus three counts of attempted aggravated murder. Petitioner was subsequently indicted on February 22, 1994, and arraigned on February 24, 1994, where he pled not guilty to all counts and specifications. The trial commenced on May 10, 1994.

Following the State's opening statement, the prosecution called Christine Mullins as a witness. Ms. Mullins, who is an employee of Ike's Restaurant, stated that while working on the

night of February 13, 1994, she observed a wounded man enter the restaurant and she called 911. (T. pp. 241-242) .

Thomas Britner, a maintenance man for Bucyrus Estates, then testified that “one of the renters came down to the apartment at a few minutes after 9:00 and, at that time, he stated he heard shots.” (T. p. 247) . Mr. Britner then went to the Chatman apartment where he saw bodies. Using a diagram, Mr. Britner described the positions of the bodies. (T. p. 249) .

Troy Matavia, an emergency medical technician (EMT), responded to Ms. Mullins’ 911 call. Mr. Matavia testified that they were en route to Ike’s Restaurant when they received a call to Bucyrus Estates. (T. p. 264) . Mr. Matavia and EMT Mike Hassinger described attending to the victims. Paramedic Scott Baldosser testified to his care of Quinton and Quanita Reeves, the surviving children. Mr. Baldosser stated that the children did not speak, and just nodded their heads. (T. p. 280) .

Paramedic Don Cordray responded to the call for help at Ike’s Restaurant. Mr. Cordray stated that Richard Warren had been shot four times. They started an IV, cut off his clothes, and transported him to the hospital. Warren was in critical condition and Cordray had no conversation with him. (T. pp. 284-286) .

Dr. Patrick Fardal, Franklin County Coroner, testified as to the autopsies and the cause of death of each victim. Linda Chatman died as a result of a gunshot wound through her neck that severed her spinal cord. (T. p. 291) . The other five shots were not fatal. Marchae Chatman died as a result of two gunshot wounds to the back that caused injury to internal organs, internal bleeding, and shock. (T. p. 293) . Marichell Chatman died as a result of multiple gunshot wounds, two in particular to the head area, one of which caused brain damage, the other broke her jaw, lodging in the base of her skull. (T. p. 295) .

Patrolman David Koepke testified that he assisted with Richard Warren at Ike's until the EMT's arrived. (T. p. 300) . Koepke also discovered a tire impression in the snow near the murder scene where a car had hit the snow bank. (T. pp. 302-03) .

Richard Warren was the next prosecution witness. Mr. Warren testified that victim Linda Chatman came to the apartment at Bucyrus Estates at approximately 8:45 p.m. to pick up the Reeves children. Mr. Warren further stated that he was on the couch watching T.V. and noticed somebody outside who was walking away from the door and the individual had not knocked. Mr. Warren opened the door and further described the events as follows:

A. I was on the couch watching T.V. and I noticed a guy outside the door, but he didn't knock and he was walking away from the door. So I got up and opened the door to see who it was. And when I opened the door the gentleman turned around asked if Linda was There. And I said yes and I turned around to tell Linda somebody was there to see her.

Q. Do you see the person that came to your door that night, in the courtroom?

A. Yes, sir, I do.

Q. Would you point him out and identify him.

A. That's him over there, sir. (Indicating)

MR. WISEMAN: Your Honor, may the record reflect the witness identified the defendant?

THE COURT: It shall.

MR. WISEMAN: Thank you, Your Honor.

Q. (Mr. Wiseman) What happened then?

A. He had asked for Linda and I turned around and told Linda somebody was there to see her, and she came to the door. And he said, "Linda, can I talk to you for a minute." She said, "Yes."

(T. p. 336).

Warren testified that Keith then asked to speak with Linda. She agreed, and went outside to talk with Keith. In response to an inquiry by Warren, Marichell told him the guy was "Kevin".

Warren testified that Marichell told him the defendant's last name but he could remember only the first name:

Q. And did she mention the last name?

A. She mentioned the last name. I didn't recall it.

Q. What also did she say?

A. She mentioned his name was Kevin and said his last name and that he was involved in a big drug bust. But she didn't say when or where.

Q. What did you do after that?

A. I went and sat back down on the couch and watched T.V.

Q. What is the next thing that happened?

A. The next thing that happened is that they both came back into the apartment.

Q. And by both, you mean Linda and Kevin -- Linda and the Defendant?

A. Yes.

Q. Then what happened?

A. He stood there for a minute and asked Marichell for a glass of water and she got him a glass of water.

Q. As he was drinking it was he making conversation?

A. He said to me that it was cold outside.

And I said, "Yeah"

And then he asked me who was winning the basketball game.

(T. p. 338).

Marichell told Warren that Keith had been involved in a "big drug bust". Mr. Warren explained that he discussed the weather and the game he was watching on T.V. with Keith, then as described by Mr. Warren, Keith reached into a garbage bag and pulled a "Tech 9" pistol:

Q. At the point in time we have been discussing--Would you stand aside so the jury can see. Show us the relative positions of the people in the apartment at the time of the conversation while the defendant was drinking the water and you were watching the same and talking to him.

A. I was sitting on this end of the couch and he was standing about there. And Linda and Marichell were somewhere around in that area. And I have no idea where the children were playing.

Q. Okay. Go ahead and take your seat.

So you are within how many feet-- Can you estimate how far away from the defendant you were?

A. That was approximately seven, eight feet.

Q. What happened at that point in time?

A. He reached into the garbage bag and pulled out a weapon, a gun.

Q. What did it look like to you?

A. To me it looked like a Tech nine.

Q. What is that?

A. A nine millimeter handgun.

(T. p. 340).

Petitioner aimed his weapon at Warren and the others and ordered everybody to the floor.

Lying on the floor were Marichell, Linda, Marchae, and the two Reeves children. Marichell was saying, "what are you doing, why are you doing this, we didn't do anything..." and used the name "Kevin". Keith then told Marichell not to say his name, and put the gun to Marichell's head and said "well, you should have thought about this before your brother started ratting on people." Warren first heard the gun go off and was subsequently shot in his right jaw. Warren heard the gun go off many more times and he was shot two more times in the back. When Warren heard the door close he got up to run to Ike's Restaurant. On the way across the snowy field he was shot once more and knocked to the ground, but managed to get up and make it to the restaurant. Warren detailed his injuries and the fact that he went through four surgeries. (T. p. 345) .

Next the prosecution called Nancy Smathers, another resident of Bucyrus Estates who lived at 1726-E. Smathers testified that when she heard a popping sound she went to her front door. Smathers saw Keith running from behind 1712-A and across the parking lot. Keith ran across the lot, got into a vehicle and started to drive out of the parking lot but slid into a snow bank. Keith rocked the car, back and forth to get it out. The car was under a street lamp, and its dome light did not come on when the door was open. (T. p. 384) . Smathers stated that Keith was wearing dark clothing and was big and stocky. She positively identified Keith as the man she saw running and also rocking the car out of the snow:

- Q. Obviously you just mentioned somebody rocking the car. Tell us in your own words what you actually observed after the car hit the snowbank.
- A. The car hit the snowbank and upon hitting the snowbank, you could tell it was stuck because the wheels were turning too fast because it was on ice. And at that time they kept, like how you rock it back and forth when you are stuck. And like, upon that, they opened the door and he had his hand up on where the metal

meets the frame and the hood, holding there and stepped out and with one foot, rocked back and forth, pulling at the same time.

- Q. You say this person had a hand on it?
- A. Yes, whatever it is that connects the roof of the car to the base of the car where the door shuts, the metal part right there.
- Q. Okay. Was there any illumination when the door opened?
- A. No. It was dark other than the street light.
- Q. Was there a light on inside the car when the door opened?
- A. Not that I could see.
- Q. Other than the street light, there was no light on the car or anything like that inside of it?
- A. When the door was opened, no because I was like -- usually you can tell when the dome light's on. There was no -- it was dark inside the car.
- Q. Were you able to see the license plate?
- A. No.
- Q. Why not?
- A. Because the light by the license plate wasn't working.
- Q. How long did this go on, the car stuck in the snowbank?
- A. I would say five minutes maybe it was stuck and rocking it and they couldn't get it out so they pulled it out. The person was just like in a hurry and frantic kind of.
- Q. And he finally got it out?
- A. It seemed like they pulled it out.
- Q. What kind of a car was this?
- A. It was -- wasn't like -- a mid-sized car, not a big one, wasn't a

Cadillac and wasn't a small one, a mid-sized car.

- Q. Were you able to observe anything about the shape of the car other than just medium sized?
- A. It was a medium sized -- the only thing brought to my attention was how most back lights slopes down. This one went down at a straight cut like that. (Indicating)
- Q. Were you able to observe anything about the individual you described in this vehicle, who exited it?
- A. Yes, he was wearing dark clothing. He had like one of those suede dark jackets, some are fur lined and some aren't. And he had on a toboggan, dark colored.
- Q. What do you mean?
- A. One of those rolled up hats.
- Q. Like a ski mask that --
- A. Just a short one rolled around here. And he was big, stocky. He was, you know, looked like he was a powerful man.
- Q. Were you able to tell what race this person was?
- A. Yes, he was of the black persuasion.
- Q. Do you know an individual named Karrie Walker?
- A. I have seen him.
- Q. Was the person you saw in the car Karrie Walker?
- A. No.
- Q. Do you see the individual in the courtroom who you was in the car that night?
- A. Yes.
- Q. Would you point to that person?

A. He is sitting besides Mr. Banks. (Indicating)

MR. WISEMAN: May the record reflect she identified the defendant?

THE COURT: It shall.

(T. pp. 382-385)

The State called Zina Scott, a girlfriend of Keith, who had known him for a year and a half prior to the incident. She had been employed by General Electric on Walnut Street in Bucyrus for nine and one half years. (T. p. 409) . On February 13, 1994, she was taken to work in her car by Keith and picked up again at 11:00 p.m. (T. p. 410) .

Gail Cochran testified that she was a corrections officer in the Crawford County Sheriff's Department responsible for checking in visitors who came to the jail. (T. p. 413) . Cochran identified State's Exhibit 45, a copy of the visitor's log, and stated that one of Keith's visitors identified herself as Sherrie Brown and signed in at 10:30 a.m. on March 5, 1994. Cochran identified State's Exhibit 42, a photo of the female who identified herself as Sherrie Brown but whose real name was Melody Davison. (T. p. 418) . Davison brought a bag containing sweat pants for Keith. When Cochran checked the bag she became suspicious and contacted another deputy. (T. p. 419). That deputy, Scott Robertson, testified that after the conversation with Cochran, he contacted the Crestline Police Department and asked them to look for Davison. (T. p. 421) . Patrolman Edward Wilhite was working for the Crestline Police Department on March 5, 1994. Wilhite testified that he stopped Davison's vehicle and he noticed the last three numbers on the license plate matched the license numbers that the Bucyrus Police Department wanted in relation to

the shootings. (T. p. 423). The car, a 1982 Omega, was subsequently impounded. (T. p. 425).

The State next called Farnella Graham, who testified that she lived across the street from the GE plant in Bucyrus. On the night of February 13, 1994, she noticed trash in front of her house and the next morning when she picked it up to throw it away, she found a spent shell casing with the trash. (T. p. 427) .

Bucyrus Police Officer John Seif testified that he met with Faisella Graham on February 14, 1994, at 1221 Walnut Street, across from the GE plant. At that time, she gave him the shell casing found on the sidewalk. (T. p. 439) .

The next State witness was Alton Davison, who is the registered owner of the 1992 Oldsmobile Omega license number MVR043. He identified State's Exhibit 42 as photograph of Melody Davison, his granddaughter. Mr. Davison identified State's Exhibit 7 as the bill of sale for four tires he bought for the car in August of 1993. He had put about 3000 miles on the car since then. He further testified that he did not recall any problem with the tires and that he had not authorized anyone to replace them. (T. p. 446) .

Steve Chandler, a Bucyrus Police Department employee, did a drawing of the scene and also searched the area with a metal detector. He discovered six 9 millimeter casings lying on top of the snow by Ike's (T. p. 458) . He also checked on Richard Warren's vehicle and found that the vehicle was in the shop with its engine torn down.

BCI investigator, David Barnes, who testified on behalf of the State, was responsible for collecting the casts of the tire track and partial license plat imprint, 043, in the snow bank near the murder scene. (T. pp. 474-75) .

BCI investigator Robert Stetzer testified to his attendance at the autopsies of the decedents. Mr. Stetzer collected clothing, fingerprints and blood samples from each victim and he also

collected bullets that had come from Marichell Chatman. (T. p. 485) .

Agent Larry Hardin testified to his activities relative to the investigation. Mr. Harden, who was responsible for photographing the scene, identified photos of the scene and also of the Omega vehicle that was impounded on march 5, 1994. (T. pp. 496-97, 510) . Harden was responsible for dusting the Omega for prints and for checking the car. He discovered the light above the license plate was not functioning, and that the dome light did not work when the driver's door was open. (T. pp. 511-12) .

Sheryl Mahan, the latent print examiner, was called by the State. Ms. Mahan testified that none of the items submitted to her, including a glass found at the apartment, revealed identifiable prints. She further testified that there were no identifiable prints from the 1982 Oldsmobile Omega. (T. p. 560) .

Thomas Nicholson, a BCI firearms examiner, testified that he examined a total of 25 fired cartridge casings. All were 9 millimeter caliber, and all were federal brand ammunition. Mr. Nicholson stated that these casings, including the casing from Walnut Street, had been fired from the same gun. (T. p. 572) .

The testimony of Michelle Yezzo, a BCI forensic scientist, was presented by deposition. Ms. Yezzo received the plaster casts of the tire track and the license plate. (Deposition T. pp. 67-7) . She testified that the license plate impression that was left in the snow bank was located in the same place as in the photo of the Omega pictured in State's Exhibit 8. The plaster cast of the tire track and the photo of the tire taken after the vehicle was recovered revealed different tread designs;

however, the tires print cast was consistent with the tires the owner had put on the car. (Dep. T. pp 4-30) .¹

Lt. David Dayne of the Galion Police Department testified that he was involved in a special investigations unit. Mr. Dayne knew Rudell Chatman who was working undercover in covert drug operations for the unit. (T. p. 589) . Rudell Chatman was murder victim Marichell Chatman's brother. As a result of Mr. Chatman's work, Keith was indicted on a four count drug trafficking indictment. (T. p. 590) . Keith was out on bond on February 13, 1994.

The prosecution called Joyce Reeves, mother of Keith's victims Quinton and Quanita Reeves. Ms. Reeves testified that Marichell Chatman was her niece and that she had been babysitting Quinton and Quanita on February 13, 1994. Ms. Reeves had asked her sister, Linda Chatman, to pick up both children. (T. p. 596) .

The Trial record establishes that Captain Stanley testified that he had the following recorded conversation from Amy Gimmet:

"Hi, this is Amy Gimmets. Letting you know that the name of the patient – the patient has identified the assailant. I guess, his first name is Kevin. He doesn' know the last name but he said if you talk to Dameon who is Marcella – which is I guess the victim, her brother is Dameon, and Dameon knows Kevin's first name. And apparently the patient and Marcella were boyfriend and girlfriend.

T.R. Volume 2 page 226 lines 17-25; Page 227 line 1.

Keith's Trial Counsel then asked Captain Stanley on re-direct examination:

Q. Captain, did you tape the conversation between the nurse and yourself?

¹ New counsel for Keith incorrectly suggested within their Brief that no forensic evidence had been recovered tying their client to the murders

A. Yes.

Q. Okay, that was all part of this, of the first call, so that was on the tape?

A. That is correct.

T.R. Volume 2 page 229 lines 2-8

Trial Counsel for Keith did not request that this tape be introduced into evidence.² This issue as explained infra is a collateral point raised on the issue of how the Bucyrus Police Department ended up in Columbus interviewing Richard Warren, the record establishes the credibility of Captain Stanley and refuted the claim raised that Captain Stanley never had such a conversation and no such tape exists. The Trial record further established that Keith's Trial Counsel implicated Mr. Melton as one of the other people that did not like the CI and who had a possible motive for shooting the CI and perhaps harming his family.³

Examination by Mr. Banks of Bruce Melton

Q. Now, Mr. Melton, Rodney Melton is your brother is that correct?

A. Yes, sir

Q. And Demetrious (Reeves) is a friend of yours?

A. A very close friend.

Q. As a matter of fact, you three were involved in a crime ring together?

A. That's hearsay, sir.

² New counsel for Keith originally opined, in their Motion for a new trial that Captain Stanley never had such a conversation. When advised that the tape recording is still in the custody of the Bucyrus Police Department the claim by new counsel migrated to no such person exists and therefore that the tape must be fraudulent. It is still unclear how new counsel for Keith suggests that Trial Counsel erred in failing to present the tape as a defense exhibit.

³ Trial Counsel for Keith implicated other individuals as well as having possible motives.

The COURT; That is what?

The Witness: that is hearsay sir

.....

Q. (Mr. Banks): As a matter of fact, you three are accused of all these pharmacy break ins, and robberies and selling drugs. You are career criminals aren't you?

A. That's hearsay.

Q. Are you accused of this?

A. Yes, sir. I am a suspect sir.

T.R. Volume 5 page 811 lines 23-25. Page 812 lines 1-22

Trial counsel for Keith also called Rodney Melton and inquired:

Q. (By Mr. Banks) When you got to the hospital in Bucyrus, you (Rodney Melton) were telling the family members, that Tom Chatman in particular, that these killings was the result of the CI⁴ snitching on people in Crestline; didn't you?

A. No, I didn't say it like that.

Q. Tell me how you said it?

A. I said maybe something he done made something like this happened.

Q. As a matter of fact, the CI came around the table at you?

A. Yup.

T.R. Volume 4 page 758 lines 15-25.

Mr. Banks called both of these witnesses (and also Demetrius Reeves) during his case in

⁴ Rather than identifying the CI in this document, the State will substitute the CI's name with CI.

chief. The State called eight (8) rebuttal witnesses.

After deliberations, the jury returned guilty verdicts on all charges and the defense requested a presentence investigation and a "post-conviction sanity hearing." (T. p. 885) . The court continued the case for sentencing. The Supreme Court of Ohio in the original Appeal made a specific factual finding that the jury had both the psychological report and presentence investigation report requested and submitted by Keith to consider during its sentencing deliberations as mitigation evidence.⁵ From these reports the Supreme Court of Ohio concluded that the jury had before it various statements to the effect that Keith was thirty years old at the time of the murders, has five half-siblings whose fathers are unknown to him, and two half-siblings by his own father. He was raised by his grandparents until he was twelve years old because of his mother's youthful age. After that time, he returned to live with his mother and stepfather. He described his childhood as happy and normal. Further, Keith maintained a low-C average in high school, participated on the football team and completed the twelfth grade. As an adult, Keith worked several jobs, including maintenance. Keith had never been fired from a job. That Keith has a child who was seven years old at the time of trial and for whom Keith paid twenty-five dollars a week in support. During the two years prior to his arrest, that Keith lived with his girlfriend, who worked at General Electric. Since Keith's last job ended, that he had been attempting to open an "African Store" in Mansfield.

Keith further went on in these reports to describe himself as someone who gets along "great" with others, "like a big teddy bear at times." These reports contained the Keith's denial of abusing alcohol or engaging in significant substance abuse, although Keith did admit to smoking marijuana from the age of fifteen. At the time of his arrest, Keith had several counts of aggravated drug

⁵ Keith incorrectly states in his Brief that no mitigation evidence was presented.

attempted murder. (T. pp. 907-909) .

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

This case has been well vetted. The Propositions of Law raised have already been reviewed by State and Federal Courts all of whom opined that the case against Keith is strong. The present attempt by Keith's new counsel to repackage previously raised issues falls short of the necessary showing to grant the relief they are requesting. As opined by the United States Sixth Circuit Court of Appeals "Finally we note that this is not an extraordinary case where a Constitutional violation has probably resulted in the conviction of one who is actually innocent."

The application to re-open the direct appeal is untimely. Ohio Rule of Appellate Procedure 26(B)(1) and (2)(b) require applications claiming ineffective assistance of appellate counsel to be filed within 90 days from journalization of the decision unless the applicant shows good cause for filing at a later time. In order to prevail on an application to reopen an appeal, a defendant is required to establish the existence of a "colorable claim" of ineffective assistance of appellate counsel. **State v. Sanders** (1996), 75 Ohio St. 3d 607, 665 N.E.2d 199. App.R. 26(B)(5) provides "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." In determining whether a defendant has raised a "colorable claim" or "genuine issue" of ineffective assistance of appellate counsel in an application to reopen, a Court will apply the two-prong analysis set forth in **Strickland v. Washington** (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. **Sanders**, supra; **State v. Reed** (1996), 74 Ohio St. 3d 534, 535, 660 N.E.2d 456. Pursuant to Strickland, a defendant must demonstrate that appellate counsel's performance was deficient and that defendant was prejudiced by the performance. Id. at 687. Essentially, defendant's burden involves showing that appellate counsel's performance fell

below an objective standard of reasonableness, 466 U.S. at 688, and that but for the unreasonable performance, the outcome of the proceedings would have been different. Id. at 694.

In regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld an appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues." Jones v. Barnes (1983), 463 U.S. 745, 77 L. Ed. 2d 987, 103 S. Ct. 3308. Additionally, appellate counsel is not required to argue assignments of error which are meritless. Barnes, supra.. Indeed, this Court has previously held that even debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. State v. Clayton (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189. Deciding whether to call a witness or how to conduct cross-examination is a matter of trial tactics and strategy which this court will not second-guess. Strickland, 104 S.Ct. at 2065.

Keith has failed to establish a colorable claim of ineffective assistance of appellate counsel under this standard and therefore his Appeal should be denied.

RESPONSE TO PROPOSITION OF LAW NO. I:

THE CHOICE OF RAISING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL TO THE EXCLUSION OF OTHER CLAIMS IS NOT INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

In regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld an appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues." Jones v. Barnes (1983), 463 U.S. 745, 77 L. Ed. 2d 987,

103 S. Ct. 3308. Additionally, appellate counsel is not required to argue assignments of error which are meritless. Barnes, supra.. Indeed, this Court has previously held that even debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. State v. Clayton (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189.

In the present case, Keith claims, as a threshold matter, that he was unavoidably prevented for eleven years from asserting additional claims of ineffective assistance of his Trial Counsel due to the failure of his Appellate Counsel to raise such issues.⁶ The issue that new counsel for Keith is requesting consideration upon is therefore whether Appellate Counsel should have included these three additional claims within their direct Appeal of ineffective assistance of Trial Counsel. The record reflects that Appellate Counsel for Keith raised the issue of ineffective assistance of Counsel on Direct Appeal; through collateral post conviction challenges and through Federal Habeas Corpus. On direct Appeal to this Court, Keith's Appellate Counsel raised the issue of Ineffective Assistance of Counsel on no less than seven aspects of Keith's Trial Counsel's performance.⁷ Keith has failed to establish how three additional claims after an eleven year delay in filing this application is warranted.

The application to re-open his direct appeal was filed on August 3, 2007 and the Appellate Judgment was filed on April 5, 1996. The application was clearly not filed within ninety days of the Judgment as required by Appellate Rule 26. The ninety day rule is applicable to all appellants. State

⁶ Keith claims for this proposition of law three claims of ineffective assistance of counsel; (1) The failure to appeal the issue of the pre-trial publicity by a neighboring County's Newspaper's story; (2) The failure to appeal a denial of a change in venue; and (3) The failure to raise the issue of Juror neutrality.

⁷ Within the appendix of the Original Supreme Court of Ohio's Decision Proposition of Law Number One raised six claimed acts of ineffective assistance of Counsel. In Proposition of Law Number IV a separate claim of ineffective assistance of Counsel was raised by Keith's Original Appellate Counsel.

v. Twyford, 106 Ohio State 3d 176; State v. Winstead, 74 Ohio St 3d 277. Keith claimed in his brief to the Third District Court of Appeals that he was unskilled at law and therefore had no understanding that his three Appellate Counsel were all ineffective. The Court of Appeals correctly reasoned that Keith did not raise these claims at the earliest time possible and that Keith could not rely on his own lack of legal training to excuse his failure to comply to the most basic of requirements. State v. Otis, 73 Ohio St 3d 39.

Assuming arguendo that the eleven year delay was reasonable, when deciding whether a criminal defendant received adequate representation, the defendant has the burden of proving ineffective assistance of counsel. State v. Lott (1990), 51 Ohio St. 3d 160, 175, 555 N.E.2d 293. To meet this burden of proof the defendant must show, ". . . first, that counsel's performance was deficient and, second, that the deficient performance prejudiced his defense so as to deprive the defendant of a fair trial." *Id.*, 174, citing Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674. In order to establish that counsel was deficient, appellant must demonstrate that his counsel's performance fell, "below an objective standard of reasonable representation." State v. Keith (1997), 79 Ohio St. 3d 514, 534, 684 N.E.2d 47. To demonstrate that he was prejudiced by this poor performance, appellant faces a "but for" test: that from the record that there exists a reasonable probability that but for the mistakes of counsel, the outcome of appellant's trial would have been different. *Id.* In Ohio, a properly licensed attorney is presumed competent. Lott, 175. Moreover, strategic or tactical decisions will not form a basis of an ineffective assistance of counsel claim. State v. Clayton (1980), 62 Ohio St. 2d 45, 48-49, 402 N.E.2d 1189.

Keith has failed to establish either prong. Counsel for Keith requested a change in venue. Trial Counsel stated that the request was premised on a newspaper article that appeared in the

Mansfield News Journal. T.R. Volume I page 2 lines 8-21. The State did not object to the Trial Court conducting a hearing on the issue. At this hearing, Trial Counsel for Keith called former Bucyrus Police Chief Joe Beran and the News Reporter Jodi Andes. The Court ultimately denied the motion for a change of venue as the voir dire process determined that the Jurors were not exposed to information that would cause them to be biased. The extensive nature of this voir dire process included the individual questioning of the Jurors by Counsel and the Court. Moreover, the Trial Court specifically advised the Jurors of the burden of Proof; the presumption of innocence and to approach the case with an open mind. As conceded by Keith, the Trial Court did inquire of the prospective Jurors whether they were aware of the article and whether they were influenced by the Article. There is absolutely no showing by Keith that any Juror was influenced by this newspaper Article.

When reviewing a decision denying a change of venue the appellate court is guided by, "* * * established principles that the decision on changing venue rests largely in the discretion of the trial court." State v. Gumm (1995), 73 Ohio St. 3d 413, 431, 653 N.E.2d 253. An appellate court will not reverse the trial court's decision without a clear showing that the trial court abused its discretion. Id. Abuse of discretion, "* * * connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude * * *." State v. Maurer (1984), 15 Ohio St. 3d 239, 250, 473 N.E.2d 768, quoting Steiner v. Custer (1940), 137 Ohio St. 448, 31 N.E.2d 855, paragraph two of the syllabus.

Before granting a change of venue, the trial court should first make a "good faith" attempt to seat a jury. State v. Gumm, 430. Although it is permissible for a trial court to hold a separate hearing on venue prior to seating a jury, the court is not required to do so. Id. Ohio recognizes that

the best test as to whether prejudice exists in the community is the examination of jurors on voir dire. **Id.** Likewise, there is no requirement that the jurors be completely ignorant of the circumstances surrounding the case. **State v. Thompson** (1987), 33 Ohio St. 3d 1, 5, 514 N.E.2d 407. Instead, the trial court should look to the totality of the circumstances when determining whether excessive pretrial publicity warrants a change of venue. **Id.** In making its determination, the trial court should closely scrutinize voir dire and consider whether a juror can lay aside the impressions or opinions formed from pre-trial publicity and render a verdict based on the evidence presented at trial. **Id.**

Keith points to no evidence a juror had actually been biased. "Any decision to change venue rests largely within the discretion of the trial court" **Id.** at P157, citing **State v. Maurer** (1984), 15 Ohio St.3d 239, 251, 15 Ohio B. 379, 473 N.E.2d 768. "[A] careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality." **Id.**, quoting **State v. Landrum** (1990), 53 Ohio St.3d. 107, 117, 559 N.E.2d 710, quoting **State v. Bayless** (1976), 48 Ohio St.2d 73, 98, 357 N.E.2d 1035. "[A] defendant claiming that pretrial publicity has denied him a fair trial must show that one or more jurors were actually biased." **Id.**, quoting **State v. Gross**, 97 Ohio St.3d 121, 2002 Ohio 5524 at P29, 776 N.E.2d 1061. A trial court has broad discretion in determining a juror's ability to be impartial. **State v. Williams** (1983), 6 Ohio St. 3d 281, 288, 6 Ohio B. Rep. 345, 351, 452 N.E.2d 1323, 1331. Thus, where a prospective juror is being challenged for bias, "deference must be paid to the trial judge who sees and hears the juror." **Wainwright v. Witt** (1985), 469 U.S. 412, 426, 105 S. Ct. 844, 853, 83 L. Ed. 2d 841, 853. A decision on a challenge to a prospective juror regarding his or her fairness and impartiality constitutes reversible error only when the trial court is shown to have abused its discretion. **State v. Wilson** (1972), 29 Ohio St. 2d 203, 211, 58 Ohio Op. 2d 409, 414, 280 N.E.2d

915, 920.

"Pretrial publicity -- even pervasive, adverse publicity -- does not inevitably lead to an unfair trial." **Nebraska Press Assn. v. Stuart** (1976), 427 U.S. 539, 554, 96 S. Ct. 2791, 2800, 49 L. Ed. 2d 683, 695. Therefore, if "the record on voir dire establishes that prospective veniremen have been exposed to pretrial publicity but affirmed they would judge the defendant solely on the law and the evidence presented at trial, it is not error to empanel such veniremen." **State v. Maurer** (1984), 15 Ohio St. 3d 239, 252; **State v. Carter** (1995), 72 Ohio St. 3d 545, 556, 651 N.E.2d 965, 976. In **State v. Bayless** (1976), 48 Ohio St. 2d 73, 98, 2 Ohio Op. 3d 249, 262, 357 N.E.2d 1035, 1051, this Court stated that "a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality."

If potential jurors who were exposed to pretrial publicity do not end up sitting on the jury, the defendant has not been prejudiced by that publicity. **State v. Roberts**, 110 Ohio St. 2d 71.

Keith's first Proposition of Law therefore should be denied.

PROPOSITION OF LAW NO II

APPELLATE COUNSEL HAS NO OBLIGATION TO APPEAL AN ISSUE INVOLVING A COLLATERAL NON MATERIAL WITNESS

In their second proposition of law, Keith adds two separate claims of ineffective assistance of counsel. First, Keith claims that his Appellate Counsel were ineffective in not thoroughly reviewing the transcript and raising an issue on direct appeal about how the Bucyrus Police Department was notified of the conscious state of material witness Richard Warren. Second, Keith claims that his Appellate Counsel failed to raise on direct appeal the failure of his Trial Counsel to list the person who contacted the Bucyrus Police Department; i.e., the person that advised the Bucyrus Police

Department of the conscious state of Richard Warren.

New counsel for Keith in essence claim that retired Bucyrus Police Captain John Stanley testified falsely that he received a telephone call from the Grant Medical Center that Richard Warren was awake and identified his assailant as Kevin. It is noteworthy to mention that this claim by new counsel has “evolved” from when it was first presented by them as part of a Motion for a New Trial currently pending in the Crawford County Common Pleas Court. Originally, new counsel claimed that no such conversation occurred or contact from the Grant Medical Center to the Bucyrus Police Department occurred. New counsel suggested that Captain Stanley made the whole matter up. When confronted with the specific Trial Record point citation of the conversation in evidence, new counsel continued to suggest that the conversation was fabricated. When confronted with the fact that Captain Stanley recorded this conversation and that such recording is still preserved by the Bucyrus Police Department, new counsel is now claiming that the recording is a fake.

Keith contends that a current record check of a licensed nurse list for 2007 does not list a Nurse Gimmet and that since Grant Hospital has no current record showing such an employee in 1994 by implication no such person exists — hence Captain Stanley lied. The trial record establishes that Captain Stanley testified that he had the following recorded conversation from Amy Gimmet: “Hi, this is Amy Gimmets. Letting you know that the name of the patient – the patient has identified the assailant. I guess, his first name is Kevin. He doesn’ know the last name but he said if you talk to Dameon who is Marcella – which is I guess the victim, her brother is Dameon, and Dameon knows Kevin’s first name. And apparently the patient and Marcella were boyfriend and girlfriend. T.R. Volume 2 page 226 lines 17-25; Page 227 line 1.

The trial record establishes that Keith’s Trial Counsel then asked Captain Stanley on re-direct

examination:

Q. Captain, did you tape the conversation between the nurse and yourself?

A. Yes.

Q. Okay, that was all part of this, of the first call, so that was on the tape?

A. That is correct.

T.R. Volume 2 page 229 lines 2-8

Yes, Trial Counsel for Keith could have requested that the tape be marked in evidence⁸ and did not. This is a collateral matter. The issue of this conversation only pertains to how the Bucyrus Police Department ended up in Columbus at Grant Hospital interviewing Richard Warren. Nothing more. Richard Warren testified at Trial and was subject to cross examination. The basis of how the Bucyrus Police Department arriving at Grant Hospital is irrelevant. Adding this person to the defense witness list would alter nothing.

Assuming arguendo the timeliness of raising this issue (subject to plain error review as no objection was interposed), a comparison to the standard needed by Keith to establish ineffective assistance of Counsel by failing to include an additional claim(s) of ineffective assistance of counsel for not appealing the entry of the tape into evidence by the defendant or listing a person on a witness list, establishes no meritorious claim of ineffective assistance of counsel. Keith cannot show that the tape is material to the issues at hand since Mr. Warren and others identified Keith during the Trial as the Killer; introducing the tape into evidence would only serve as cumulative evidence of Keith's guilt; and finally this tape does not impeach or contradict Captain Stanley, but rather bolsters the

⁸ It is still unclear how new counsel for Keith suggest that it would have been a sound tactic for Trial Counsel for Keith faced with such a tape to request the same be marked as a defense exhibit and or played to the Jury.

testimony of Captain Stanley. It appears that Captain Stanley is owed an apology.

Keith's second proposition of law should be denied.

PROPOSITION OF LAW NUMBER 3

THE OVERWHELMING WEIGHT OF THE EVIDENCE AGAINST KEITH REMOVES ANY CLAIM(S) OF CUMULATIVE ERROR.

Keith claims in his Third Proposition of Law that the cumulative effect of errors by his three Appellate Counsel and his Trial Counsel rendered the Trial and Sentence unreliable. In order to arrive at this position, Keith attempts to cite select portions of the record to establish his factual innocence. The record as a whole established otherwise.⁹ Keith claims cumulative error but strangely fails to list any such cumulative errors within this Proposition of Law. Instead, Keith relies on his opinion and hyperbole to posit that the witnesses against him and the forensic evidence lack credibility. The powerful weight of the evidence has been noted by this Court in the Original Appeal; by Sixth Circuit Court of Appeals and by multiple intermediary Courts.

Keith's Third Proposition of Law should be denied.

PROPOSITION OF LAW IV

APPELLATE COUNSEL MAY SELECT WHICH ARGUMENTS TO RAISE ON APPEAL.

In Keith's Fourth Proposition of Law, Keith suggest that his three Appellate Counsel were ineffective in failing to raise a confrontation clause issue involving the recorded conversation between Grant Hospital and retired Bucyrus Police Captain Stanley. Keith posits that the failure of Trial Counsel to object to this testimony; and the invited error by Trial Counsel¹⁰ in asking Captain

⁹ Appellee will not reproduce the entirety of the case facts in this Proposition of Law

¹⁰ Trial Counsel for Keith called Captain Stanley as a witness for Keith (T.R. Volume II commencing page 216). Trial Counsel for Keith solicited this information on direct examination from Retired Captain Stanley regarding the nurse. Thus, any Appellate issue would involve the invited error doctrine.

Stanley about this conversation and whether the conversation was taped should have alerted his Appellate Counsel to assert an additional claim of ineffective assistance of counsel on direct appeal.

Assuming arguendo that this issue is timely raised, any appeal would have faced the immediate hurdle of the plain error standard and the invited error standard. Trial Counsel for Keith originally used the conversations by retired Captain Stanley to suggest to the Jury that other individuals shared the name "Kevin". T.R. Volume II page 223 lines 2-25 continuing onto page 224 lines 1-24. The purpose of the questioning from Keith's Trial Counsel was to suggest that Captain Stanley first became advised of Kevin Keith's name, not from Richard Warren, but rather from a member of the regional law enforcement task force. T.R. page 224 lines 22-25 continuing onto page 225 lines 1-6. Keith's Trial Counsel then asserted by oral motion to the Court that the identification procedure was tainted and requested that the identification of Keith be suppressed. Keith's Appellate Attorneys raised the identification procedure issue in their Original Appeal to this Court under Proposition of Law number three. Thus, the issue is subject to res-judicata.

Plain error occurs when an error is not brought to the attention of the court. Under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced." **State ex rel. Kline v. Carroll**, 96 Ohio St.3d 404, 2002 Ohio 4849, 775 N.E.2d 517; **State v. Smith**, 148 Ohio App. 3d 274, 2002 Ohio 3114, at P30.

Keith's fourth proposition of law should be denied.

PROPOSITION OF LAW V

APPELLATE COUNSEL HAS NO DUTY TO INCLUDE IMMATERIAL MATTERS INTO THE RECORD.

In Keith's Fifth Proposition of Law, Keith suggests that his Appellate Counsel were ineffective for failing to include in the record the Juror Questionnaires. Keith's new counsel fail to

assert any reason why the inclusion of the Juror Questionnaires would have altered the outcome of this case. Instead, new counsel posit that a complete record requires such inclusion. This claim, assuming arguendo the timeliness of the same being raised, fails to meet either prong of the **Strickland** test. Counsel are not required to undertake acts that have no claimed import to a case.

Keith's Fifth Proposition of Law should be denied.

RESPONSE TO PROPOSITION OF LAW VI

THE APPELLATE COURT HAS NO OBLIGATION TO FERRET OUT THE BASIS OF A CLAIM TO RE-OPEN A DIRECT APPEAL. THE APPELLANT HAS THE BURDEN TO ESTABLISH GOOD CAUSE FOR A DELAY.

In Keith's Sixth Proposition of Law, Keith challenges the Appellate Court's decision not to allow him to re-open his direct appeal. In essence, Keith claims that he is entitled ipso facto to re-open his direct appeal due to his decision to change of counsel. Ohio Rule of Appellate Procedure 26 requires an appellant to submit good cause to re-open a direct appeal. Keith cited none.

Keith's Sixth Proposition of Law should be denied.

RESPONSE TO PROPOSITION OF LAW VII

A TRIAL COURT IS NOT REQUIRED TO SUPPLEMENT A RECORD

In Keith's Seventh Proposition of Law, Keith claims that the Trial Court abused it's discretion in failing to supplement the record with the Jury Questionnaires thirteen years after the completion of the Trial. Other than requesting that they be part of the record, Keith suggest no reason why the Court's decision in denying his request constitutes an abuse of discretion.

Keith's Seventh Proposition of Law should be denied.

CONCLUSION

For these reasons, the State of Ohio respectfully requests that Keith's Propositions of Law be denied.

Respectfully submitted,

By: 
Clifford Murphy (COUNSEL OF RECORD)
COUNSEL FOR APPELLEE
STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing Merit Brief of the Appellee has been served via Ordinary U.S. Mail, postage pre-paid, this 15th day of February 2008 upon Appellant's Counsel at their address listed in the cover page of this Merit Brief.


Clifford Murphy
COUNSEL FOR APPELLEE,
STATE OF OHIO

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

History:

131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); 145 v H 571 (Eff 10-6-94); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06.

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 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) [Ruling upon application for reconsideration.]

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.

History:

Amended, eff 7-1-75; 7-1-93; 7-1-94; 7-1-97.