IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	CASE NO. 09-1280
Plaintiff-Appellee,	:	On Appeal from the cuyahoga County Court of Appeals, 8th Appellate District.
vs.	:	
MICHAEL GAUGHAN,	:	C.A. Case No. 90523
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MICHAEL GAUGHAN

MICHAEL GAUGHAN#533-936
NAME AND NUMBER
manci
INSTITUTION
p.o.box 788
ADDRESS
mansfield,ohio 44901
CITY, STATE & ZIP
PHONE

DEFENDANT-APPELLANT, **PRO SE**

BILL MASON
PROSECUTOR NAME
1200 ontario st
ADDRESS
cleveland,ohio 44113
CITY, STATE & ZIP
PHONE

COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
JUL 16 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE NOS.

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

STATEMENT OF THE CASE.....

STATEMENT OF THE FACTS.....

FIRST PROPOSITION OF LAW.....

CONCLUSION.....

CERTIFICATE OF SERVICE.....

APPENDIX:

State v. _____ (_____), _____ App. No. _____ unreported

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

THIS CASE INVOLVE THE CONSTITUTIONAL ISSUE OF A APPEAL COURT NOT ANSWERING ASSIGNMENTS OF ERROR PRESENTED TO THE COURT AS A APPEAL OF RIGHT.IF THIS COURT DO NOT ACCEPT JURISDICTION AND ALLOW THE APPEAL COURT OF CUYAHOGA COUNTY TO PICK AND CHOOSE WHICH ASSIGNMENTS OF ERROR THEY WILL REVIEW THEN THE APPEAL COURT WILL PURPOSELY IGNOR THE VALID CLAIMS AND JUST REVIEW THE ERRORS WHICH HAS NO CHANCE OF WINNING.

STATEMENT OF THE CASE

APPELLANT WAS CONVICTED OF AGGRAVATED MURDER AND AGGRAVATED ROBBERY. APPELLANT SUBMITTED SEVERAL ADDITIONAL ASSIGNMENTS OF ERROR TO THE APPEAL COURT AFTER BEING GRANTED LEAVE TO DO SO.THE APPEAL COURT DID NOT ANSWER THE SUPPLEMENTAL ASSIGNMENTS OF ERROR SUBMITTED TO THE COURT BY APPELLANT AND FILE A 26(B).APPEAL COURT DENIED THE 26(B) AND APPELLANT IS PRAYING THIS HONORABLE COURT ACCEPT JURISDICTION SO THAT THE UNANSWERED ERRORS CAN BE PROPERLY ADDRESSED.

STATEMENT OF THE FACTS

THE APPELLANT IN THE CASE HAS PRESENTED SEVERAL CONSTITUTIONAL ASSIGNMENTS OF ERROR TO THE APPEAL COURT FOR REVIEW IN A MURDER AND ROBBERY CASE THAT THE STATE GAINED A CONVICTION ON DUE TO SEVERAL PROSECUTORIAL MISCONDUCT ACTS AND THE INEFFECTIVE ASSISTANCE OF TRIAL AND APPEAL COUNSEL.

1st PROPOSITION OF LAW

THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL.

CONCLUSION

This case raises a substantial constitutional question, involves a felony and is one of public or great general interest. Review should be granted in this case.

Michael Gaughan
SIGNATURE

Michael Gaughan 533-936
NAME AND NUMBER

Manci
INSTITUTION

P.O. Box 788
ADDRESS

Mansfield, Oh. 44901
CITY, STATE & ZIP

DEFENDANT-APPELLANT, **PRO SE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Michael Gaughan, has been served by U.S. mail postage pre-paid to clerk of courts ~~Prosecuting Attorney~~ 65 South Front St. Columbus, Oh. 43215, this 9th day of July, 20 09.

Michael Gaughan
SIGNATURE

Michael Gaughan 533-936
NAME AND NUMBER

DEFENDANT-APPELLANT, **PRO SE**

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 90523 | LOWER COURT NO. CP CR-479475

COMMON PLEAS COURT

-vs-

MICHAEL GAUGHAN

Appellant

MOTION NO. 421223

Date 06/08/2009

Journal Entry

APPLICATION BY APPELLANT, PRO SE, FOR REOPENING PURSUANT TO APP. R. 26(B) IS DENIED.

FILED AND JOURNALIZED
PER APP. R. 22(E)

JUN 8 _ 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge CHRISTINE T. MCMONAGLE, Concurs

Judge FRANK D. CELEBREZZE,JR., Concurs

Judge MARY J. BOYLE

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90523

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL GAUGHAN

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 421223
LOWER COURT NO. CR-479475
COMMON PLEAS COURT

RELEASE DATE: June 8, 2009

ATTORNEYS FOR PLAINTIFF-APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Allan T. Regas
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR DEFENDANT-APPELLANT

Michael Gaughan, pro se
Inmate No. 533-936
Mansfield Correctional Inst.
P.O. Box 788
Mansfield, Ohio 44901

Michael P. Maloney
24441 Detroit Road
Suite 300
Westlake, Ohio 44145

JUDGE MARY J. BOYLE:

The Applicant, Michael Gaughan, has filed a timely application for reopening pursuant to App. R. 26(B). He is attempting to reopen the appellate judgment that was rendered by this court in *State v. Gaughan,* Cuyahoga App. No. 90523, 2009-Ohio-955. In that opinion, we affirmed defendant's convictions for aggravated murder and aggravated robbery. For the below stated reasons, we decline to reopen Gaughan's original appeal.

To establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that deficiency prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

In *Strickland*, the United States Supreme Court stated that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is too tempting for a defendant to second-guess his attorney after conviction and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under

the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 104 S.Ct. at 2065.

In his application, Gaughan asserts the following: "Appeal counsel violated the appellant 6th amendment rights to effective assistance of appeal counsel by waiving oral arguments when the attorney knew that appellant prayed for counsel to argue the 'supplemental assignments of error' filed pro-se by appellant. The appeal court did not even answer the four assignments of error filed pro-se by appellant. Each error contained a valid constitutional question of merit. Counsel collected $3,012.10 for work he did not even argue. Therefore this appellant pray [sic] that this honorable court will re-open the appeal and allow appellant to be granted counsel so that he may have his issues presented to the court."

However, Gaughan does not present any argument with his assignment of error pertaining to how counsel's performance was deficient and how he was prejudiced by that deficiency. In *State v. Kelly* (Nov. 18, 1999), Cuyahoga App. No. 74912, reopening disallowed (June 21, 2000), Motion No. 312367, this court held that "the mere recitation of assignments of error is not sufficient to meet applicant's burden to 'prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been

successful.' *Spivey, supra.*" See also *State v. Mosely*, Cuyahoga App. No. 79463, 2002-Ohio-1101, reopening disallowed, 2005-Ohio-4137, Motion No. 365082; *State v. Dial*, Cuyahoga App. No. 83847, 2004-Ohio-5860, reopening disallowed 2007-Ohio-2781, Motion No. 392410; *State v. Ogletree*, Cuyahoga App. No. 86500, 2006-Ohio-2320, reopening disallowed 2006-Ohio-5592, Motion No. 387497; *State v. Huber*, Cuyahoga App. No. 80616, 2002-Ohio-5839, reopening disallowed 2004-Ohio-3951, Motion No. 356284.

By not presenting argument pertaining to his proposed assignment of error, Gaughan has completely failed to demonstrate that his counsel was deficient and that he was prejudiced by such deficiency. Consequently, there is no basis for this court to make any such finding. Furthermore, a review of the record indicates that this court struck Gaughan's pro-se brief because it failed to comport with the appellate rules. This court also gave Gaughan twenty-one days to file a corrected brief. Gaughan, however, never filed a corrected brief. Therefore, it would have been error for appellate counsel to argue any assignments of error presented by Gaughan.

Accordingly, the application to reopen is denied.

FILED AND JOURNALIZED
PER APP. R. 22(E)

JUN 8 _ 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

MARY J. BOYLE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR