

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

JAMES FRAZIER,

Defendant-Appellant.

\* S.C. No. 05-1316  
\* On Appeal from the  
\* Lucas County Court  
\* of Common Pleas  
\*  
\* Court of Common Pleas  
\* Case No. CR04-1509  
\*  
\* **DEATH PENALTY CASE**

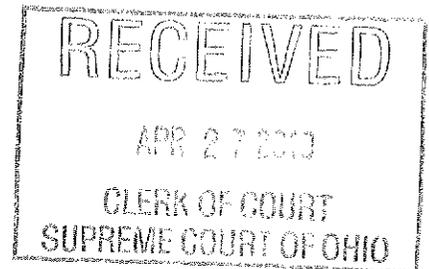
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MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION TO DEFENDANT-  
APPELLANT'S APPLICATION TO REOPEN APPEAL

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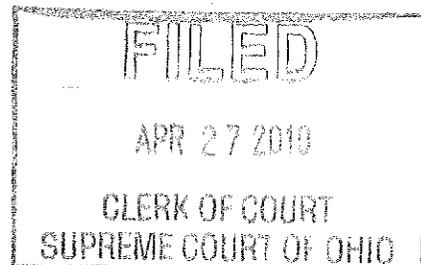
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COUNSEL FOR APPELLANT, JAMES FRAZIER

## STATEMENT OF THE FACTS AND OF THE CASE

In May, 2005 Defendant-Appellant, James Frazier ("defendant") was convicted by a jury in Lucas County, Ohio of Aggravated Murder with capital specifications, Aggravated Robbery and Aggravated Burglary.

On May 15, 2006, defendant, through Attorney Kathryn Sandford of the State Public Defenders Office, filed a petition for post-conviction relief in the trial court, which petition was denied. Defendant appealed the post-conviction relief denial, employing Attorney Sandford. The denial of the post-conviction relief petition was affirmed by the Lucas County Court of Appeals in *State v. Frazier*, 6th Dist. No. L-07-1388, 2008 Ohio 5027 on September 30, 2008. Attorney Sandford sought discretionary appeal to this Court which was denied in *State v. Frazier*, 121 Ohio St.3d 1425, 2009 Ohio 1296, 903 N. E.2d 325 on March 25, 2009.

Meanwhile, defendant appealed his convictions and death sentence to this Court in *State v. Frazier*, 115 Ohio St.3d 139, 2007 Ohio 5048, 873 N. E.2d 1263, alleging 24 separate assignments of error. This court affirmed the convictions and sentencing on October 10, 2007.

Thereafter, employing the same appellate counsel from the merit appeal, (Attorney Spiros Cocoves), defendant sought a writ of certiorari in the United States Supreme Court which was denied on April 21, 2008 in *Frazier V. Ohio* (2008), 553 U. S. 1015, 128 S. Ct. 2077, 170 L. Ed.2d 811.

On May 27, 2009, defendant filed a petition for a writ of habeas corpus in the United States Court for the Northern District of Ohio, Eastern Division, captioned

"*James Frazier v. David Bobby, Warden*" Case No. 3:09-cv-1208 and on June 2, 2009, defendant's present counsel, Attorney David Doughten was appointed to represent defendant in that matter.

On April 14, 2010 defendant, again represented by Attorney David L. Doughten, filed an Application For Reopening Pursuant to S.Ct.Prac.R. XI, Sec. 6, alleging three proposed assignments of error that he alleges should have been presented by his previous appellate counsel in the merit appeal.

Defendant does not present his own affidavit, nor any explanation as to why he was unable to file the subject application to reopen within the 90 day period required by the Rule, other than to allege in his memorandum that "There is no evidence that Mr. Frazier was aware of the existence of a procedure to challenge the effectiveness of direct appeal counsel until well after the expiration of the 90 day limit. Frazier did not have the intellectual ability to waive his right to file a challenge to the effectiveness of direct appeal counsel." (Defendant's Memorandum in Support, p. 1).

## ARGUMENT

### **I. DEFENDANT'S APPLICATION SHOULD BE DENIED FOR UNTIMELINESS**

Subsection (A) of S.Ct.Prac.R. XI, Sec. 6 pertaining to an application for reopening provides:

(A) An appellant in a death penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court. An application for reopening shall be filed within 90 days from entry of the judgment of the Supreme Court, unless the appellant shows good cause for filing at a later time.

Subsection (B) provides that an application for reopening shall contain a

"showing of good cause for untimely filing if the application is filed more than 90 days after entry of the judgment of the Supreme Court."

Defendant neglected to file his application until more than two and one half years after the entry of judgment by this Court in the merit appeal. While we cannot expect that defendant's appellate counsel in the merit appeal (Spiros Cocoves) would file an application to reopen based upon allegations of his own ineffectiveness as appellate counsel, the record shows that defendant's appellate counsel last on-the-record involvement in this case was during appeal of the merit case to the U. S. Supreme Court which ended when certiorari was denied on April 21, 2008. Defendant has been represented by separate counsel from the State Public Defenders Office since May, 2006. Such counsel could have filed a timely application on defendant's behalf. Moreover, defendant has been represented by Attorney Doughten for purposes of habeas corpus relief since June 2, 2009, a period of almost a year, and yet neglected to file this application in a prompt manner.

Referring to App. R. 26(B), which is almost identical to S.Ct.Prac.R. XI,<sup>1</sup> and also imposes a 90 day limitation period for filing a motion for reopening in an appeals court, this Court has stated: "Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved." *State v. Gumm*, 103 Ohio St.

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<sup>1</sup> S.Ct.Prac.R. XI, Section 6 mirrors Ohio R. App. P. 26(B) as to death penalty cases for offenses committed on or after January 1, 1995, after which appellants in those cases were entitled to just one appeal -- directly to the Supreme Court of Ohio -- and were accordingly entitled to the effective assistance of counsel at the Supreme Court level. *Cowans v. Bagley* (S.D. Ohio, Sept. 12, 2006), 2006 U.S. Dist. Lexis 68181 at p. 8.

3d 162, 2004 Ohio 4755, ¶7, 814 N. E.2d 861.

In *State v. LaMar*, 102 Ohio St.3d 467, 2004 Ohio 3976, 812 N. E.2d 970, defendant was convicted of several capital murders in 1995 and his convictions were affirmed by the court of appeals in 1998. Defendant filed an application to reopen his appeal in 2003, asserting ineffective assistance of appellate counsel, which application was denied by the appellate court since defendant had filed well beyond the 90 day limit in App. R. 26(B) and had not shown good cause for the delay. On appeal, this Court affirmed dismissal of the application, although defendant argued that his appellate counsel continued to represent him for many months after his merit appeal was decided, further claiming that he was without the legal experience or financial resources to file the application on his own. In rejecting LaMar's claim of good cause for late filing, this Court stated:

To be sure, as LaMar contends, "counsel cannot be expected to argue their own ineffectiveness." *State v. Davis* (1999), 86 Ohio St.3d 212, 214, 1999 Ohio 160, 714 N.E.2d 384. Other attorneys -- or LaMar himself -- could have pursued the application, however. Nothing prevented them or him from doing so, and in fact other attorneys did pursue post conviction relief on LaMar's behalf under R. C. 2953.21 in 1997 and 1998. Those attorneys could have filed a timely application under App. R. 26(B) for LaMar in 1998. In any event, ample opportunities existed well before November 2003 for LaMar himself or his attorneys to file an application for reopening. As we have said, "good cause can excuse the lack of a filing only while it exists, not for an indefinite period." *State v. Fox* (1998), 83 Ohio St.3d 514, 516, 1998 Ohio 517, 700 N. E.2d 1253. The excuse that LaMar and his attorneys were occupied with other appeals or that they simply neglected to pay attention to the rule is not "good cause" for missing the filing deadline.

And LaMar himself cannot rely on his own alleged lack of legal training to excuse his failure to comply with the deadline. "Lack of effort or imagination, and ignorance of the law \* \* \* do not automatically establish good cause for failure to seek timely relief" under App.R. 26(B). *State v. Reddick* (1995), 72 Ohio St.3d 88, 91, 1995 Ohio 249, 647 N. E.2d 784. The 90-day requirement in the rule is "applicable to all appellants," *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 1996 Ohio 52, 658 N. E.2d 722, and LaMar offers no sound reason why he -- unlike so many other Ohio criminal defendants -- could not comply with that fundamental aspect of the rule.

*State v. LaMar*, supra, at ¶18-¶19.

In this case, defendant has been represented by counsel from the State Public Defender's office since prior to the decision in the merit appeal in 2007. Defendant's appellate counsel in the merit appeal evidently has had no involvement in defendant's representation since certiorari was denied in the U. S. Supreme Court in April 2008. Defendant had counsel available to file this application long before April 14, 2010, when it was actually filed. Moreover, defendant's present counsel, who has been representing defendant since at least June, 2009, could have filed this application long ago. Good cause for untimely filing cannot persist indefinitely. *State v. LaMar*, supra, at ¶18.

The issue of defendant's mental status was treated extensively in the merit appeal, *State v. Frazier*, 2007 Ohio 5048, ¶¶150-160, 250-252, and in the appeal of the denial of post conviction relief, *State v. Frazier*, 2008 Ohio 5027, ¶¶14, 16, 17-25, 28-31, 48-55.) The evidence demonstrates that although defendant may have a borderline range of intelligence, he is not mentally retarded. No excuse is provided by his intelligence for his untimely filing, particularly since defendant has enjoyed three sets of appeals attorneys. Moreover, defendant's alleged ignorance of the law provides no excuse. *State v. LaMar*, supra, at ¶19.

Defendant's application should be denied. He has provided no good cause to explain his extreme delay in filing. Enforcing the 90 day rule protects the State's legitimate interest in the finality of this Court's judgments and prevents endless reiteration of stale claims.

## II. DEFENDANT'S APPLICATION SHOULD BE DENIED ON THE MERITS

### A. STANDARD FOR INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The applicable standard for adjudging ineffective assistance of appellate counsel and the circumstances under which an appellate court should reopen an appeal on that basis has been recently set forth by this Court as follows:

The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel. See *State v. Sheppard* (2001), 91 Ohio St.3d 329, 330, 2001 Ohio 52, 744 N.E.2d 770; *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 1998 Ohio 704, 701 N.E.2d 696.

In order 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 he presented those claims on appeal." *Sheppard*, 91 Ohio St.3d at 330, 744 N.E.2d 770, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Moreover, to justify reopening his appeal, appellant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696.

*State v. Were*, 120 Ohio St.3d 85, 2008  
Ohio 5277, ¶¶ 10-11, 896 N. E.2d 699.

"*Strickland* charges us to "appl[y] a heavy measure of deference to counsel's judgments," 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L. Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 2002 Ohio 350, 761 N.E.2d 18."

*State v. Tenace*, 109 Ohio St.3d 451, 2006  
Ohio 2987, ¶7, 849 N. E.2d 1.

**B. DEFENDANT HAS NOT SATISFIED HIS BURDEN TO SHOW THAT HE HAS A COLORABLE CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL**

**1. PROPOSED PROPOSITION OF LAW I**

(Waiver of Right to Present Statement In Penalty Phase)

Although the trial court obtained a personal waiver of defendant's right to testify in his own behalf in the guilt phase of the trial (T. pp. 1816-1819), his trial counsel advised the court of defendant's waiver of his right to testify or provide a statement in the penalty phase of the trial. (T. pp. 1989-1990). Defendant has not provided any case suggesting that such waiver was in any way improper. Defendant now contends that the record must disclose that defendant knowingly, intelligently, and voluntarily waived his right to present a statement in the penalty phase. Defendant is mistaken.

R.C. 2929.03(D)(1) permits a capital defendant to make a penalty-phase statement without oath or cross-examination. In his second proposition of law, Campbell contends that the trial court had a legal obligation to inform him of that right.

No authority requires a trial court to inform a capital defendant of his right to make an unsworn, penalty-phase statement. Crim.R. 32(A)(1) does not apply, because an unsworn statement under R.C. 2929.03(D)(1) is not an allocution under the rule. See *Reynolds*, 80 Ohio St. 3d at 684, 687 N.E.2d at 1372.

Nor do existing legal principles require the adoption of Campbell's novel theory. We have rejected the notion that a trial court must personally address a capital defendant to determine whether he knowingly, intelligently, and voluntarily waived his right to present mitigating evidence. *State v. Keith* (1997), 79 Ohio St. 3d 514, 530, 684 N.E.2d 47, 62-63. (Such an inquiry is required when a defendant seeks to waive the presentation of *all* mitigating evidence, *State v. Ashworth* [1999], 85 Ohio St. 3d 56, 706 N.E.2d 1231, but Campbell did not do that.) We have also rejected the claim that a trial court must inform the defendant of his right to testify at trial. *State v. Bey* (1999), 85 Ohio St. 3d 487, 499, 709 N.E.2d 484, 497. Campbell's claim is not supported by *Keith*

or *Bey*. Campbell's second proposition of law is overruled

*State v. Campbell*, 90 Ohio St. 3d 320, 326,  
2000 Ohio 183, 738 N. E.2d 1178.

Defendant's waiver of the right to make a statement in the penalty phase of the trial was properly placed upon the record and did not constitute error. Even if it did, defendant's appellate counsel in the merit appeal was not obligated to raise all conceivable issues, but could focus upon those alleged errors that he believed had the best chance of prevailing. Lastly, even if defendant's waiver somehow constituted error, it was not plain error, and thus would not have affected the outcome of the appeal.

2. Proposed Proposition of Law II  
(Denial of Right to Allocution)

Defendant claims that the trial judge denied defendant his right to allocution under Crim. R. 32(A)(1) and that appellate counsel should have included such alleged error in his merit brief to this Court. Crim. R. 32(A)(1) provides in relevant part that the trial judge, before imposing sentence shall "Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." This is precisely what the trial judge did before imposing sentence; see T. p.2221. No violation of defendant's allocution right occurred. Moreover, there is no statutory or case law authority for the proposition asserted by defendant that the court must engage in

a colloquy with defendant to establish waiver of allocution. In any event, even if there was a denial of allocution, which the record shows did not occur, such denial, if raised on appeal, would have been subject to affirmance based upon invited or harmless error. *State v. Fry* (March 23, 2010), Slip Opinion 2010 Ohio 1017 at ¶187.

### **3. Proposed Proposition of Law III**

(Miscellaneous Issues)

#### **a. Juror Angela Kennedy.**

The issue of Juror Kennedy's contact with the relative of a State's witness was raised in the merit appeal as defendant's Proposition of Law VI. This court determined that the trial court properly examined both Kennedy and the relative to establish no prejudice to the satisfaction of the trial court, the prosecutors and defendant's trial attorneys, and that trial counsel were not ineffective in not requesting Kennedy's dismissal. *State v. Frazier*, 2007 Ohio 5048, ¶¶100-109.

#### **b. Failure of Trial Counsel To Object to State's Argument Regarding Jury Verdict in Sentencing Phase**

The issue of the prosecutor's argument in the sentencing phase supposedly confusing the jury about whether a single juror can prevent a death sentence was argued in the merit appeal. See Proposition of Law No. 13, subdivision (B), (appellee's brief, p. 82-83), and was rejected by this Court in the merit appeal. *Id.* at ¶237. The issue of the nature and circumstances of the crime versus aggravators was also argued in Proposition of Law 13, subdivision (A),

(appellee's brief, p. 79-82), and was also rejected by this Court in the merit appeal. Id. at ¶237.

c. Trial Counsel's Closing Statements Conceding Heinous Crime

This court determined in the merit appeal that defense counsel's tactic of conceding the horrible nature of the murder to the jury in the penalty phase was a reasonable trial tactic. Id. at ¶¶223-231. Thus, this issue has been fully considered and rejected.

d. Trial Counsel's Alleged Failure to Place on Record, Defendant's Understanding of His Right to Testify in Penalty Phase

Defendant, through counsel, waived his right to testify. There is no requirement that the court ensure a knowing waiver:

Fry argues that the trial court violated his constitutional rights by failing to question him to ensure that he made a knowing, intelligent, and voluntary waiver of his right to testify. However, "a trial court is not required to conduct an inquiry with the defendant concerning the decision whether to testify in his defense." (Emphasis sic.) *State v. Bey* (1999), 85 Ohio St.3d 487, 497, 1999 Ohio 283, 709 N.E.2d 484.

*State v. Fry*, 2010 Ohio 1017, at ¶118

e. Post-Verdict Contact by Trial Judge With Jury

This issue was also raised in defendant's Proposition of Law No. XIV and this Court found no prejudice or error in the judge talking to the jury at the end of the case. See *State v. Frazier*, 2007 Ohio 5048, ¶¶210-214. Had appellate counsel alleged that trial counsel were ineffective for not objecting, it is clear that this Court would have found no plain error.

**CONCLUSION**

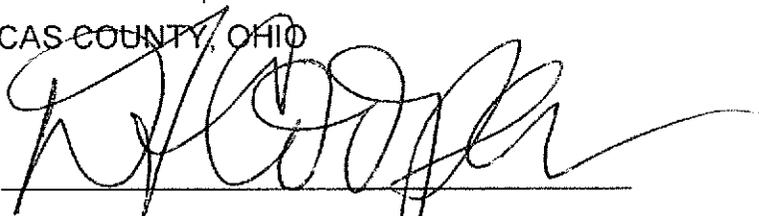
Defendant's application to reopen has been submitted substantially out of time and is unsupported by any evidence demonstrating a good cause for not meeting the 90 day filing limit. For that reason alone, the application should be denied. On the merits, most of defendant's proposed propositions of law were briefed, considered and rejected in the merit appeal. In any event, defendant has failed to establish a genuine issue that he was deprived of effective appellate counsel.

For these reasons, the application should be denied.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY  
LUCAS COUNTY, OHIO

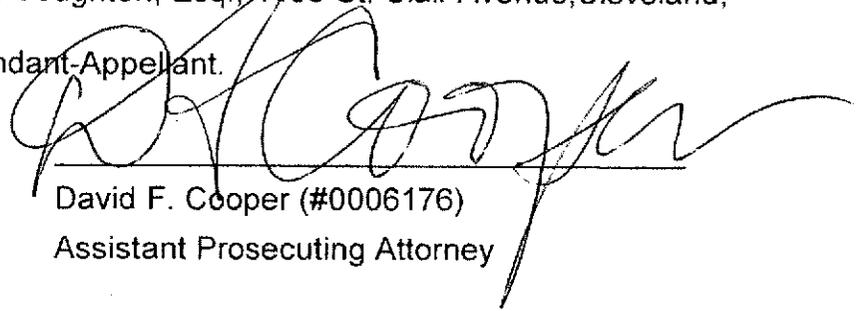
By: \_\_\_\_\_

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David F. Cooper (#0006176)  
Assistant Prosecuting Attorney

**CERTIFICATION**

This is to certify that on the 20<sup>th</sup> day of April, 2010, a copy of this Memorandum was sent by ordinary mail to David L. Doughten, Esq., 4403 St. Clair Avenue, Cleveland, Ohio 44103-1125, Attorney for Defendant-Appellant.

A handwritten signature in black ink, appearing to read "David F. Cooper", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

David F. Cooper (#0006176)  
Assistant Prosecuting Attorney