IN THE SUPREME COURT OF OHIO

09-0208

TRACY HUNTER,

Appellant,

v.

THE STATE OF OHIO,

Appellees.

On Appeal from the Montgomery County Court of Appeals Second Appellate District

Court of Appeals Case No. 22201

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT TRACY HUNTER

TRACY HUNTER, PRO SE
Prison Id. No. #543-809
Chillicothe Corr. Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

PRO SE, APPELLANT

CARLEY J. INGRAM (0020034)
Assistant Prosecuting Attorney
301 W. Third Street
5th Floor
Dayton, Ohio 45422

COUNSEL FOR APPELLEE

FILED
JAN 28 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW. 3

Proposition of Law No.1: The Appellant's right to appeal shall not be extinguished because another right of the Appellant--the right to effective assistance of counsel--has been violated 4

Proposition of Law No.2: The Appellant has right to effective assistance of Counsel on direct appeal under the Sixth Amendment. 4

Proposition of Law No.3: Appellant's conviction for the firearm specification is contrary to law. 5

Proposition of Law No.4: The conviction for burglary is against the manifest/sufficiency of evidence when the State's star witness offered misleading and false testimony that Appellant forced his way into the victim's home. 7

Proposition of Law No.5: The trial court erred when it overruled Appellant's Crim.R. 29 Motion for Acquital. 8

Proposition of Law No.6: Appellant's conviction for a firearm specification is against the manifest weight of the evidence. 9

Proposition of Law No.7: The Appellant contends he was denied his right to a fair trial because of prosecutorial misconduct. 10

Proposition of Law No.8: The Appellant contends that he was denied effective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments tot he United States and Ohio Constitutions when appellate counsel failed to raise on direct appeal, that the trial court lacked procedural and subject matter jurisdiction. 11

CONCLUSION. 12

CERTIFICATE OF SERVICE. 13

APPENDIX

Appx.Page

Opinion of the Montgomery County Court of Appeals (December 15, 2008). 4

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

In this case the denial of Appellant's right to effective assistance of counsel precluded a collateral attack on direct appeal substantively extinguishing his right to appeal constitutional violations.

As the United States Supreme Court stated in **Evitts v. Lucey**,(1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821, at 399-400. "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their fredom drastically curtailed. A state may not extinguish this right because another right of the appellant- the right to effective assistance of counsel-has been violated."

Failure of the court to resist Constitutional abuses by the executive perpetuates the erosive effect of diminished judiciary power and devalues the patrimonial endeavor to establish those freedoms.

The Montgomery County Court of Common Pleas appointed Mr. Christopher Thompson to represent Appellant Hunter on appeal of his sentence and conviction following his trial.

Appellant's claim of ineffective assistance of counsel are grounded in the court appointed appellate counsel's failure to raise certain constitutional violations on direct appeal, failure to communicate to Appellant "reasonably" what Appellant's direct appeal would consist of; and failure of counsel to advise the court of the impasse and then comply with the procedures enunciated in **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493(1967). **U.S.C.A. Const. Amend. 6.**

Appellate Counsel's failure to brief and preserve for review by the federal habeas corpus courts Appellant's federal claims has resulted in the denial of Appellant's Sixth Amendment right to "effective assistance" of

counsel, as a result of Appellate Counsel's deficient representation Appellant has been prejudiced because the state court has not reviewed the federal issues prepared by counsel as required by the Sixth Amendment. The deficient representation has precluded the state from taking cognizance and appellate review of federal claims. "It is inherent in the Constitutional plan ... that when a State court takes cognizance of a case, the State assents to appellate review by this court of the Federal issues raised in the case 'whoever may be the parties to the original suit, whether private persons, or the State itself.'" Id. at 30, 110 S.Ct. 745 2238(quoting **Principalities of Monaco v. Mississippi**, 292 U.S. 313, 329, 54 S.Ct. 745, 78 L.Ed. 1282(1934); **Proprietors of Charles Rivers Bridge v. Proprietors of warren Bridge**, 11 Pet. 420, 535 9L.Ed. 773(1837)(Story, J., dissenting)).

Appellant's right to "Due Process" as provided by the General Assembly where the Ohio Revised Code accords instruction that "remedial laws and all proceedings under them shall be liberally construed to promote and assist the parties in obtaining justice." **R.C. 1.11**, has been infringed upon by the Court of Appeals failure to grant Appellant's **App.R. 26(B)**, which would have provided Appellant a remedy for the violation his right to effective assistance, due process and meaningful access to the courts. The discretion to deny an Appellant who has raised a legitimate Sixth Amendment violation based on ineffective assistance of appellate counsel and Appellant's "due process" right to appeal has not provided a remedy and does not comport with the State's obligations to appellate review.

In this case, Appellant has not been afforded the "effective assistance" of counsel as required under the constitution. Appellate Counsel's failures to properly present Appellant's claims of constitutional violations have resulted in the violation of Appellant's First Amendment right "to petition the

Government for a redress of grievances" and Appellant's Fifth Amendment right to "due process of law"as applied to this State under the Fourteenth Amendment right to "due process of law".

This case raises for this court the Appellant's, and all criminal defendant's right's to "due process of law", "effective assistance of counsel", "meaningful access to the courts" while questioning the lower court's integrity for failure to provide constitutional protections guaranteed under the United States Constitution- even in this "police" state.

STATEMENT OF THE CASE AND FACTS

The case arises from the attempt of Appellant Tracy Hunter to have constitutional violations reviewed on direct appeal by the Second District Court of Appeals.

In April, 2007, Appellant was convicted of aggravated burglary, in violation of **R.C.§2911.11(A)(2)**, a felony of the first degree, with an accompanying firearm specification, and the trial court sentenced Hunter to an aggregate prison term of 11 years. The Court of Appeals affirmed the trial court's decision on Appellant's direct appeal on June 13, 2008, in which appellate counsel argued that the trial court erred by allowing the State to use its peremptory challenges to dismiss the only two African-American jurors from the venire, in violation of **Batson v. Kentucky**(1986), 476 U.S. 79, 106 S.Ct. 1712.

Appellate Counsel failed to communicate, reasonably, to Appellant what assignments would be presented in Appellant's direct appeal, and prejudiced Appellant by not including the assignments of error now presented for review under **App.R.26(B)**, citing Appellate Counsel's "ineffective assistance" in violation of the Sixth Amendment to the United States Constitution.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No.1: The Appellant's right to appeal shall not

be extinguished because another right of the Appellant--the right to effective assistance of counsel--has been violated.

In **Evitts v. Lucey**(1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821, the United States Supreme Court stated "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the Appellant--the right to effective assistance of counsel--has been violated."

Appellant's claims of constitutional violations have not had the benefit of an appellate review of the issues on their merits. In **De Hart v. Aetna Life Ins. Co.**(1982), 69 Ohio St. 2d 189, 431 N.E.2d 644, 23 O.O.3d 210, this court stated at 192, 431 N.E.2d 644: "*** It is a fundamental tenet of judicial review in Ohio that Courts should decide cases on their merits. See e.g., **Cobb v. Cobb**(1980), 62 Ohio St.2d 124, 403 N.E.2d 991, 16 O.O. 3d 145. Judicial discretion must be carefully--and cautiously--exercised before the Supreme Court will uphold an outright dismissal of a case on purely procedurally grounds."

Proposition of Law No.2: The Appellant has right to effective assistance of Counsel on direct appeal under the Sixth Amendment.

Appellant's right to "effective assistance" of counsel under the Sixth Amendment, Due Process and Equal protection of Laws under the Fifth and Fourteenth Amendment requires review of meritorious issues omitted by appellate counsel's deficient representation, presented in Appellant's **App.R. 26(B)** Application to Reopen.

Appellant was convicted, after being denied right to a fair trial, due process of law, and equal protection of the laws. In **Rodriquez v. United States,** 89 S.Ct. 1715(1969), "Those whose right to appeal has been frustrated

should be treated exactly like any other appellant; he should not be given an additional hurdle to clear just because the rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the Courts below erred in rejecting Petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated." Appellate Counsel prejudiced Appellant by not presenting for review the constitutional violations that Appellant had identified and requested counsel to brief.

The effective assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render or rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffect-iveness or incompetence.

Appellant's right to appellate review of constitutional violations has been denied where appellate counsel has failed to advocate his position and to perfect an appeal or to follow withdrawal procedures specifically mandated by **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493(1967). **U.S.C.A. Consti. Amend. 6.**

Proposition of Law No.3: Appellant's conviction for the firearm specification is contrary to law.

Appellant was convicted of aggravated burglary and a firearm specification following a jury trial. At trial, Appellant's alleged victim testified that Appellant was in possession of a firearm. While that firearm was never recovered, Appellant was convicted of the specification without proof of the firearm being operable. See **State v. Gaines**, 46 Ohio St.3d 65 at syllabus; **State v. Mills**, 73 Ohio App.3d 27, 595 N.E.2d 1045.

In order for an offender to be convicted of a firearm specification, the

State is required to prove the elements of the offense. Ohio legislation is instructive on that point.

Ohio Revised Code **§2921.11(A)(2)** provides: "When determining whether a firearm is capable of expelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely on circumstantial evidence including but not limited to, the representation of actions of the individual exercising control over the firearm." **O.R.C. §2921.11(A)(2). Id. Gaines.**

Although the Appellant was convicted of the specification, the record does not demonstrate proof was made that the firearm was operable. While **O.R.C. §2921.11(A)(2)** sets forth the criteria by which to prove the firearm's operability, the Supreme Court of Ohio has clarified what is meant by circumstantial evidence, "A conviction for a firearm specification may be made in light of testimony as to gun shots, smell of gun powder, bullets, or bullet holes." **Gaines**, 545 N.E.2d at 72, or any implicit threat by the individual possessing the firearm." **State v. Thompkins**, 78 Ohio St. 3d 308, 678 N.E.2d 541, 546.

There was no testimony the alleged firearm was operable. There were no gunshots heard, bullet holes photographed, shell casings recovered at the scene of the alleged burglary, nor any ammunition found on Appellant's person at the time of his arrest. Moreover, there were no threats made by Appellant to the alleged victim that would reasonably suggest the firearm was operational. In fact, at the cross-examination, the alleged victim testified that Appellant made no threats nor did anything. **T.p. 74:18-25,** and page **75:1-14.** Absent evidence the firearm was operational, this court is required to consider Appellant's constitutional protections against the firearm specification as violative of his right to due process. **Thompkins, supra.**

Proposition of Law No.4: The conviction for burglary is against the manifest/sufficiency of evidence where the State's star witness offered misleading and false testimony that Appellant forced his way into the victim's home.

At trial, the alleged victim testified that Appellant forced his way into his home. First the alleged victim alleged that Appellant kicked his door open then he alleges Appellant forced his door open. Appellant's conviction is based on the sole testimony of this witness where the physical evidence in this case is inconsistent with what has been offered as proof of Appellant's alleged act of burglary.

In this case appellate counsel's deficient performance prejudiced Appellant by failing to raise and preserve on direct appeal Appellant's challenge of his conviction as being against the manifest weight of the evidence. When the conviction is being challenged on appeal as being against the manifest weight of the evidence, the court of appeal must review the record, weigh the evidence and all reasonable inferences, consider the witness credibility and determine whether, in resolving the conflict in the evidence, the trier of fact "clearly lost its way and created a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." **State v. Manns**, 169 Ohio App.3d 687, 864 N.E.2d 657 at paragraph 11. On a review for sufficiency of evidence, a reviewing court must examine the evidence at trial and determine whether such evidence, if believed, would support a conviction." **Id. at Paragraph 10.**

As stated above, the only evidence offered from the state was testimony from the alleged victim that Appellant forced his way into the home. The alleged victim does not testify that Appellant forced his way into the home to commit any offense and Appellant was not charged with any offense other than

aggravated burglary. The alleged victim presented false testimony during trial, and is questionable because he (alleged victim) is uncertain about how the Appellant entered the home. **T.p. 71:23; and T.p. 72:6-9; and 22-23.** More importantly, the Alleged victim states that he never saw Appellant kick his door open. **T.p.73:1-2.** His assertion Appellant kicked his door open is premised on the Alleged victim observing Appellant cross his threshold. There was no damage done to the door consistent with the use of force as an essential element defining aggravated burglary. The alleged victims use of the words "forced" and "kicked" are inconsistent witht the evidence collected and recorded by the technician that testified there was no damage to the door. **T.p. 151:11-12**, no new damage, **T.p. 151:21.** This evidence technician noticed no new evidamage to the door frame, splintering of wood or the sort thereof consistent with the use of force or a kick as the alleged victim suggests. T.p. 152, 157, **158, 159, and 161.** Appellant submits that the alleged victim committed perjury and precluded Appellant from asserting a full defense at his trial. The reason there was no damage to the door was that the alleged victim opened the door for Appellant.

Because appellate counsel prejudiced Appellant's appeal by failing to raise this assignment of error on appeal Appellant has not had the opportunity to properly challenge his conviction. Appellant's conviction was obtained through the use of false and misleading testimony and denied Appellant his right to due process, and the court allowed it to go uncorrected. **Napue v. People of State of Illinois**, 360 U.S. 262.

Proposition of Law No.5: The trial court erred when it overruled Appellant's Crim.R. 29 Motion for Acquittal.

Crim.R. 29(A) provides in relevant part:

"The court on motion of a defendant ... after evidence on either

side is closed, shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses."

State v. Hannah, 2003 WL 22359604, (Ohio App.2 Dist., 2003)

As fully incorporated and stated above, Appellant submits and maintains the evidence in this case is insufficient and against the manifest weight because the testimony of the State's star witness alleges that his front door was forced, and kicked open. The testimony of the alleged victim is contrary to what has been established and testified to by the evidence technician, a trained police officer well versed in the gathering and recording of evidence that the the door to the alleged victims residence sustained no new or recent damage consistent with the use of force or a kick when the alleged victim alleges Appellant burglarized his home.

The trial court erred to the prejudice of Appellant when it overruled Appellant's Motion for Acquittal, and Appellant was further prejudiced on direct appeal because appellate counsel did not raise this as an assignment of error. Appellant submits that the results of his appeal would have been different had appellate counsel briefed the assignment of error.

Proposition of Law No.6: Appellant's conviction for a firearm specification is against the manifest weight of the evidence.

Appellate counsel prejudiced Appellant's defense on direct appeal because appellate counsel did not raise this issue as an assignment of error on direct appeal, and there exist a reasonable probability of reversal of the conviction because the only evidence the state presented toward the existence of a firearm was the testimony of the alleged victim.

If appellate counsel would have raised this issue on direct appeal, the

record would have supported Appellant's contention that the alleged victim's testimony is not credible, and would have raised sufficient questions as to whether the trier of fact did in fact "clearly lose its way". However, because appellate counsel did not raise this issue as an assignment of error Appellant has not been afforded his due process right to appeal constitutional violations.

Proposition of Law No.7: The Appellant contends he was denied his right to a fair trial because of prosecutorial misconduct.

In **State v. Cox**, Richland App. No. 02CA111, 2003-Ohio-5831, 195. quoting **State v. Laconna**,(2001) 93 Ohio St.3d 83, 97, 2001-Ohio 1292. The Supreme Court of Ohio's standard for a claim of prosecutorial misconduct based on the knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable liklihood that the false testimony could have affected the judgment of the jury. Such a claim is in the nature of an allegation of prosecutorial misconduct. And the burden is on defendant to show (1) the statement was actually false (2) The statement was material; and (3) The prosecution knew it was false. It is well established that the prosecutor, as an agent of the state, has a constitutional duty to ensure the defendant a fair trial. See, e.g. **State v. Franklin**,(March 12, 1992), Richland App. No. CA-2881 citing, **Mooney v, Holohan**,(1965) 294 U.S. 103.

In the case at bar, the Appellant contends the state elicited false testimony to obtain the conviction of aggravated burglary in the fact that she used the alleged victims false testimony that there was damage to the front door that he alleged the Appellant kicked in, to prove an essential element for an aggravated burglary under **R.C.§2911.11(A)(2)** of forced entry. The State based its case around the accusations that the Appellant forced his way into the premises by kicking the door in and elicited the false testimony from the

the alleged victim that there was damage to the front door and the screen door. The alleged victims testimony was proven to be false when during cross-examination his testimony was impeached with prior testimony of the preliminary hearing of November 30, 2006. The record clearly reflects that after the alleged victim presented the testimony that impeached his prior testimony the alleged victim changed his testimony and then stated that there was no damage to the inside door and that the door worked properly after the alleged incident. **T.p. 153:1-25**

This impeaching testimony was also indirect contradiction to the State's theory of forced entry. The State failed to correct the false/perjured testimony of it's witness and that testimony was necessary to establish the "forced entry" element of the conviction.

Appellate counsel was ineffective and prejudiced Appellant defense when appellate counsel did not raise for review that issue as an assignment of error.

> **Proposition of Law No.8:** The Appellant contends that he was denied effective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States and Ohio Constitutions when appellate counsel failed to raise on direct appeal, that the trial lacked procedural and subject matter jurisdiction.

In the case at bar the Appellant submits that appellate counsel was ineffective for not raising the constitutional issue that the Appellants conviction and sentence is void, because Appellants indictment failed to charge an offense.

Under Ohio law as well as federal law, an accused has an absolute right to be placed on trial by the presentment of an indictment found by the Grand

Jury. **State v. Childs**, 88 Ohio St. 194, 724 N.E.2d 711(Ohio2000).

The indictment must state not merely words from the statute to depend on giving the Defendant sufficient notice of the offense to which he is to be tried, but it must state all the elements that constitute the offense in which the defendant must defend against, and prepare his defense around, See **State v. Colon**, 118 Ohio St.3d 26, 885 N.E.2d 917 Ohio 2008 (Nos. 2006-2139, 2006-2250).

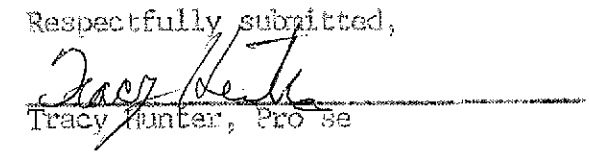
In the case at bar the Appellant contends that his indictment was defective in (2) two regards. One Appellant's indictment failed to state the culpable state of knowingly trespassed as an element to the alleged offense, and (secondly) Appellant's indictment failed to state an underlying offense. As such Appellant could not have been sufficiantly notified of what he was being tried for, or develop a meaningful defense from such indictment.

Appellant's defense was prejudiced by appellate counsel's failure to identify and brief the issue as an assignment of error for review by the appellate court. The structural error was corrected by the trial court when it amanded the indictment, however the prejudicial effect had already infected the proceedings, and should have been briefed.

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.

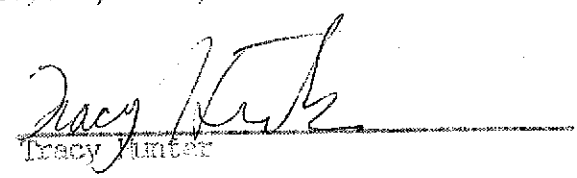
Respectfully submitted,



Tracy Hunter, Pro Se

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, Carley J. Ingram (0020084), Assistant Prosecuting Attorney, Montgomery County prosecutor's Office, 301 W. Third Street, 5th Floor, Dayton, Ohio, 45422 on January 26, 2009.



Tracy Hunter

Pro Se Appellant

FILED
COURT OF APPEALS
2008 DEC 15 AM 10: 14
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22201
v.	:	T.C. NO. 2006 CR 4942
TRACY D. HUNTER	:	
Defendant-Appellant	:	
	:	

. . . . . .

DECISION AND ENTRY

Rendered on the 15th day of December, 2008.

. . . . . .

CARLEY J. INGRAM, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

TRACY D. HUNTER, #548-809, Chillicothe Correctional Institution, 15802 State Route 104 North, P. O. Box 5500, Chillicothe, Ohio 45601
Defendant-Appellant

. . . . . .

PER CURIAM:

This matter is before the Court on Tracy Hunter's pro se "Motion for Leave to Exceed the Required Number of Pages" and "Application for Re-Opening," filed August 29, 2008. In April, 2007, Hunter was convicted of aggravated burglary, in violation of R.C.

2911.11(A)(2), a felony of the first degree, with an accompanying firearm specification, and the trial court sentenced Hunter to an aggregate prison term of 11 years. We affirmed the trial court's decision on Hunter's direct appeal on June 13, 2008, in which Hunter argued that the trial court erred by allowing the State to use its peremptory challenges to dismiss the only two African-American jurors from the venire, in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

"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." App. R. 26(B)(1). "An application for reopening shall contain all of the following: * * * (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." "An application for reopening * * * shall not exceed ten pages, exclusive of affidavits and parts of the record." App. R. 26(B)(4). "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." App. R. 26(B)(5).

"Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standard as other litigants." *Yocum v. Means*, Darke App. No. 1576, 2002-Ohio-3803. A litigant proceeding pro se "cannot expect or demand special treatment from the judge, who is to sit as an impartial arbiter." Id. (Internal

citations omitted).

Hunter's application is 15 pages long and fails procedurally. App.R. 26(B)(4) does not provide for extensions of the page limitation set forth therein. Cf. App.R. 19(A). Hunter's motion to extend the page limit is overruled.

Hunter attached a sworn statement to his application which provides that his counsel failed to raise additional assignments of error on appeal as directed by Hunter. Hunter did not provide any part of the transcripts below, and App.R. 26(B)(2)(e) places the responsibility firmly upon him to provide us with such portions of the record as are available to him. *State v. McNeill* (1998), 83 Ohio St.3d 457, 700 N.E.2d 613, 1998-Ohio-38. It is clear that Hunter is in possession of the transcripts as Hunter's affidavit indicates that he received trial transcripts from defense counsel, and Hunter specifically cites to the transcript in his application. Without any additional record of what occurred at trial other than what is contained in our previous opinion and our appellate file, and absent any additional information in Hunter's affidavit, Hunter's application fails to support the claim of ineffective assistance.

Finally, Hunter's primary argument in his Application to Re-Open is that the testimony of Gary Hand lacked sufficient credibility to support a conviction. The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. This court will not substitute its judgment for that of the trier of fact on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03. Given the deference a reviewing court must accord to the factfinder's assessment of credibility,

Hunter's proposed assignments of error based on Hand's "false testimony" lack a reasonable probability of success. In other words, Hunter has not raised "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

Hunter's application is DENIED.

IT IS SO ORDERED.

WILLIAM H. WOLFF, JR., Presiding Judge

JAMES A. BROGAN, Judge

MARY E. DONOVAN, Judge

Copies mailed to:

Carley J. Ingram
Tracy D. Hunger
Hon. Barbara P. Gorman