

ORIGINAL

IN THE SUPREME COURT OHIO

10-1930

STATE OF OHIO, :
Appellee, : On Appeal from the Hamilton
County Court of Appeals,
vs. : First Appellate District
CAMERON McGLOTHIN, : Court of Appeals
Appellant. : Case No. C-060145

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CAMERON McGLOTHIN

Robert R. Hastings, Jr. (0026041)
Law Office of the Hamilton County
Public Defender
230 East Ninth Street, Suite 2000
Cincinnati, Ohio 45202
(513) 946-3712
Fax No. (513) 946-3707
bhastings@cms.hamilton-co.org

COUNSEL FOR APPELLANT CAMERON McGLOTHIN

Joseph T. Deters
Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
Fax No. (513) 946-3017
Joe.deters@hcpros.org

COUNSEL FOR APPELLEE, STATE OF OHIO

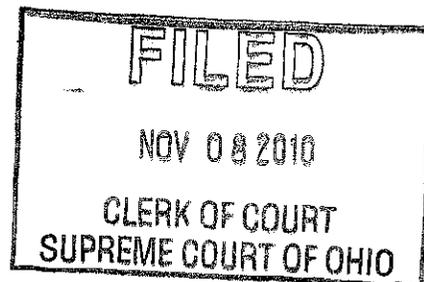


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<p>Where the Court of Appeals grants a reopening of Appellant's appeal by stating that Appellant has sustained his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, it is error to not consider all the issues of ineffective assistance of appellate counsel in total in determining if Appellant was deprived of the United States and Ohio constitutional guarantees to effective assistance of counsel.</p>	
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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case presents the issue of whether the Court of Appeals correctly excluded the Appellant's issues regarding three assignments dealing with issues of ineffective assistance of appellate counsel contained in Appellant's Application to Re-Open his appeal. The deficiencies that Appellant raised included counsel waiving assignment of error in a prior appeal to the Supreme Court of Ohio; failing to raise violations of the United States Constitution in the assignment of error; and failing to challenge the initial indictment for failing to set a mens rea. The Court of Appeals only addressed Appellant's assignment regarding sentencing on the allied offenses of aggravated robbery and robbery. In its Entry Granting Delayed Application for Reopening the Court of Appeals stated, "Because McGlothin has sustained his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, the court grants his application to reopen his appeal." But the Court of Appeals restricted Appellant's assignment of error on the reopening to the allied offense issue. Clearly appellate counsel's combined failures did not meet the standard for effective assistance of counsel as set forth in Strickland v. Washington (1984) 466 U.S. 668, 104 S.Ct. 2052.

STATEMENT OF THE CASE AND FACTS

Appellant was charged with murder; an accompanying gun specification; having a weapon under disability; aggravated robbery; and robbery. The record is clear that the Court of Appeals denied him the opportunity to fully develop the issue of ineffective assistance of counsel by restricting the reopening to the issue of allied offenses.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I:

Where the Court of Appeals grants a reopening of Appellant's appeal by stating that Appellant has sustained his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, it is error to not consider all the issues of ineffective assistance of appellate counsel in total in determining if Appellant was deprived of the United States and State of Ohio constitutional guarantees to effective assistance of counsel.

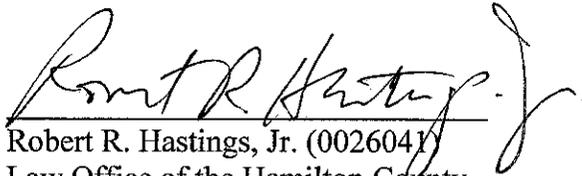
The Court of Appeals overlooked the fact that appellate counsel's combined failure to raise certain issues on appeal or to properly raise certain issues constituted ineffective assistance of counsel.

Clearly had appellate counsel performed his duties in a manner that was consistent with the standards of practice in criminal cases, the result in this case would have been different resulting in a dismissal of some charges and a re-trial on other issues.

Conclusion

Appellant respectfully requests that this Court accept jurisdiction of this matter for the reasons set forth above.

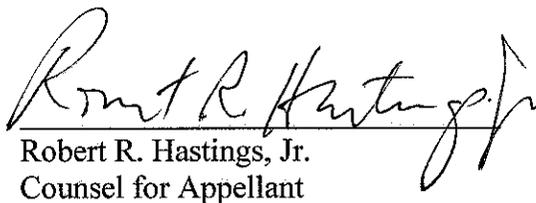
Respectfully submitted,



Robert R. Hastings, Jr. (0026041)
Law Office of the Hamilton County
Public Defender
230 East Ninth Street, Suite 2000
Cincinnati, Ohio 45202
(513) 946-3712– Telephone
(513) 946-3707 – Fax
Counsel for Appellant, Cameron McGlothlin

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered to the Office Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on the 8th day of November, 2010.


Robert R. Hastings, Jr.
Counsel for Appellant

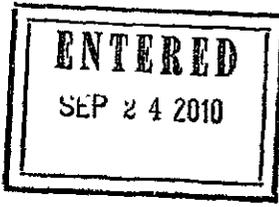
APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, :
Plaintiff-Appellee, :
vs. :
CAMERON McGLOTHIN, :
Defendant-Appellant. :

APPEAL NO. C-060145
TRIAL NO. B-0508457

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Cameron McGlothlin was convicted of murder with a specification, having a weapon under a disability, aggravated robbery, and robbery. The trial court sentenced McGlothlin to prison terms of 15 years to life for murder, three years for the accompanying specification, one year for having a weapon under a disability, nine years for aggravated robbery, and seven years for robbery. The sentences for murder, the specification, having a weapon under a disability, and aggravated robbery were to be served consecutively, but were otherwise made concurrent with the sentence for robbery. The aggregate sentence was 28 years.

McGlothlin appealed to this court, and in September, 2007, we affirmed the judgment of the trial court. In October 2009, we granted McGlothlin's delayed application to reopen his appeal.

In his brief, McGlothlin raises four assignments of error. But in our entry granting his application, we limited our consideration of the reopened appeal to whether the trial court erred when it convicted McGlothlin of both aggravated

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.



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robbery and robbery. This issue is raised in McGlothlin's first assignment of error. The other three assignments of error are not well taken, as they are beyond the scope of our consideration.

McGlothlin asserts that the trial court erred when it convicted him of aggravated robbery and robbery because they are allied offenses of similar import.² We agree. In *State v. Cabrales*, the Ohio Supreme Court held that "if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import."³ McGlothlin was found guilty of aggravated robbery in violation of R.C. 2911.01(A)(3) and robbery in violation of R.C. 2911.02(A)(2). In comparing the elements of those offenses, we conclude that the offenses are allied offenses of similar import. And having reviewed the record, we are convinced that the offenses were not committed separately or with a separate animus. The trial court erred when it convicted McGlothlin of both offenses. Accordingly, we vacate the separate sentences imposed for aggravated robbery and robbery and remand the case for imposition of only one sentence for either of the two offenses. In all other respects, we affirm the judgment of the trial court.

Therefore, we affirm the trial court's judgment in part, vacate the sentences for aggravated robbery and robbery, and remand the cause for further proceedings pursuant to the terms of this judgment entry.

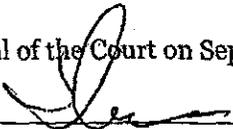
A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 24, 2010

per order of the Court


Presiding Judge



² See R.C. 2941.25.

³ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.

B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
OCT - 8 2009

STATE OF OHIO,	:	APPEAL NO. C-060145
Plaintiff-Appellee,	:	TRIAL NO. B-0508457
vs.	:	
CAMERON MCGLOTHIN,	:	<i>ENTRY GRANTING DELAYED</i>
Defendant-Appellant.	:	<i>APPLICATION FOR</i>
		<i>REOPENING, APPOINTING</i>
		<i>COUNSEL, AND EXTENDING</i>
		<i>TIME.</i>

We consider this cause upon defendant-appellant Cameron McGlothin's App.R. 26(B) application to reopen his appeal.

Good Cause for the Filing Delay

An appellant must apply to reopen his appeal within 90 days of the date on which the court of appeals journalized its judgment, unless he can show good cause for applying at a later time.¹ This court journalized its judgment on September 14, 2007, and McGlothin filed his application to reopen on April 1, 2009. He thus failed to meet the 90-day deadline.

McGlothin asserts that "criminal defendants, prosecutors, and some appellate districts were undecided and uncertain as to the proper mechanism for raising the constitutional claim of ineffective assistance of appellate counsel" until, "[o]n September 18, 2008, the Ohio Supreme Court [in *State v. Davis*²] clarified that the proper mechanism and the proper forum for raising [ineffective-appellate-counsel] claims was to file an Application for Reopening pursuant to App.R. 26(B)." This

¹ See App.R. 26(B)(1) and 26(B)(2)(b).
² 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221.

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“uncertain[ty],” he insists, excused his delay in applying to reopen his appeal. We agree.

Before the supreme court’s September 2008 decision in *Davis*, this and other appellate districts, following the supreme court’s decision in *State v. Houston*, applied the doctrine of res judicata to preclude reopening an appeal if the ineffective-appellate-counsel claim either had been or could have been raised on appeal to the supreme court.³ In *Davis*, the supreme court effectively overruled *Houston*, holding that a court of appeals may apply the doctrine of res judicata to preclude a merit ruling on an App.R. 26(B) claim if the supreme court has considered the claim on its merits, but not if the supreme court has declined jurisdiction of the discretionary appeal.⁴

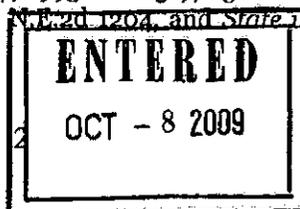
We decided McGlothin’s appeal a year before the supreme court decided *Davis*. In that interim, he did not challenge appellate counsel’s effectiveness in a timely filed App.R. 26(B) application. He instead unsuccessfully sought a discretionary appeal with the supreme court.

McGlothin’s failure to seek reopening of his appeal within the 90 days mandated by App.R. 26(B) is understandable and excusable. The state of the law was then such that challenges to his appellate counsel’s effectiveness that he now presents would have been subject to preclusion under the doctrine of res judicata because they could have been raised in his appeal to the supreme court. We, therefore, hold that McGlothin’s forbearance in filing an App.R. 26(B) application in reliance on the law as it existed until the decision in *Davis* provided good cause for his filing delay.⁵

³ See *State v. Houston*, 73 Ohio St.3d 346, 347, 1995-Ohio-317, 652 N.E.2d 1018, citing *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204, and *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

⁴ *Davis* at ¶23-28.

⁵ See App.R. 26(B)(1) and 26(B)(2)(b).



The Appeal is Reopened

We turn to the merits of McGlothlin's App.R. 26(B) application. An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal."⁶ The United States Supreme Court's decision in *Strickland v. Washington*⁷ provides the standard for determining whether the applicant was denied the effective assistance of appellate counsel.⁸ The applicant must prove "that his counsel [was] deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal."⁹

In his application, McGlothlin asserts that his appellate counsel was ineffective in "waiving" assignments of error in his discretionary appeal to the Ohio Supreme Court and in failing to "federalize" assignments of errors submitted in his appeal here. App.R. 26(B) does not permit an intermediate appellate court to reopen an appeal on the ground that appellate counsel was ineffective in pursuing a discretionary appeal to the Ohio Supreme Court.¹⁰ Nor can McGlothlin show a reasonable probability of success in his appeal to this court had his appellate counsel "federalize[d]" his assignments of errors.¹¹ Thus, neither incident of alleged ineffectiveness provides a ground for reopening the appeal.

McGlothlin also contends that his appellate counsel was ineffective in failing to submit an assignment of error challenging his convictions for aggravated robbery and robbery, when his indictment had omitted the mens rea elements of the offenses.

⁶ *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696; App.R. 26(B)(5).

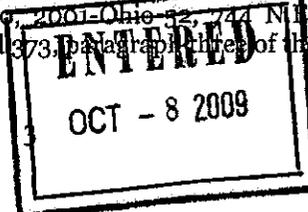
⁷ (1984), 466 U.S. 668, 104 S.Ct. 2052.

⁸ See *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456.

⁹ *State v. Sheppard*, 91 Ohio St.3d 329, 330, 2001-Ohio-52, 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.

¹⁰ See App.R. 26(B)(5).

¹¹ See *Sheppard*, 91 Ohio St.3d at 330.



He cites in support of this contention the Ohio Supreme Court's decision in *State v. Colon*.¹²

As we noted supra, we decided McGlothin's appeal on September 14, 2007. The supreme court decided *Colon* on April 9, 2008. And in July 2008, the supreme court, on reconsideration, held that the *Colon* rule "applies only to those cases pending on the date [it] was announced."¹³ Because McGlothin's appeal was not "pending" before this court on April 9, 2008, when the supreme court decided *Colon*, its rule did not apply to his case, and his counsel cannot be said to have been deficient in failing to raise the matter on appeal.

Finally, McGlothin contends that his appellate counsel was ineffective in failing to submit an assignment of error challenging, under R.C. 2941.25, the trial court's imposition of separate prison terms upon jury verdicts finding him guilty of aggravated robbery and robbery. We agree.

In our March 2007 decision in *State v. Cabrales*,¹⁴ we held that a trial court could not, consistent with R.C. 2941.25, sentence a defendant for both possession of a controlled substance under R.C. 2925.11(A) and trafficking in the same controlled substance under R.C. 2925.03(A)(2), because the offenses are allied offenses of similar import and had not been committed separately or with a separate animus as to each. On April 9, 2008, the Ohio Supreme Court affirmed our judgment in *Cabrales*.¹⁵ In so doing, the court, citing with disapproval our 2002 decision in *State v. Palmer*,¹⁶ rejected as "overly narrow" the "view of numerous Ohio appellate districts * * * that [the allied-offenses analysis set forth in *State v. Rance*¹⁷] 'requires

¹² 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

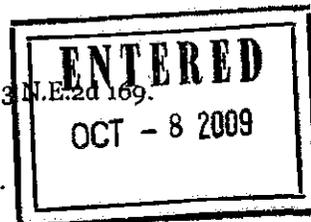
¹³ *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

¹⁴ 1st Dist. No. C-050682, 2007-Ohio-857, ¶36.

¹⁵ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

¹⁶ 148 Ohio App.3d 246, 2002-Ohio-3536, 772 N.E.2d 726.

¹⁷ 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.



a strict textual comparison' of elements under R.C. 2941.25(A)."¹⁸ Based on the supreme court's decision in *Cabrales*, we reconsidered *Palmer* and our March 2008 decision in *State v. Madaris* and held that robbery in violation of R.C. 2911.02(A)(2) and aggravated robbery in violation of R.C. 2911.01(A)(1) are allied offenses of similar import.¹⁹ And in September 2009, the Ohio Supreme Court, having arrived at the same conclusion in *State v. Harris*,²⁰ affirmed our decision on reconsideration in *Madaris*.²¹

Like *Palmer* and *Madaris*, *McGlothin* was convicted of robbery in violation of R.C. 2911.02(A)(2). But unlike *Palmer* and *Madaris*, who were convicted of aggravated robbery in violation of R.C. 2911.01 (A)(1),²² *McGlothin* was convicted of aggravated robbery in violation of R.C. 2911.01 (A)(3).

McGlothin's conviction for robbery required proof that, in attempting, committing, or fleeing after a theft offense, he had inflicted, attempted to inflict, or threatened to inflict physical harm. His conviction for subdivision (A)(3) aggravated robbery required proof that, in attempting, committing, or fleeing after a theft offense, he had "inflicted or attempted to inflict serious physical harm." Applying the analysis established by *Cabrales* and its progeny,²³ we conclude that aggravated robbery in violation of R.C. 2911.01(A)(3) and robbery in violation of R.C. 2911.02(A)(2) are allied offenses of similar import. And because *McGlothin*

¹⁸ *Cabrales* at ¶21.

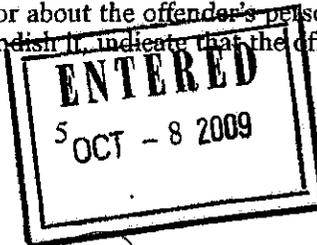
¹⁹ See *State v. Palmer*, 178 Ohio App.3d 192, 2008-Ohio-4604, 897 N.E.2d 224, ¶3-7 and 15, discretionary appeal allowed, 120 Ohio St.3d 1505, 2009-Ohio-361, 900 N.E.2d 622; *State v. Madaris*, 1st Dist. No. C-070287, 2008-Ohio-2470, ¶3.

²⁰ 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882.

²¹ *State v. Madaris*, ___ Ohio St. 3d ___, 2009-Ohio-4903, ___ N.E.2d ___.

²² R.C. 2911.01(A)(1) provides that no person, in attempting, committing, or fleeing after a theft offense, shall "[h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

²³ See *Harris* at ¶15-17.



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committed the offenses neither separately nor with a separate animus as to each, R.C. 2941.25 precluded the trial court from sentencing him for both.

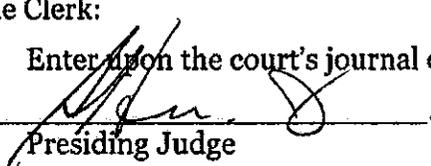
We decided *Cabrales* while McGlothin's appeal was pending before this court. And an assignment of error predicated on our decision in *Cabrales* would have presented a reasonable probability of success. Thus, McGlothin has demonstrated a deficiency in his appellate counsel's performance that prejudicially affected the outcome of his appeal.²⁴

Because McGlothin has sustained his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, the court grants his application to reopen his appeal.²⁵

Further, the court appoints Christine Y. Jones, Attorney Registration #0055225, as counsel for McGlothin and extends time: McGlothin shall have until December 8, 2009, to file his brief; and the state shall have until February 9, 2010, to file its brief.

To the Clerk:

Enter upon the court's journal on OCT - 8 2009, by order of the court.



Presiding Judge

(COPIES SENT TO ALL PARTIES.)



²⁴ See *Sheppard*, 91 Ohio St.3d at 330.

²⁵ See App.R. 26(B)(5); *Spivey*, 84 Ohio St.3d at 25; *Reed*, 74 Ohio St.3d at 535.