ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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STATEMENT OF THE CASE

The Appellant, James C. McCausland, was found guilty at a bench trial in The Butler County Area III Court of operating a vehicle under the influence, (OVI), speeding, and refusing a chemical test with a prior conviction. (T.p. 53-55) Appellant's convictions were affirmed by the Twelfth District in *State v. McCausland*, Butler App.No. CA2007-10-254, 2008-Ohio-5660.

STATEMENT OF FACTS

Appellant was stopped by an Ohio State Patrolman while driving on State Route 63 and Britton Lane between 2:00 and 2:15 in the morning after leaving a local restaurant/bar. (T.p. 4, 24-26, 29, 31, 35) Appellant was cited for speeding and after failing field sobriety tests, was arrested for OVI. (T.p. 9) He refused the portable breath test and a subsequent test offered at the Monroe police station. (T.p. 9-12)

Trooper Staples testified for the state and after extensive cross-examination, Appellant testified on his own behalf. (T.p. 15-22, 41) As rebuttal, the prosecution recalled the trooper and Appellant's counsel re-cross examined the trooper. Thereupon, the prosecution informed the court, "Your Honor, that's all we have." (T.p. 49-53) Prior to a detailed review of the evidence and the court's announcement of guilty verdicts on all three charges, the record indicates a distinct "Pause." (T.p. 53-55) Although Appellant neither requested summation nor objected to the lack of final argument at trial, Appellant now claims he was unconstitutionally denied the opportunity for closing argument.

ARGUMENT

Proposition of Law No. 1:
Appellant had the opportunity to present a closing argument, but chose to waive this presentation.

A. The "Red" Herring Case.

Closing argument was elevated to a Sixth Amendment-protected trial phase in 1975. In 1975, the United States Supreme Court decided on appeal the constitutionality of a New York statute that gave a trial court discretion to deny counsel's request at the conclusion of a criminal, nonjury trial, to present final argument. *Herring v. New York* (1975), 422 U.S. 853, 95 S.Ct. 2550.

The factual setting of *Herring* was that as the prosecution concluded its case in on motion by the defense, the court dismissed one charge relating to Herring's possession of a weapon. *Id.* The court adjourned for the weekend and the presentment of evidence, including the testimony of the accused, concluded the next week followed by a motion to dismiss Herring's robbery charge, which the court denied. *Id.*

In response to a request by defense counsel to "be heard somewhat on the facts," the trial court answered that, "[u]nder the new statute, summation is discretionary and I choose not to hear summation." *Id.* Unfortunately for Mr. Herring, this denial of summation was at the time a legitimate exercise of the trial court's discretion as

provided for in N.Y.Crim.Proc.Law Section 320.20(3) (c). [1]

After his conviction was affirmed and leave to appeal to New York's highest court was denied, the United States Supreme Court accepted jurisdiction and decided that "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all." *Id.* at 863. (Emphasis added)

The High Court's decision in *Herring* followed a series of announcements by the Court striking down state laws that had the ill-effect of placing unconstitutional restrictions on defense counsel in criminal cases.[2] In *Herring*, the constitutional right to engage in closing argument was laced tightly to a defendant's Sixth Amendment right to representation or to the constitutionally protected 'assistance of counsel.' *Id.* at 865.

To reemphasize, the *Herring* holding narrowly struck down a statute that permitted a court to exercise its discretion and deny a defendant the opportunity to present closing argument when requested. In recognition of the specific factual scenario in *Herring*,

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[1]The law stated in relevant part that, "[t]he court may in its discretion permit the parties to deliver summations."

[2]*Ferguson v. Georgia* (1961), 365 U.S. 570, 81 S.Ct. 756, (holding unconstitutional a state statute prohibiting defense counsel from direct examination of a defendant); *Brooks v. Tennessee* (1972), 406 U.S. 605, 92 S.Ct. 1891, (finding a state law that restricts counsel's right to decide if and when the accused should testify unconstitutional). *Herring* at 857.

the Twelfth District's affirmation of the convictions in the case at bar is supported soundly in both the law and the facts as evidenced in the record on appeal.

As opined by the Twelfth District in *McCausland*, "the [Herring] court's holding was limited to a constitutional violation where a trial court affirmatively denied the defendant's request for a closing argument." *McCausland*, 2008-Ohio-5660, ¶ 9. Further, "[t]here was nothing in *Herring* to suggest that its holding applied when there was merely an omission of a summation." *Id.*

In the *Herring* decision, distinguished from the present case, New York had a specific statute that gave the court in a bench trial discretion when it came to entertaining final arguments. Since Ohio has no such law, this is not at issue herein. Another distinction between *Herring* and *McCausland* is that the *Herring* trial started one week and continued into the next, separated by the weekend. The record of the court trial in the case sub judice, as pointed out by the Twelfth District, "was set for three o'clock and was completed by the end of the day, as there was no break. * * * [T]he state called only one witness * * * and the defense only called appellant * * *. There was very little complexity to the case. * * * [I]t is entirely plausible that appellant's counsel did not feel the need to make a closing argument to the court." *Id.* at ¶ 21. The Twelfth District in the case sub judice based its decision in part on the following.

"There was a 'pause' after the examination of the recalled witness, but before the judge made his determination. Appellant also neglected to raise an objection to the trial court either before, or after, the verdict * * *. The transcript * * * shows that appellant's attorney spoke to the court after the decision, yet nothing was mentioned regarding a summation.* * * The trial court did not deny appellant's request for a closing argument because Appellant never requested a summation," and no plain error occurred. *Id.* ¶¶ 20-21, 26.

Common knowledge informs that one is denied an opportunity when an opportunity exists, a request or attempt is made to take advantage of that opportunity, and that request is denied or the attempt is foiled. Many appellate court decisions in Ohio that have addressed the absence of a closing argument have done so by applying *Herring* even where the facts do not merit the application, rather than deciding the case on the glaring and distinguishing fact in *Herring.* These courts have limited themselves to answering only whether there was an opportunity to present closing argument and they do not answer the question of whether that opportunity was requested and affirmatively denied. The fact remains that in *Herring,* summation was requested and denied. In the case at hand, counsel did not ask to close thus eliminating the possibility of a denial. The Twelfth District's decision in the case at bar is squarely in line with *Herring* with a recognition of the distinguishing facts. However, should this Court require further review, an examination of the issue of waiver follows.

B. Appellant waived his right to present a summation.

As outlined by the Twelfth District in *State v. McCausland,* Ohio's appellate districts have examined the holding as pronounced in *Herring* from differing perspectives with keen focus on the issue of whether the right to present final argument may be waived and, if so, in what manner waiver may or must occur. *McCausland,* 2008-Ohio-5660, ¶¶ 10-16. The Twelfth District, however, "decline[d] to expand [Herring's] 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." *Id.* at ¶ 15.

Because the right to summation is sewn into the fabric of an accused's Sixth Amendment right to the assistance of counsel and fundamental to due process,[3] the 'waiver' focus reflects the general rule that such a constitutional right may be waived if done knowingly and intelligently, with caution against a presumption of waiver.[4] *Brady v. United States* (1970), 397 U.S. 742, 90 S.Ct. 1463; *Johnson v. Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019.

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[3]U.S.C.A. Const. Amends. 6; *Washington v. Texas* (1967), 388 U.S. 14, 87 S.Ct. 1920.

[4]See the Tenth District cases of *City of Columbus v. Woodrick* (1976), 48 Ohio App. 2d 274, 357 N.E.2d 58, (requiring a knowing, on the record waiver of closing argument); and, *State v. Gerrard*, 170 Ohio App.3d 487, 2007-Ohio-1244, (further requiring a waiver of closing argument must be "express, intentional and voluntary." ¶ 51. In Gerrard, however, although the court found no waiver, but did find plain error, the court used its discretion and chose not to recognize the error. *Id.*, at ¶58, 64, 70-71.

The decision in *Herring* clearly considered waiver of summation as the Court wrote, in reliance on *Yopps v. State* (1962), 228 Md. 204, 178 A.2d 879: "The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, * * * unless he has waived his right to such argument * * *." *Herring* at 860, quoting *Yopps* at 207. (Emphasis added) As further guidance, the United States Supreme Court has written that: "[U]nder our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." *Estelle v. Williams* (1976), 425 U.S. 501, 512, 96 S.Ct. 1691.

The Sixth Circuit examined an appellant's complaint that she was denied her constitutional right to confront witnesses in *United States v. Crossley and Grubich,* 224 F.3d 847, 2000 Fed.App. 0289P (6th Cir. Ohio). With reference to the presumption against waiver unless evidence exists of an intentional relinquishment or abandonment, the court in *Crossley* noted that if counsel wants to cross-examine, where the court does not inquire if counsel wants to cross-examine, the court does not deny "the opportunity to do so. [Appellant] could have spoken up and asked the court to cross examine. The Seventh Circuit has held that a defendant waived his right to confront a witness where the defendant was not barred from cross-examining a witness where his 'failure to

examine * * * was the product of his own inaction * * *.' " *Crossley* at 864, quoting *Trigg v. United States,* 430 F.2d 372, 374-375, C.A.Ill.No. 17587, (7th Cir.1970), cert.denied, 400 U.S. 966. The *Crossley* court held that Appellant "waived her right to cross-examine * * * when she remained silent * * * and did not ask for the opportunity to * * * cross examin[e]." *Id.*

The Tenth Circuit in *United States v. Stenzel*, 49 F.3d 658, N.M. No. 94-2105, (10th Cir. 1995), recognized the constitutional connection between closing argument and the right to counsel's assistance but articulated that a defendant must object to the error and not invite an issue on appeal that the court erred. *Id.* at 661. Stenzel was tried to the bench and after dialogue with the court, following the close of evidence, counsel renewed and argued several motions prior to the court's finding of guilt. *Id.* Counsel remained mute on the record as to summation. *Id.* Considering whether oral argument had been waived, the court stated, "[c]onsidering the brevity of the case and the clarity of the legal and factual issues, this was a reasonable tactic. * * * We have found no cases imposing an affirmative duty on a court to offer counsel the opportunity to argue their case." *Id.* at 661-662.

The Fifth Circuit was asked to decide whether an appellant was denied the opportunity to present closing argument in *United States v. Davis*, 993 F.2d 62, Tex.No. 92-8276, (5th Cir.1993). "A precise standard for identifying waivers of closing argument remained undefined in this circuit until our recent decision in *Martinez.*

There we adopted the standard set forth in *Johnson v. Zerbst* (citation omitted) and held that '[a]s a general proposition, before a waiver of the right to present closing argument will be found the record must clearly demonstrate its 'intentional relinquishment or abandonment.' We emphasized that '[a]n affirmative waiver on the record is not required'; rather, waiver may be inferred from a review of the entire record. [S]ome rights are more likely to be foregone as a matter of strategy than others. *United States v. Spears*, 671 F.2d 991, Ill.No. 81-1607, (7th Cir.1982). Where a defendant is represented by counsel, the decision to waive summation is a matter of trial strategy within the discretion of counsel. (Citation omitted) If the evidence is strong, counsel may conclude that a summation would damage the client's interests, especially when considering the likely response of the prosecutor. *See United States ex rel Spears v. Johnson*, 463 F.2d 1024, Pa.No. 71-1766, (3d Cir. 1972)." *United States v. Davis*, 993 F.2d 62, 64 quoting *United States v. Martinez*, 974 F.2d 589, 591 (5th Cir. 1992).

The *Davis* court, relying on *Martinez*, found that the decision to close is as a matter of trial strategy and that choice is better made where counsel, in a trial before the court, can best assess how the court receives the evidence. No express waiver is required and may be inferred by taking into consideration the circumstances as demonstrated by the record. Other recent state court decisions are in agreement with the federal districts that waiver of summation, a tactical decision, may be inferred from the record.

Texas prosecuted Trampas Foster and placed him on deferred adjudication. *Texas v. Foster*, 80 S.W.3d 639, Tex. App.No. 01-01-00637-CR-10, (1st Dist. 2002) at 639. He was later found guilty of other crimes and sentenced to prison. *Id.* at 640. In response to his appeal claim that he was denied his right to closing argument, the court recognized that final argument is attendant to 'adversarial fact-finding' but distinguished *Foster* from an earlier case, *Ruedas v. State*, (Citation omitted), that factually squared with *Herring* wherein counsel plainly asked to be heard in summation and the court denied the request. *Foster* at 640. "In the instant case, however, no such request was made, and the trial court did not refuse to allow appellant to make closing arguments * * *." *Id.* In *Foster*, however, because no objection was made to the lack of final argument, the Texas court found Foster had failed to preserve error for review. *Id.* at 641.

In 2003, a court of appeals in Hawaii took on the task of tracing state and federal court decisions covering the several decades since *Herring* in deciding whether an appellant was unconstitutionally denied his right to final argument in an appeal from a conviction for operating a vehicle under the influence of an intoxicant. *See, Hawaii v. Hebert*, 110 Hawaii 284, 132 P.3d 852.

The *Hebert* court concluded in part that: "It would be a significant extension of those cases [where no request and no denial is reflected in the record] to hold that there was a denial of the right to argue where there was no affirmative request by defense

counsel, by inferring from the 'cold record' that the court prevented such a request* * *. It may be argued that the problem could be avoided by requiring that in each case, where trial is by the court, the judge affirmatively and on the record obtain a waiver of argument. In our view, that would simply be one more instance of improperly shifting the responsibility of counsel to the shoulders of the trial judge and would open up a whole new area for appeal where the question would then be, not whether the defendant had a fair trial and was adequately represented, [arguably the purpose of an accused's Sixth Amendment right to the assistance, the effective assistance, of counsel], but whether or not the trial judge recited the correct 'magic words' at the correct time whether the waiver, in view of the judge's tone or voice and demeanor, was in fact a voluntary waiver. The issue is a simple one, factual in nature. Did defense counsel desire to argue or didn't he, and if he did, was he prevented form doing so? If counsel truly desired to argue, one would expect that at some point in the proceedings, * * * he would have at least mentioned it. Yet ..... here, the issue never came up until the case reached the Court of Appeal. A trial judge, like anyone else, is entitled to 'face his accuser.' If counsel fails to request, on the record, an opportunity to argue, and then wishes to contend that he was prevented by the trial judge from making the request, he, in some fashion, ought to bring it to the trial court's attention rather than appear to acquiesce in the proceedings only to later raise the issue on appeal along with an unsupported claim," that he was denied the opportunity. *Id.* at 860.

The *Hebert* court, in affirming the conviction, held in essence that counsel may not rest on his laurels at trial, when it comes to closing argument, but carries the burden to inform the court of the desire to present summation, and it is prohibited to raise the issue for the first time on appeal. *Hebert* at 861.[5] This Honorable Court has also been instructive that final argument is a matter of trial tactics that is waivable.

Most recently, in *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, Justice O'Connor wrote that "[w]aiver is the intentional relinquishment or abandonment of a known right." *Id.* at ¶ 13. Writing further: "[W]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.* * * Confrontation Clause rights, like other constitutional rights, can be waived * * * [and] * * * we must therefore examine whether [the] waiver was valid." *Pasqualone* at 189-190, citing *United States v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770.

Moreover, while rights such as waiving a jury, pleading guilty and testifying on one's behalf may only be waived by a defendant personally, "as to other rights, a lawyer must have 'full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.' "

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[5]Accord, *Lee v. State* (1977),175 Ind. App.17, 369 N.E.2d 1083; *State v. Hale*, 472 S.W. 365 (Mo.1971); *State v. Rojewski* (1979), 202 Neb. 34, 272 N.W. 920; *Long v. State*, 74 P.3d 105, (Okla.Crim.App.2003)

Pasqualone at 192, quoting *Taylor v. Illinois* (1988), 484 U.S. 400, 418, 108 S.Ct. 646. Decisions by trial counsel of the tactical and strategic nature are waivable by counsel for an accused, including the right to confrontation. *Pasqualone* at 192, citing *United States v. Plitman* (C.A.2 N.Y. 1059), 194 F.3d 59, 63.

As found in *Pasqualone*,[6] where defense counsel's representation is adequate and complete, a waiver of a constitutional right may be accomplished without such waiver being express, verbal and on the record and, without the court engaging in a protracted session of inquiry to ascertain that a waiver of a right by the accused is knowing and intentional. *Id.* at 94. This Court has previously determined that 'to close or not to close' is a strategic decision that counsel may effectively waive.

Timothy Hoffner was convicted of several crimes and sentenced to death. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, syllabus. Among numerous assignments of error and propositions of law on appeal, Hoffner claimed ineffective assistance because no final argument was offered by his attorney at the close of the guilt phase of his trial. *Id.* at ¶ 47. Justice Lundberg Stratton, writing for a unanimous Court, determined that "[d]efense counsel made a tactical decision to waive closing argument in order to preclude any rebuttal argument from the prosecutor. Courts must be highly deferential to counsel's performance and will not second-guess trial strategy

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[6]Moyer, C.J., Lundberg Stratton, J., O'Donnell, J., Pfeifer, J. (in judgment only), and Dinklelacker, J. (for Cupp, J.) concurred.

decisions. (Internal citation omitted) Hoffner has not shown that counsel's strategy was unreasonable or prejudicial. See, also, *State v. Keith* (1997), 79 Ohio St.3d 514, 537, 684 N.E.2d 47 (failure to make an opening and closing argument will not result in ineffectiveness per se.)" *Hoffner*, 2004-Ohio-3430 at ¶ 47.

"[W]aiver of closing argument * * * might simply constitute a matter of trial strategy." *State v. Farrah*, Franklin App.No. 01AP-968, 2002-Ohio-1918, ¶58, citing *State v. Burke*, 73 Ohio St.3d 399, 404-405, 1995-Ohio-290 and *State v. Apanovich* (1987), 33 Ohio St.3d 19, 24.

Chief Justice Moyer writing for the court[7] examined multiple propositions of law in *State v. Smith*, 89 Ohio St.3d 323, 2000-Ohio-166[8], a death penalty appeal. Smith claimed ineffective assistance of trial counsel based on his attorney's failure to engage in final argument. *Id.* at 334. The decision finds that, "[y]et it is plausible in this case that counsel's trial strategy to forgo closing argument prevented the prosecution from making a strong rebuttal * * * defense counsel apparently chose to concentrate on * * * making a strong case for mitigation * * *. * * * [C]ounsel did not fall below an objective standard of reasonable representation. * * * Even assuming that defense counsel's trial strategy was questionable, such a strategy did not constitute ineffective assistance of counsel. See *State v. Clayton* (1980), 62 Ohio St.2d 49, 402 N.E.2d 1189.

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[7]Justice Lundberg Stratton dissented, only as to counsel's ineffective assistance for failing to voir dire the jury on racial issues. *State v. Smith*, 89 Ohio St.3d 323, 340.

[8]Cert.denied, *Smith v. Ohio*, 534 U.S. 1047, 122 S.Ct. 625; denial of Habeas affm'd, *Mahdi v. Bagley*, 522 F.3d 631 (6th Cir.2008), rehearing and rehearing en banc denied; cert.denied, *Mahdi v. Bobby* (2009), 129 S.Ct. 1986.

In another Ohio decision, the Eleventh District considered on appeal the issue of whether the trial court erred by not providing the defense a closing argument. *State v. Newton*, Lake App.No. 96-L-058, 1997 WL 401557. While finding that pursuant to *Herring v. New York*, the right to closing argument in a criminal bench trial implicates a defendant's rights under the Sixth and Fourteenth Amendments, "by the facts of the [Herring] case * * * [t]he defendant's attorney * * * specifically requested the opportunity to deliver a closing argument but the trial court refused to allow it. When read in its proper context *Herring* stands for the proposition that a trial court must permit the defense in a criminal trial to give a closing argument if it requests to do so. * * * A different question is presented if the defense never makes an indication to the trial court that it wishes to exercise its right to make a closing argument. This is the scenario presented by the case at bar. * * * [D]espite the fact that the transcript does not contain an express waiver of the right to make a closing argument, counsel for the defense could have either offered to give a closing summation or objected to the lack of closing arguments.

* * * Despite the opportunities to request a closing argument, defense counsel failed to do so." *Newton* at *3-*4. The *Newton* court held, relying on the soundness of its earlier decision in *State v. Ericson* (citation omitted) that "if a defendant neither requests a closing argument nor lodges an objection with the trial court, then the defendant has waived the right to raise the issue on appeal. *Newton* at *4.

The Twelfth District in *McCausland* declined to extend *Herring* to the point of a presumption against waiver of closing argument. *McCausland*, 2008-Ohio-5660, ¶ 15. While our High Court has historically cautioned against presuming waiver, even the *Herring* court contemplated waiver of summation when writing that an accused has a protected right to final argument, unless counsel "has waived his right to such argument." *Herring* 422 U.S. at 860.

With the right to assistance of counsel comes many strategic trial decisions, decisions that are afforded counsel and the accused so as not to "rewrite the duties of trial judges." *Estelle v. Williams*, 425 U.S. at 512. Although express or explicit waiver of some constitutional rights of an accused is mandated by an appearance in the record of an 'intentional relinquishment or abandonment,' of that right, certain responsibilities remain in the hands of the accused's advocate and a trial court must not have to ask counsel, specific to the issue at hand, if they wish to be heard on the facts at the close of evidence; appeal should not be predicated upon the 'product' of counsel's "own inaction." *United States v. Crossley*, 224 F.3d 864.

The denial of an opportunity to engage in final argument requires on the facts that the record reflect a request by counsel and an affirmative denial by the court, facts that are absent in the record of the case at bar. As the Twelfth District concluded that a total denial of the opportunity for final argument in a nonjury, criminal trial may be unconstitutional, the *Herring* court's "holding was limited to a constitutional violation

where a trial court affirmatively denied the defense's request for a closing argument." *McCausland*, 2009-Ohio-566-, ¶ 9. *United States v. Stenzel* relates that there are no "cases imposing a duty on a court to offer counsel the opportunity to argue their case." *Stenzel*, 49 F.3d at 661-662.

Texas courts have succeeded in identifying waivers of closing argument and opine that an affirmative waiver is not needed, it may be inferred from the record. *United States v. Davis*, 993 F.2d 64. Because "some rights are more likely to be foregone as a matter of strategy than others," Texas further refined the issue to include the fact that waiver of argument falls within the ambit of the advocate as part and parcel of trial strategy. *Davis* at 64, citing *United States v. Spears*, 671 F.2d 991, 993 (7th Cir. 1982). Decisions from the Lone Star state continue to distinguish cases under their review, as did the Twelfth District in *McCausland*, from the stated facts as found in *Herring* where counsel requested and was denied closing argument. *See, Texas v. Foster*, 80 S.W.3d 640-641 (holding that error had not been preserved when there was no objection at trial to the fact that appellant's attorney did not choose to present closing arguing, no request was made to present summation and the court, therefore, did not deny appellant the right.) And, in Hawaii, courts are not inclined to shift the duties of trial counsel when it comes to exercising the right to closing argument, onto the "shoulders of the trial judge." *Hebert*, 132 P.2d at 860-861.

In Ohio, this Honorable Court has provided guidance, first by establishing that certain constitutional rights are waivable and, second, that closing argument is a matter of trial counsel's tactical and strategical arsenal, allowing an attorney, "full authority to manage the conduct of the trial." *Pasqualone*, 121 Ohio St.3d at 192. Ohio courts will not engage in continued Monday morning quarter backing when it comes to the non-express, non-verbal waiver of closing argument where counsel's representation is adequate and "as long as counsel does not fall below an objective standard of reasonable representation." *Smith*, 89 Ohio St.3d at 334. The law in Ohio is also settled that a trial court is not required to advise a criminal defendant of his right to testify on his own behalf and the court does not have the responsibility to inquire of an accused as to this right. *State v. Bey*, 85 Ohio St.3d 487, 1999-Ohio-283.

While this Court has seemingly determined the issue, Appellant asserts there is a conflict as to waiver of a constitutional right, specific to closing argument, among the Ohio appellate courts relying on *Herring* issue, more pronouncedly as to the issue of waiver.

The earliest cited decision comes from Preble County, however, it involved an affirmative denial by the mayor, in mayor's court, of a defendant's right to present his case. *State v. Decker* (1925), 113 Ohio St. 512, 150 N.E. 74. The court in *City of*

Columbus v. Woodrick, although no request and no denial of the right to closing was on the record, a 'tacit' denial of the right was found when the court decided the defendant's fate directly following the close of, or as later coined, 'on the heels of the evidence.' *Woodrick*, 48 Ohio App.2d 274, 276, 357 N.E.2d 58. The Tenth District, some thirty years after *Woodrick*, determined that although it found plain error where no express waiver of closing argument was on record, it refused to exercise its discretion and affirmed in *State v. Garrard*, 2007-Ohio-1244. As the Twelfth District illuminated in *McCausland*, "[t]he Fifth, Sixth and Seventh districts have embraced the Tenth district's rationale and accepted the idea that 'failure to request closing * * * is * * * insufficient of * * * clear waiver.' *State v. Baron*, Mahoning App.No. 050-MA-156, 2007-Ohio-4323, ¶ 34. *McCausland* at ¶ 11. "Other districts have adopted a contrary position" as the Twelfth District refers to its prior decision in *State v. Brown*, Clermont App.No. CA-1210, 1211, 1983 WL 6344, where *Herring* was found to apply only to an improper denial of defense counsel's request for a final argument, and, as the court found in *Brown*, "there was no request for a final argument * * * 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 * * * the failure to allow a closing argument was not reversible error." *McCausland* at ¶ 11-12.[9]

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[9]The Eighth, Ninth and Eleventh Districts have agreed with the Twelfth District's decision that absent a request and denial, reversal is not warranted. *Jackson v. Jackson*, Cuyahoga App.Nos. 64284, 64873, 1993 WL 526704; *State v. Yoder*, Wayne App.No. 2099, 1986 WL 1740; *State v. Erickson*, Lake App.No. 12-137, 1988 WL 41557; *State v. Newton*, Lake App.No. 96-L-058, 1994 WL 401557.

CONCLUSION

Based on the foregoing, the decision affirming McCausland's area court convictions should be affirmed. Appellant was not denied the opportunity to present a closing argument, the court 'paused' at the conclusion of evidence and engaged in discussions with defense trial counsel; counsel did not request to argue, the court did not deny the request. As a matter of trial strategy and given the competent, more than adequate representation of McCausland's trial counsel as evidenced in the record, the circumstances exhibit that counsel made a decision to forego summation. There was no objection to the absence of final argument and no error flowed from the fact that neither side expressed a desire to be heard at the conclusion of evidence in McCausland's case.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent by regular mail this 29th day of June to counsel for Appellant as follows:

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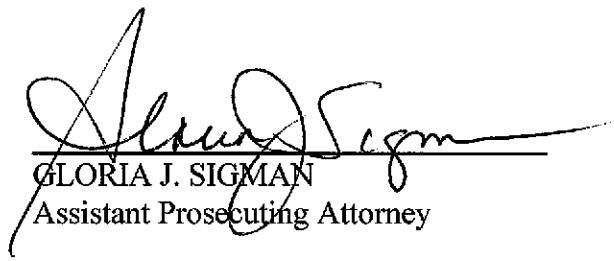

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