

IN THE SUPREME COURT OF OHIO

James C. McCausland,	:	
	:	
Appellant,	:	Case No. 08-2415
	:	
v.	:	
	:	
State of Ohio,	:	On Appeal from the
	:	Butler County Court
	:	of Appeals, Twelfth
Appellee.	:	Appellate District
	:	

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APPELLEE STATE OF OHIO'S MEMORANDUM IN RESPONSE TO APPELLANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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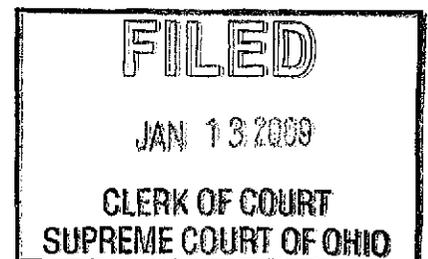


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<b><u>Appellant’s Proposition of Law:</u></b> The trial court erred and denied Appellant a fair trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution when it denied Counsel the opportunity to make a closing argument prior to the judgment of the trial court.....	
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EXPLANATION OF WHY THIS CASE IS NOT ONE INVOLVING A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND  
IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

No substantial constitutional question nor does the herein case one of public or great general interest. An appellate court's utilization of a plain error analysis where error is claimed at an area court bench trial when no closing arguments were requested or denied, and no objections were made prior to or following the guilty verdict rendered by the court, does not rise to the level of a substantial constitutional question and does not peak the public or other general interest in the matter requiring the Ohio Supreme Court to review the appellate court's decision.

Appellant attempts to invoke this Honorable Court's jurisdiction by asserting that a conflict exists between the Twelfth District Court of Appeals and another district or districts, however, Appellant failed to ask the Twelfth District to certify that a conflict exists and currently couches his conflict complaint under the guise of a substantial constitutional question or one of public or great general interest.

The appellate court conducted a review for plain error and found that "although [he] had the opportunity to request one \* \* \* [and] appellant \* \* \* neglected to raise an objection to the trial court \* \* \*." *State v. McCausland*, Butler App.No. CA2007-10-254, 2008-Ohio-5660 at ¶ 20. Finding no indication that the outcome of the trial would have been different if a closing argument had been made, Appellant's conviction was affirmed. *Id.* Nothing in Appellant's Memo in Support of Jurisdiction requires this Court to take action other than to dismiss the current appeal.

## STATEMENT OF THE CASE AND FACTS

In March of 2007, Appellant was stopped for speeding and subsequently arrested for Operating a Motor Vehicle Under the Influence, having a prior conviction for the same offense. Appellant was also charged with his refusal to take a chemical test. Appellant waived a jury and a trial to the bench was held in a Butler County area court. Following the presentation of evidence and discussion by the parties with the court, Appellant was convicted and on appeal claimed that his constitutional right to a fair trial was violated because he was denied the right to make a closing argument. The Twelfth District affirmed the conviction and Appellant now claims the case raises a substantial constitutional question and is one of public or great general interest arguing that a conflict exists among the Ohio appellate district courts and, therefore, the Supreme Court of Ohio should exercise its jurisdiction. This Honorable Court should dismiss the herein appeal from review under any theory proposed by Appellant, including that a conflict exists when none has been certified and Appellant attempts to bootstrap Supreme Court jurisdiction where no provision exists for review of the Twelfth District's decision.

The Twelfth District conducted a plain error analysis of Appellant's complaint with respect to the fact that he did not request, engage in, or object to the lack of a closing argument. In affirming his conviction, the court of appeals correctly found that the outcome of Appellant's case would not have been different had his trial attorney presented a closing argument.

## ARGUMENT IN SUPPORT OF APPELLEE'S POSITION

The Twelfth District has under an appropriate plain error analysis determined that the outcome of Appellant's bench trial was not affected by the fact that his counsel did not ask for and was not denied an opportunity to present a closing argument. Trial counsel for Appellant failed to object to the fact that he did not present a summation of the evidence to the bench requiring the court of appeals to undergo a plain error analysis.

An error otherwise waived may be considered by an appellate court under the doctrine of plain error if the error affects a substantial right pursuant to Crim.R. 52(B) but any notice of plain error must be taken with "utmost caution" where "exceptional circumstances exist" and only to "prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 94-95.

The Twelfth District in its decision noted that both sides called, recalled, examined, cross and re-cross examined witnesses. "Prior to pronouncing the sentence \* \* \* the judge had at least two more conversations on the record with appellant's attorney. [At] no time (even after a 'pause' was noted in the record) did appellant's counsel object to not being able to make a summation, nor did he request the opportunity to make a closing argument." *State v. McCausland*, 2008-Ohio-5660 at ¶¶ 3-4. Even assuming denial of a summation was error, "because appellant's counsel failed to raise the issue, any analysis made by this court would be under plain error. Crim.R. 52. \* \* \* [and] plain error does not exist \* \* \* nothing indicates the outcome of the trial would have been different had defense counsel presented a closing argument." *Id.*, at ¶¶ 22-23; ¶ 26.

The lower court also considered Appellant's claim that a reversal of his conviction was warranted based on a 1975 decision construing a New York statute that specifically gave a trial court the right to deny a defense request to present closing argument in a bench trial.

The Twelfth District determined that it would not expand the holding in *Herring v. New York* (1975), 422 U.S. 853, 95 S.Ct. 2550, however, beyond its limitation that a "total [affirmative] denial of the opportunity for final argument" is constitutional error.

*McCausland* at ¶8. "[W]e decline to expand its rationale to create a presumption against waiver when a closing is neither requested by the defense nor objected to when not offered by the court." *McCausland* at ¶ 15. The Twelfth District had previously examined the *Herring* decision in *State v. Brown*, Clermont App.No. CA-1210, 1983 WL 6344 and held as follows.

"In *Brown*, we found that because there was no request for a final argument by either party, both parties had the opportunity to request a summation, the trial court did not affirmatively deny any request by the appellant to make a closing argument, and the appellant failed to raise an objection to the trial court before or after the verdict was rendered, the failure to allow a closing argument was not reversible error." *State v. McCausland*, 2008-Ohio-5660 at ¶ 12, citing *Brown*.

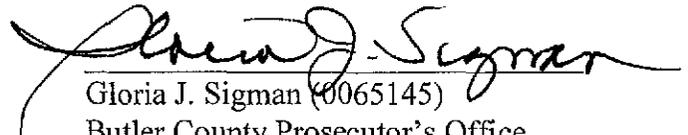
The Twelfth District noted that R.C. 2315.01(A)(6) states that a party *may* submit or argue a case and further relied on *State v. Farrah*, Franklin App.No. 01AP-968, 2002-Ohio-1918, ¶ 58, citing *State v. Burke*, 73 Ohio St.3d 399, 404-05, 1995-Ohio-290 and *State v.*

*Apanovich* (1987), 33 Ohio St.3d 19, 24 wherein silence on the issue of a request to engage in summation at the conclusion of a bench trial may very well indicate a strategy decision squarely within the standard of “reasonable professional assistance.” found in *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052. Ultimately, Appellant’s case herein was appropriately reviewed for plain error and none was found.

CONCLUSION

Because the case at bar does not involve any substantial constitutional question and is not one of great or general public interest; and because no conflict has been certified to this Honorable Court as none exists; Appellee respectfully requests that the appeal herein be dismissed.

Respectfully,

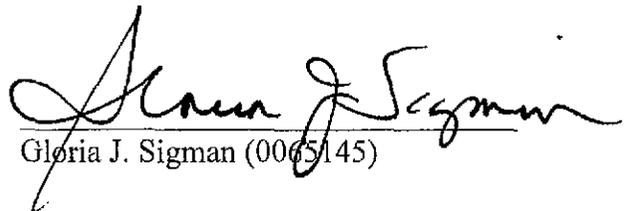


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PROOF OF SERVICE

12 I hereby certify that a copy of the foregoing was served via regular U.S. mail on this 12<sup>th</sup> day of January, 2009, to the following counsel for Appellant, James C. McCausland:

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