

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff/Appellee,

vs.

GARY CHARLES RIGDON,

Defendant/Appellant.

: Case No. **08-1526**
:
:
: On Appeal from the Warren
:
: County Court of Appeals,
:
: Twelfth Appellate District
:
:
: Court of Appeals
:
: Case No. 0050895
:

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT GARY CHARLES RIGDON

Gary Charles Rigdon, Pro se
Prison Id. No. A525731
Chillicothe Corr. Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

DEFENDANT-APPELLANT, PRO SE

Rachel A. Hutzell
Warren County Prosecutor's Office
Warren County Prosecuting Attorney
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325 Telephone
(513) 695-2962

COUNSEL FOR APPELLEE, STATE OF OHIO

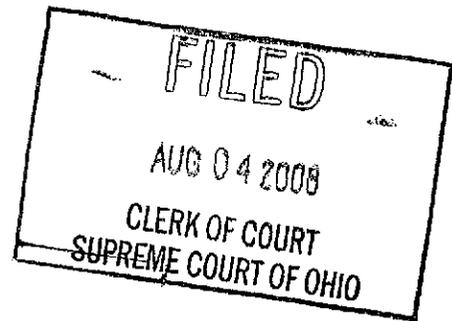


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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents (3) three critical issues for review in the State of Ohio specifically regarding State prisoners attempting to pursue their statutory right to review of Constitutional violations pursuant to App.R. 26(B): (1) Whether the State of Ohio's prisoners right to "Effective Assistance of Counsel" on appeal in accordance with U.S. Const. amend. VI and Ohio Const. art.I, §10 and Ohio prisoner's right to "Due Process of Law" pursuant to U.S. Const. amend. XIV and analogous provisions of the State of Ohio's constitution require the State to act in accord with the dictates of the constitution-and, in particular,"in accord with the Due Process Clause" **Evitts v. Lucey**, 469 U.S. 387, 401(1985), when a State prisoner has complied with the State's Corrective Process in attempting to have the issues resolved based on the merits of the claims raised; and (2) Whether the State of Ohio's corrective process is undermined by a process that is not "swift and simple and easily invoked ..." **Case v. Nebraska**, 381 U.S. 336, 346-47(1965); **Evitts v. Lucey**, 469 U.S. 387(1985), when a State prisoner utilizes a rule that purports to "govern procedure in appeals to court of appeals from the trial courts of record in Ohio". See Rules Governing the Courts of Ohio, Title I Applicability of Rules, Rule 1 Scope of Rules(A). then to have tainted procedures employed against him by State agents, ie., police, prosecutor and judges, which denies review of Sixth Amendment Ineffective Assistance of Appellate Counsel claim; and (3) Whether Prosecutorial Misconduct which effectively denies Fifth, Sixth and Fourteenth Amendment provisions under the United States Constitution requires review in order to provide an "adequate corrective process" sufficient to comply with "Due Process of Law" pursuant to the Fourteenth Amendment of the U.S. Const. and analogous provisions of the Constitution.

In this case, the Court of Appeals rules that there was no genuine issue as to whether Appellant was deprived of the effective assistance of counsel on appeal under App.R. 26(B)(5), therefore, that Ohio Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor, (a)(d) do not require State Prosecutor's to actually comply with the fore mentioned rules. Where as in this case Appellate counsel (1) failed to raise the claim of prosecutorial misconduct on direct appeal; and (2) failed to present trial counsel's failure to conduct basic rudimentary investigation into the witness, Ohio State Trooper, Wickman; and (3) failed to identify the trial court's error where the verdict form signed by the jury did not include either the degree of the offense of which the defendant was convicted or a statement that an aggravating element had been found to justify convicting a defendant of a greater degree of a criminal offense, citing **State v. Pelfrey**, 112 Ohio St. 3d 422, 860 N.E. 2d 735, 2007-Ohio-256; and (4) failed to raise trial counsel's ineffectiveness for not raising prosecutorial misconduct because the prosecution withheld statements made to the Lebanon Police Department; and (5) failed to raise trial counsel's ineffectiveness for failing to raise prosecutorial misconduct and obtain testimony from Ohio State Trooper which would have allowed appellant to assert a "self-defense" defense in conjunction with his "accidental" discharge defense; and (6) failed to raise trial counsel's ineffectiveness for failing to obtain an expert witness whose testimony would determine that the Lebanon Police Department tampered with the weapons condition at the time following the "accidental discharge". The court of appeals also ruled that, "this court finds no reasonable probability that the claims would have succeeded had they been presented on appeal" clearly conceding that the claims presented in the fore mentioned Application to Reopen, pursuant to App.R. 26(B), had been omitted from his direct appeal, because of appellate

ounsel's deficient representation.

The impact of the court of appeals flawed decision threatens state prisoner's attempts to pursue their statutory right of Application to Reopen Appeal, pursuant to App.R.26(B). The court of appeals ruling undermines the plain meaning provided in the Rules of Appellate Procedure, Title I, Rule 1(A). By its ruling, the court of appeals defies the Fourteenth Amendment "Due Process of Law" clause and fails to provide at least as much protections as the U.S. Const., thus undermining the legislative intent, ignoring the plain meaning of the rule, and in effect, has written App.R. 26(B) out of Ohio law. Moreover, the court of appeals decision establishes an arbitrary and capricious attitude that it may disregard it's obligation by denying "Due Process of Law" to a "procedure in appeals to court of appeals from the trial courts of record" and that it may do so with impunity. Finally, the decision of the court of appeals which has written App.R.26(B) out of Ohio law; restoring the law as it was prior to the implementation of the rule, promotes the erosion of one's right to Due Process of Law shifting the balance of power from the tribunal-blatantly defying legislation and most importantly the Federal and State constitutions. These discrete acts attack the most basic fundamentals which define "Due Process of Law" in our courts, and require correction. "[W]hen a State opts to act in field where it's action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular,"in accord with the Due Process Clause", **Evitts v. Lucey**, 469 U.S. 387, 401(1985).

The import of the decision of the court of appeals affect every governmental entity in Ohio, and threatens the dictates of the Constitution which require the State act in accord with the Due Process Clause. The public's interest in the proper administration of justice is deeply affected by a

holding that the Ohio Rules of Appellate Procedure are not binding on the Ohio Court of Appeals. Such subversion incapacitates the integrity of the court of appeals, and pays no homage to the fundamental principle that the rule of law compels government as well as prisoners. Similarly, the public interest is affected if the clear meaning of Appellate Rules purporting to govern procedure in the Court of Appeals can be arbitrarily and capriciously altered to vitiate the Appellate Rules intent that provide "Due Process of Law" for prisoners who have been subjected to ineffective assistance of appellate counsel on appeal.

Apart from these governmental considerations, which make this case one of great public interest, the decision of the court of appeals has broad general significance. Every citizen in the State of Ohio has a vested interest in the proper administration of justice which provides citizens and the courts rules that govern procedure which clearly state the applicability of rules. The Court of Appeals right to govern, also obliges the same to be governed by it's own rules of procedure. Under these rules, citizens may, exercise their right to "Due Process of Law", as provided under the Fourteenth Amendment. The resulting opportunity to reopen an appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel would allow the case to proceed as on initial appeal, addressing those assignments of error and arguments not previously considered.

The decision of the court of appeals violates the authoritative principle professing rules that govern procedure in appeals to the court of appeals- App. R.26(B)- from citizens denied the effective assistance of appellate counsel. Under this holding, citizens are denied "Due Process of Law" where they have received deficient representation on appeal. The result of this decision has written App.R.26(B) out of Ohio law. Citizens would be denied "Due Process of Law" through ineffective assistance of counsel on appeal, and

then be further prejudiced by Ohio's corrective process, which inadequately administers it's corrective process that is not "swift and simple and easily invoked ...", **Case v. Nebraska**, 381 U.S. 336, 345-47(1965)(Brennan, J., concurring); **Goldberg v. Kelly**, 397 U.S. 254(1970); **Evitts v. Lucey**, 469 U.S. 387(1985).

Noteworthy, the decision of the court of appeals is unauthorized both by the rules that govern procedure in appeals to the court of appeals and the Fourteenth Amendment of the U.S. Constitution. The court of appeals and rules governing the procedures in the State of Ohio, including Fourteenth Amendment "Due Process" provisions, require the judiciary to govern accordingly. Correspondingly, where there is the same reason, there is the same law, and where there are similar situations, the judgment is the same.

The judgment of the court of appeals has great general significance also because it undermines the court of appeals credibility because it permits the judiciary to avoid their responsibilities, to govern according to the applicable rules. If the arbitrary and capricious application of appellate rules, contemptuous to the State Government; it's Constitution and the Federal Constitution, the authoritativeness and purport of the obligation and the formulated intention of the Rule will be void. The tribunal, such as the court of appeals, could refuse regardless of how egregious the representation is to apply the rule governing procedure in appeals to the court of appeals. Such a probability is contrary to current case law and the clearly stated purpose of the Ohio Rules of Appellate Procedure, App.R.26(B).

Finally, this case includes a substantial constitutional question. The decision transgresses Ohio's constitution by implementing the judiciary of the court of appeals, conferred by the Ohio Rules of Appellate Procedure, over the U.S. Federal Constitution's analogous provisions which provide "Due Process of

Law". Such a constitutional imbalance is contrary to the court's ruling in **Evitts v. Lucey**(1985), 469 U.S. 387, 105 S.Ct. 830.

Contrary to the holding in **Evitts v. Lucey, supra**, the lower court's version of App.R.26(B) nullifies the benefit of the Rule. The decision would invite a return to Appellate Courts disposing of cases and avoiding it's obligations to consider the merit of claims raised. This court rejected such a regression in **Barksdale v. Van's Auto Sales, Inc.**,(1988), 38 Ohio St. 3d 127, 128, 527 N.E. 2d 284."[It is] a basic tenet of Ohio jurisprudence that cases should be decided on their merits and not on mere procedural technicalities."

If allowed to stand, the decision of the court of appeals would defeat the purpose of App.R.26(B). Under the decision, egregiously deficient appellate representation and prosecutorial misconduct would be beyond purview of the appellate courts. Ineffective assistance of appellate counsel claims would only be reviewed through 26(B) Applications to Reopen, under **State v. Murnahan** ,(1992), 63 Ohio St. 3d 60, 584 N.E. 2d 1204, which limits the filing of an application to reopen an appeal only in situations where the time for reconsideration and an appeal to the Supreme Court has expired, **Murnahan**, 63 Ohio St. 3d at 65. The Ohio Rules of Appellate Procedure, designed to govern procedure in the courts of appeal provide due process of law, would be frustrated if allowed to stand.

In sum, this case puts in issue the essence of citizens rights to "Due Process of Law", thereby affecting the required level of representation afforded citizens in the courts of Ohio. To promote the purposes and preserve the integrity of the rules governing the courts of Ohio, to assure uniform application of the Rules of Appellate Procedure, to promote the proper administration of justice by the judiciary, and to remove obstructions to the proper determination of claims on their merits, this court must grant jurisdiction to

hear this case and review the erroneous and dangerous decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

The case arises from the attempt of Appellant, Gary Charles Rigdon ("Rigdon") to utilize Ohio Rules of Appellate Procedure, App.R.26(B), Application for Reopening to apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. The Warren County Court of Appeals, Twelfth Appellate District (the "Court") ruled that "there was no genuine issue as to whether ["Rigdon"] was deprived of the effective assistance of counsel on appeal, under App.R.26(B)(5), therefore Rigdon's application for reopening was denied.

The "Court" Entry Denying Application for Reopening deviates from Ohio Rules of Appellate Procedure, Title I, Applicability of Rules, Rule 1, Scope of Rules (A) "These rules [purport to] Govern procedure in appeals to courts of appeal from the trial courts of record in Ohio". Rigdon's App.R.26(B) maintains he was denied the effective assistance of appellate counsel because counsel failed to raise the (6) six assignments of error presented in the fore mentioned App.R.26(B), (3) three of which were addressed by the State's Reply and subsequent Entry Denying Application for Reopening. App.R.26(B)(1) requires "An application for reopening ... be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment", App.R.26(B)(2),(a),(c),(d),(e); (3); (4) were adhered to based on surrounding facts. Rigdon met the requirements as imposed by App.R.26(B) Application for Reopening. The "Court", however, in denying the application, refused to comply with the "rule govern[ing] procedure in appeals to court of appeals from the trial courts of record in Ohio" determining that

"Clearly these are matters regarding counsel's professional discretion in determining trial strategy. They also involve issues that could have and should have been raised in Appellant's direct appeal in case No. CA 2006-05-064. Challenging the verdict form as deficient is also a matter that should have been raised on direct appeal in Case No. CA 2006-05-064. As such, res judicata prohibits it's consideration under App.R.26(B)." See Entry Denying Application for Reopening, at Page 3 and 4.

The entire basis for App.R.26(B) is the claim that appellate counsel rendered constitutionally ineffective assistance by failing to raise one or more issues in the original appeal. The "Courts" novel interpretation of the rule denying Rigdon's App.R. 26(B) application based on res judicata has, in effect written App.R. 26(B) out of Ohio law restoring the law as it was prior to the decision in **Murnahan, supra**. Rigdon has not had the opportunity to brief and argue the unraised issues in his appeal. Because a timely-filed application pursuant to App.R.26(B) gives him the right to raise the issues, he has a due process right to do so, pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution, a right denied by the court's order denying his application without even considering the merits of the assignments of error which he raised therein, **Evitts v. Lucey**, (1985), 469 U.S. 387, 105 S.Ct. 830.

The Supreme Court held that "claims of ineffective assistance of appellate counsel should be considered and disposed of in the appellate court where the alleged error occurred ..." **Morgan v. Eads**, 104 Ohio St. 3d 142, 2004-Ohio --6110, 818 N.E. 2d 1157. The denial of Rigdon's Application for Reopening also violated this principle.

The court of appeals erred in ruling that under App.R.26(B)(5) there were no genuine issues as to whether appellant was deprived of the effective assis-

tance of counsel on appeal. The court of appeals also erred in failing to recognize that a timely-filed App.R.25(B) requires the appellate court to comply with the "State Corrective Process" because the Rigdon has a Due Process right pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The court of appeals further failed to abide by Ohio Rules of Appellate Procedure which govern procedures in the courts of appeals and provide a "State Corrective Process" that provides "Due Process of Law" to citizens.

In support of its position on these issues, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Ohio State Prisoner's right to "effective assistance of counsel" under U.S. Const. Amend. VI and Ohio Const. Art. I, §10; and Ohio State Prisoner's right to "due process of law" pursuant to U.S. Const. Amend XIV and analogous provisions of the State of Ohio's Constitution require the State to act "in accord with the due process clause" **Evitts v. Lucey**, 469 U.S. 387, 401(1985) when a state prisoner has complied with the "State's Corrective Process" in attempting to have issues resolved based on the merits of the claims raised.

In the interest of promoting the administration of justice the Ohio Rules of Appellate Procedure govern all procedures in appeals to the Twelfth District Court of Appeals from trial courts of record within the jurisdictional boundaries of the Twelfth District. The Rules of Appellate Procedure prescribe the procedures to be followed ... by all parties, whether represented or unrepresented.

Ohio Rules of Appellate Procedure, Rule 25(B) Application for Reopening sets forth the "State Corrective Process" to be followed to reopen the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. Under that rule, "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". App.R.26(B)(5), provides further guidance in the proper administration of justice, which states:

"(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".

This provision provides a process by which Ohio's Prisoner's may present the claim of Ineffective Assistance of Counsel on appeal to require the State to actually litigate [such] claims on their merits. The Appellate Court's application of a res judicata bar to trial counsel's ineffectiveness is unjust. The Court, however, was correct in stating that "They also involve issues that could have and should have been raised in Appellant's direct appeal in Case No. CA2006-05-064, challenging the verdict forms as deficient is also a matter that should have been raised on direct appeal in Case No. CA2006-05-064". Rigdon vehemently asserts that the merits of the claims raised must be briefed. Because the Appellate Court has not considered the merits of Rigdon's claims which were omitted from his initial appeal, he has not had a ruling on the merits of those claims.

In this case, the State has provided a facially adequate process, however, the Appellant is precluded from utilizing it by reason of an unconscionable breakdown in that process, thus, the requisite opportunity for full and fair litigation is absent. The unconscionable breakdown in the "State's Corrective Process" has previously been addressed in **Morgan v. Eatis**, 104 Ohio St. 3d 142, 2004-Ohio-6110, 818 N.E. 2d 1157, where this Court has held that "claims of ineffective assistance of appellate counsel should be considered and disposed of in the appellate court where the alleged error occurred ...".

Proposition of Law No. II: The State of Ohio's correc-

tive process should be a process that is "swift and simple and easily invoked ..." **Case v. Nebraska**, 381 U.S. 336, 346-47(1965); **Evitts v. Lucey**, 469 U.S. 387 (1985), when a state prisoner utilizes a rule that purports to "govern procedure in appeals to court of appeals from the trial courts of record in Ohio". See Rules Governing the Courts of Ohio, Title I Applicability of Rules, Rule 1 Scope of Rules (A). Then to have tainted procedures employed against him by State agents, ie., police, prosecutor and judges which denies review of Sixth Amendment Ineffective Assistance of Appellate Counsel claim.

App.R. 26(B) provides a facially adequate process for Appellant's to raise claims of constitutionally ineffective assistance of appellate counsel.

In this case, Appellant has conscientiously pursued available state remedies, however, the appellate court has not actually made those procedures available because of an unconscionable breakdown in that process.

The court of appeals unreasonably applied clearly established federal law in determining that appellate counsel was not deficient, as required to show effective assistance, to foreclose opportunity to brief and argue issues not raised on direct appeal. As used in this analysis, Ineffective Assistance of Counsel is intended to comprise the two elements set forth in **Strickland v. Washington**, (1984) 466 U.S. 668, 104 S.Ct. 2052, namely, a deficiency in the representation of appellant and prejudice resulting from such deficient representation. **Tenace**; **State v. Sheppard**, 91 Ohio St. 3d 329, 2001-Ohio-52; **State v. Reed**, 74 Ohio St. 3d 534, 1996-Ohio-21. Appellant demonstrated genuine issue(s) as to whether he was denied the effective assistance of appellate counsel. **Tenace**, 2006-Ohio-2987 at ¶6, citing **State v. Spivey**, 84 Ohio St. 3d 24, 25, 1998-Ohio-704, certiori denied(1999), 526 U.S. 1091, 119 S.Ct. 1506. "To show ineffective assistance, [Appellant] must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had they presented those claims on appeal."

State v. Jaloweic, 92 Ohio St. 3d 421, 422, 2001-Ohio-164, certiori denied, 534 U.S. 64, 122 S.Ct. 374.

Appellant's App.R. 26(B) Application for Reopening demonstrated that appellate counsel "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." **Strickland**, 466 U.S. at 687, 104 S.Ct. 2052. For example, on appeal, appellate counsel failed to raise trial counsel's deficient representation because trial counsel failed to raise prosecutorial misconduct where the police withheld recorded statements. The police misconduct, attributable to the prosecution, has denied appellant the "due process" right to App. R. 26(B) Application to Reopening, to have previously omitted issues determined on their merits. the court of appeals "miscarriage of justice" based on an obvious error and an unsupportable decision under the law requires correction.

Police misconduct and prosecutorial misconduct which the trial court allows and is not addressed through the appropriate State Corrective mechanism in the appellate court requires the Ohio Supreme Court to accept jurisdiction to afford "due process of law" under the Fourteenth Amendment to the United States Constitution for Ohio prisoners.

Proposition of Law No. III: Prosecutorial misconduct raised under ineffective assistance of appellate counsel claim which effectively denies Fifth, Sixth and Fourteenth Amendment provisions under the United States Constitution requires review in order to provide an "adequate corrective process" sufficient to provide "due process of law" pursuant to the Fourteenth Amendment of the United States Constitution and analogous provisions of the State of Ohio's Constitution.

The prosecutorial misconduct (police misconduct attributable to the State) resulted in a fundamental-miscarriage-of-justice, because appellant's right to "effective assistance of counsel on appeal" under the Sixth Amendment to the United States Constitution was infringed upon by an inadequate "State

Corrective Process" which did not, in this case, make certain procedures available to the appellant where there are facts in dispute and the opportunity to brief the merits of the claims raised under App.R. 26(B) has been denied. The State has not provided the Appellant the requisite procedural steps.

The State appellate court's refusal, and it's unstated failure, actually to consider the Appellant's Sixth Amendment claim through a "State Corrective Mechanism" that purports to allow "a defendant in a criminal case [to] apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel", by the unjust application of the res judicata doctrine. The Rule [App.R.26(B)] which governs procedure in appeals to courts of appeals from the trial court's of record require the proper administration of justice, where there is substantive merit to Appellant's ineffective assistance of appellate counsel claims under the United States Constitution Amend. VI and Ohio Const. art. I, § 10, because appellate counsel was constitutionally ineffective, and as Appellant has shown, the outcome of Appellant's matter would have been different if the other issues had been raised and argued. **State v. Smith**, ----Ohio App. 3d----, 2007 Ohio 1977, ----N.E. 2d----, 2007 Ohio App. LEXIS 1826 (Apr. 20, 2007).

The State's Corrective Mechanism for the claim of ineffective assistance of Appellate counsel under App.R. 26(B) prevail over conflicting applications of federal and state law provisions employed in violation of the **Napue/Giglio/ Brady Doctrine**. It is a bedrock constitutional principle that when the State knowingly uses false evidence at trial to obtain a conviction, it acts unconstitutionally. See **Napue v. Illinois**, 360 U.S. 264, 269(1959); **Pyle v. Kansas**, 317 U.S. 213, 215,(1942); **Mooney v. Holohan**, 294 U.S. 103, 112(1935).

CONCLUSION

For the reasons discussed above, this case involves matters of public and

great general interest and a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Gary Charles Rigdon, Pro se
Prison Id. No. A525-731
Chillicothe Corr. Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Rachel A. Hutzel, Warren County Prosecuting Attorney, Warren County Prosecutor's Office, 500 Justice Drive, Lebanon, Ohio 45036, on July 31, 2008.



Gary Charles Rigdon, Pro se

Appellant, Pro se

COURT OF APPEALS
IN THE COURT OF APPEALS WARREN COUNTY, OHIO
FILED

JUL - 1 2008

STATE OF OHIO,

James D. Swartz, Clerk
LEBANON OHIO

Appellee,

CASE NO. CA2007-03-038

- vs -

GARY C. RIGDON,

ENTRY
DENYING APPLICATION
FOR REOPENING

Appellant.

This matter came on to be considered upon an application for reopening filed pro se pursuant to App.R. 26(B) by appellant, Gary C. Rigdon, on May 5, 2008, a memorandum in opposition filed by counsel for appellee, the state of Ohio, on May 30, 2008, and a pro se reply to the state's memorandum in opposition filed on June 9, 2008.¹

A jury convicted appellant on two counts of felonious assault with firearm specifications, and the trial court imposed an aggregate sentence of six years in prison. Appellant's convictions and sentence were affirmed on direct appeal. See *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843; appeal not accepted for review, 115 Ohio St.3d 1474, 2007-Ohio-5735.

While the direct appeal was pending, appellant moved for a new trial pursuant to Crim.R. 33. The trial court denied the motion and this court subsequently affirmed that decision on appeal. *State v. Rigdon* (Feb. 4, 2008), Warren App. No. CA2007-

1. App.R. 26(B) neither contemplates nor authorizes additional filings other than the original application and the prosecution's memorandum in opposition. See App.R. 26(B)(3). Thus, we are under no obligation to give any weight to, or even consider, appellant's reply in support of his application for reopening



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03-038 (accelerated calendar judgment entry), motion for reconsideration denied (Mar. 27, 2008), appeal not accepted for review, ___ Ohio St.3d ___, 2008-Ohio-2823.

Appellant now claims he was denied the effective assistance of appellate counsel in Case No. CA2007-03-038 because counsel failed to raise assignments of error arguing trial counsel was ineffective for failing to: (1) properly investigate a potential defense witness and hire a firearms expert; (2) raise prosecutorial misconduct; and (3) challenge deficient jury verdict forms.

An application of this nature shall be granted only if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, ¶5. See, also, *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, App.R. 26(B)(5). As used in this analysis, ineffective assistance of counsel is intended to comprise the two elements set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, namely, a deficiency in the representation of appellant and prejudice resulting from such deficient representation. *Tenace*; *State v. Sheppard*, 91 Ohio St.3d 329, 2001-Ohio-52; *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21. Appellant bears the burden of demonstrating a genuine issue as to whether he was denied the effective assistance of appellate counsel. *Tenace*, 2006-Ohio-2987 at ¶6, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, certiorari denied (1999), 526 U.S. 1091, 119 S.Ct. 1506.

Appellant first claims that appellate counsel was ineffective for not arguing the ineffective assistance of trial counsel regarding the investigation of a potential

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defense witness. The individual in question, a state highway patrolman living in the neighborhood where the incident occurred, was not called as a witness by either the prosecution or the defense. It appears, however, that this individual could provide no information that would have assisted the defense at trial. The patrolman's written statement attached to the application indicates that he was in his house when he heard a firearm discharged, did not witness the actual shooting, and only observed what occurred after appellant shot the victim.

Regarding appellant's assertion that trial counsel should have retained an expert to investigate the firearm's potential to accidentally discharge, it is evident that appellant consciously loaded a round into the weapon's chamber, discharged the weapon, then deliberately loaded a second round into the chamber. See *State v. Rigdon*, 2007-Ohio-2843 at ¶¶6, 7, 37, 38. Appellant's final act of reloading the weapon after it has discharged is hardly consistent with his claim that the shooting was accidental.

There exists a presumption that the act or omission of trial counsel is the product of trial strategy, falling within the discretion of the professional. *State v. Wells*, Warren App. No. CA2005-04-050, 2006-Ohio-874, ¶11. And decisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics. *Id.* at ¶12. See, also, *State v. Coulter* (1992), 75 Ohio App.3d 219, 230.

Trial counsel knew the identity of the state trooper through pretrial discovery. Trial counsel's decision whether to retain and call a firearms expert as a witness was likewise made based upon counsel's investigation and knowledge of the case. Clearly these are matters regarding counsel's professional discretion in determining trial

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strategy. They also involve issues that could have and should have been raised in appellant's direct appeal in Case No. CA2006-05-064. Challenging the verdict forms as deficient is also a matter that should have been raised on direct appeal in Case No. CA2006-05-064. As such, *res judicata* prohibits its consideration under App.R. 26(B).

The claim of prosecutorial misconduct involves matters that occurred either at or following the hearing on the motion for new trial. The conduct which is the basis of appellant's complaint, even if true, does not amount to a violation of an essential duty to appellant. Nor has there been a demonstration that appellant was prejudiced by the prosecutor's conduct.

"Under *Strickland*, a court must apply 'a heavy measure of deference to counsel's judgments,' 466 U.S. at 691, 104 S.Ct. 2052, and 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' *Id.* at 689, 104 S.Ct. 2052." *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, at ¶7. Counsel's failure to raise every possible issue in the court of appeals is not tantamount to ineffective assistance of counsel. The process of "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues," is far from evidence of incompetence, but rather the hallmark of effective appellate advocacy. *Jones v. Barnes* (1983), 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3312-13.

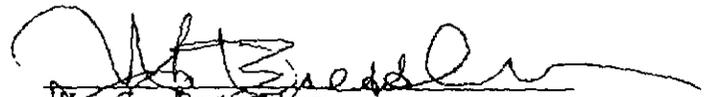
"To show ineffective assistance, [appellant] must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had they presented those claims on appeal." *State*

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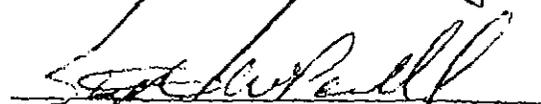
v. *Jalowiec*, 92 Ohio St.3d 421, 422, 2001-Ohio-164, certiorari denied, 534 U.S. 964, 122 S.Ct. 374. Having reviewed appellant's claims, this court finds no reasonable probability that the claims would have succeeded had they been presented on appeal.

Upon due consideration of the foregoing, and it appearing to the court that there is no genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal under App.R. 26(B)(5), appellant's application for reopening is hereby DENIED.

IT IS SO ORDERED.


H. J. Bressler,
Administrative Judge


William W. Young, Judge


Stephen W. Powell, Judge

NOTICE TO THE CLERK:

SERVE A COPY OF THIS ENTRY DIRECTLY ON APPELLANT
AT THE FOLLOWING ADDRESS:

Gary C. Rigdon
Inmate #A525-731
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, OH 45601