

IN THE SUPREME COURT OF OHIO

11-0510

PAUL LEFFLER	:	On Appeal from the Hardin
	:	County Court of Appeals,
APPELLANT,	:	Third District
	:	
	:	Court of Appeals
V.	:	Case No. 06 07 22
	:	
STATE OF OHIO,	:	
	:	
APPELLEE,	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION, PAUL LEFFLER

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*Proposition of Law I:*

**THE THIRD DISTRICT'S REFUSAL TO HEAR THE ORIGINAL  
APPLICATION AND THIS SUCCESSOR APPLICATION VIOLATES THE  
OPEN COURT AMENDMENT TO THE OHIO CONSTITUTION AND THE DUE  
PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE FEDERAL  
CONSTITUTION MADE APPLICABLE TO THE STATES BY THE  
FOURTEENTH**

*Proposition of Law II*

**APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL  
GUARANTEED BY THE SIXTH AMENDMENT MADE APPLICABLE TO THE  
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EXPLANTATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL  
QUESTION

In this matter, a defendant pleads guilty before a judge for a sex offense involving a minor. The defendant thought better of this plea and sought to have the plea withdrawn prior to sentencing. A full hearing was held where prior counsel was examined as to his representation of Appellant. An appeal was taken and Appellant has served his sentence.

Appellant would ask that this court entertain this matter solely to determine where and when the open courts amendment applies in Ohio. These matters were raised in a application to reopen filed by Appellant's wife. Due to certain technical issues the application was denied without a merits ruling. Habeas counsel re-filed the application and the court of appeals has again determined it should not entertain this application.

The ineffective assistance claim has been briefed but due to the courts unwillingness to reach a merits ruling in this case, we have no determination whether Appellant received counsel as set forth in the Ohio and Federal Constitutions.

## STATEMENT OF THE CASE AND FACTS

### *Statement of the Facts*

The indictment in this matter alleges instances of sexual misconduct between the Appellant and two separate prosecuting witnesses. Appellant, at all times relevant to this Appeal, was a minister in Kenton, Ohio.

There were two separate allegations from 1999, one near Thanksgiving and the other near Christmas. They dealt with the same fourteen year old prosecuting witness. The Thanksgiving allegation was that the Appellant struck the prosecuting witness on the buttocks and told her of his desire for her. The Christmas allegation stated that the Appellant had sexual intercourse with the prosecuting witness on an inflatable air mattress in a house under construction.

There was an additional pair of allegations from 2005 with a different prosecuting witness. These allegations deal solely with Appellant taking another young lady in the car and engaging in improper discussions with her.

### *Statement of the Case*

On February 24, 2006, Appellant was indicted for numerous sex offenses involving minors. He was arraigned on February 27, 2006, and entered pleas of not guilty. Appellant was released on bond pending trial. After numerous continuances the matter was set for trial on May 21, 2007.

Appellant entered a plea of guilty to two counts of sexual imposition, no contest to two counts of contributing to the delinquency of a minor on May 23, 2007. On July 26, 2007, Appellant filed a motion to withdraw those same pleas. A hearing for that

motion was held and a order denying the motion was filed on September 11, 2007. On September 19, 2007, Appellant was sentenced to thirty months for all of the convictions.

Appellant filed a timely notice of appeal with the Third District Court of Appeals. The sole issue for appeal was whether the trial court abused its discretion in not granting the Appellants motion to withdraw his plea. The Third District Court of Appeals affirmed the trial court's decision on June 23, 2008. A timely notice of appeal and memorandum in support of jurisdiction was filed on August 5, 2008. The Ohio Supreme Court declined jurisdiction on December 3, 2008.

Appellant filed an application to reopen the direct appeal pursuant to Appellate Rule 26 (b) on September 22, 2008. On October 7, 2008, Appellee filed a motion to dismiss the application because it had been signed by Appellant's wife. The court granted same on December 4, 2010. Appellant did not re-file the application.

Appellant filed a petition for a writ of habeas corpus with the Northern District of Ohio on December 2, 2009. Appellee filed a motion to dismiss reasoning that due to the fact the petition was mixed with exhausted and unexhausted claims it must be denied. On August 23, 2010, Appellant requested that the matter be stayed pending his exhaustion of the ineffective assistance claim. This request was granted on November 9, 2009 giving Appellant until December 9, 2010 to file a new, properly executed application with the Third District.

A properly executed application to reopen the direct appeal was filed with the clerk of common pleas court in Hardin County on December 8, 2010. The Third District denied said application on February 16, 2011.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### *Proposition of Law I*

#### **THE THIRD DISTRICT'S REFUSAL TO HEAR THE ORIGINAL APPLICATION AND THIS SUCCESSOR APPLICATION VIOLATES THE OPEN COURT AMENDMENT TO THE OHIO CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE FEDERAL CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH**

Article I, Section 16 of the Ohio Constitution, the “open courts” amendment, states that every person “shall have remedy by due course of law and shall have justice administered without denial or delay.”

“Due course of law” means the same as “due process of law,” and there is no difference respecting due process of law in the Constitution of the United States and that of Ohio. *City of Akron v. Chapman* (1953), 160 Ohio St. 382, 116 N.E.2d 697.

Appellant filed a application to re-open his direct appeal making serious allegations of ineffective assistance of counsel. The court denied this application based on the fact Appellant's wife mistakenly signed the document as his power of attorney. The court not only denied the application but struck it from the record. It was not re-filed. Contrary to assertions by the Ohio Attorney General there are no clear instructions in the December 4, 2008 entry on re-filing this application. It is merely denied and struck. One could certainly read between the lines and see that he should file this application with a properly executed affidavit. However, there is no directive such as Appellant shall file a properly executed affidavit and application within thirty days of this order. As far as Appellant knew the application was denied and struck and he was left with no recourse.

States may erect reasonable procedural requirements for triggering the right to an adjudication. *State v Lamar 102 Ohio St. 3d 467 in the syllabus*. Good cause can excuse the lack of a filing to reopen an appeal only while it exists, not for an indefinite period. Rules App.Proc., Rule 26(B). *Id.* Certainly the procedure under Appellate Rule 26 and under the precepts of *Murnahan* can be seen as reasonable. Furthermore, a pro se appellant is held to the same obligations and standards set forth in the appellate rules that apply to all litigants. *Kilroy v. B.H. Lakeshore Co.* (1996), 111 Ohio App.3d 357, 363, 676 N.E.2d 171. Appellant followed the procedures set forth in Appellate Rule 26. He filed an application with the court of appeals that comports with the requirements..

The definition of a power of attorney: “A power of attorney is an authorization by one person, the principal, to another, the attorney-in-fact, granting to the attorney-in-fact the power to conduct the principal's business or personal affairs.” 1 Anderson's Ohio Probate Practice and Procedure (10th Ed.2009) 509, Section 30.01. Appellant granted this to his wife while he was in prison. To conduct his affairs and take care of the many businesses he ran in Kenton, Ohio. Certainly Stephanie Leffler could have believed that this was yet another business matter to attend. There is no indication that she understood the implications of signing a legal document to be filed with the court of appeals. No one believed that Stephanie Leffler was going to be representing Appellant in his application to reopen the appeal.

When Appellant filed a successor application to correct this mistake, the court of appeals deemed it untimely. Thus preventing a merits ruling on the matter. This denies the Appellant a remedy without just cause in violation of the open courts amendment. It

also prevents his ability to have a fair process by which to adjudicate his constitutional complaints.

*Proposition of Law II*

**APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL  
GUARANTEED BY THE SIXTH AMENDMENT MADE APPLICABLE TO THE  
STATES BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES  
CONSTITUTION**

*Standard*

An attorney is assumed to be competent and to perform his duties ethically and competently. *State v. Lytle (1976)*, 48 Ohio St.2d 391. 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 v. Washington (1984)*, 466 U.S. 668, 687-689. The burden of proving ineffectiveness is on defendant. *Vaugh v. Maxwell (1965)*, 2 Ohio St. 2d 299.

In *State v. Bradley (1989)*, 42 Ohio St.3d 136, the Supreme Court adopted the following test to determine if counsel's performance is ineffective: "[c]ounsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation, and, in addition, prejudice arises from counsel's performance." *Id.*, at paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington (1984)*, 466 U.S. 668.

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* This requires showing that "[c]ounsel's errors were so serious as to deprive

the defendant of a fair trial, a trial whose result is reliable." *State v. Goodwin*, 84 Ohio St.3d 331, 334.

*Instances of ineffective assistance of trial counsel*

***I. Failure to oppose government motions to amend***

On **February 28, 2006**, the state filed a motion to amend counts one and eight in the indictment. The Court ordered that count one be changed to reflect a year of 2005. Counts eight and were changed to reflect the same. Counsel did not object and was granted by the trial court.

Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189.

Failure to raise a meritless issue does not constitute ineffective assistance. *In re Carter*, Jackson App. Nos. 04CA15 and 04CA16, 2004-Ohio-7285 at paragraph 41; *State v. Knott*, Athens App. No. 03CA30, 2004-Ohio-5745, at paragraph 35.

Finally, a reviewing court must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. See *Strickland*, 466 U.S. at 689.

This failure to file opposition is not a debatable trial tactic or strategy. This failure to oppose a motion would not have been meritless.

There are two issues regarding the motion to amend: the lack of substance under Criminal rule 47 and the serious questions regarding the state of the evidence in this matter.

a. *Criminal Rule 47*

Ohio Criminal Rule 47, states, in part:

An application to the court for an order shall be by motion. A motion, other than one made during trial or hearing, shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority, and may also be supported by an affidavit.

*Ohio Criminal Rule 47*

The entirety of the motion follows:

Now comes the state of Ohio, Pursuant to Criminal Rule 7 (D) and hereby moves the court for an order to amend the indictment in this case. Count 1 and Count 8 should reflect a year of 1999. The requested amendment does not materially affect the contents of the Indictment, nor does it alter the charge to which the defendant has entered a plea.

*Motion to Amend Indictment filed February 26, 2006.*

The state of Ohio failed to state with particularity the grounds upon which it is made. While it is true it does not change the name or charge in the indictment the State of Ohio doesn't state why it needs to amend the indictment.

b. *Rationale for amendment*

Defense counsel has to wonder if this difference was a clerical error or did the grand jury hear a different story. A different story that has these alleged incidents occurring in 2005 when all of the other evidence had them occurring in 1999. Did the prosecutor presenting the case misspeak and ask the 1999 witness about a 2005 incident and they agreed? If so this creates a colorable *Brady* claim. The motion to amend is silent on why the indictment differed from the evidence. Without challenging it, the defense counsel would never know why the indictment is so far off from the evidence.

## *II. Failure to request grand jury transcripts*

Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general.

This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes, which outweighs the policy of secrecy. *Pittsburgh Plate Glass Co. v. United States* (1959), 360 U.S. 395, 400.

It should be noted that speculation by a defendant that grand jury testimony might contain material evidence or might aid his cross-examination by revealing inconsistencies does not amount to a showing of a particularized need. *State v. Mack*, 73 Ohio St.3d 502, 508, 1995-Ohio-273; *State v. Webb*, 70 Ohio St.3d 325, 337, 1994-Ohio-425; Such an argument could be made in any case. *Webb* at 338.

A "particularized need" exists "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial". *State v. Davis* (1988), 38 Ohio St.3d 361, 365. A claim of particularized need cannot be replete with speculation and innuendo. *State v. Stojetz*, 84 Ohio St.3d 452, 460 syllabus. Whether to release grand jury testimony "is within the discretion of the trial court." *Greer*, supra. at paragraph one of the syllabus. A decision to deny release will not be reversed absent an abuse of discretion. *State v. Brown* (1988), 38 Ohio St.3d 305, 308. *State v. Cherry* (1995), 107 Ohio App.3d 476, 479.

There is a huge discrepancy in the date testified to by the prosecuting witnesses and the date on the indictment. Without knowing what question was asked to what witness it is difficult to know if one of the children changed their story. If a child witness

readily answered yes that an alleged incident happened six years previous to her prior story that creates a *Brady* issue. If the discrepancy is clerical, the result is less ominous. Only the prosecutor's office knows the truth. However, They failed to include it in their motion to amend the indictment. They failed to include any rationale in their motion to amend.

The particularized need in this matter is to discover why the evidence differs from the indictment. Without asking for the transcripts defense counsel capitulated that this difference was merely a clerical error. Only by seeking and obtaining this transcript would defense counsel learn the true meaning of the difference.

### ***III. Failure to file a motion for a rape shield hearing***

Trial counsel failed to file a motion to have the court hold a hearing to determine which evidence would be admissible under the so called rape shield law that was in place during 2007.

The American Bar Association standards require that defense counsel investigates the circumstances surrounding the allegations contained in the indictment. They state, " Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." *ABA Standards regarding Criminal Justice.*

Further, the Ohio code of professional responsibility provides that a lawyer should not handle a matter which he/she cannot handle competently. *Disciplinary Rules 6-101*.

The so called rape shield law states, " Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial." *ORC 2907.02 (E)*. Failure to request a hearing waives the defendant's ability to introduce such evidence at trial.

#### *Analysis*

Trial counsel failed to challenge the issue regarding what testimony was produced at the grand jury regarding the date of certain events. If the prosecutor asked a witness a question with an incorrect date and the witness answered affirmatively, that witness has just changed their story. The grand jury can only go by what the witnesses are asked and what the prosecutor tells them. Defense counsel should have challenged this issue, but did not. This failure is not trial strategy and it is not a tactic. It misses a real opportunity to attack the state's case in chief. Certainly, defense counsel should not wait until trial to discover that one of his most potent cross examination questions would be barred by the rape shield law.

#### **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 grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was sent via Regular U.S. mail to the Hardin County Prosecutors Office on 31 day of March, 2011.



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Appendix

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State v Leffler.....1-2

FEB 16 2011

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
HARDIN COUNTY**

*Carrie L. Haudensold*, Clerk  
Hardin Co. Court of Appeals

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**STATE OF OHIO,**

**CASE NO. 6-07-22**

**PLAINTIFF-APPELLEE,**

**v.**

**PAUL D. LEFFLER,**

**J U D G M E N T  
E N T R Y**

**DEFENDANT-APPELLANT.**

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This cause comes before the Court on Appellant's application for reopening direct appeal pursuant to App.R. 26(B), and Appellee's response in opposition to the application.

The appellate judgment affirming the conviction and sentence of Appellant was filed on June 23, 2008; Appellant filed a timely, pro se application for reopening of the appeal on September 22, 2008; Appellant's application was stricken on December 3, 2008 because, although he alleged that he prepared it, the application was improperly signed by his wife as "P.O.A." The instant application was filed on December 8, 2010.

Upon consideration of same, the Court finds that the instant application is not filed within ninety days of the appellate judgment, as required by App.R. 26(B)(1). In addition, the Court finds that the application does not set forth good

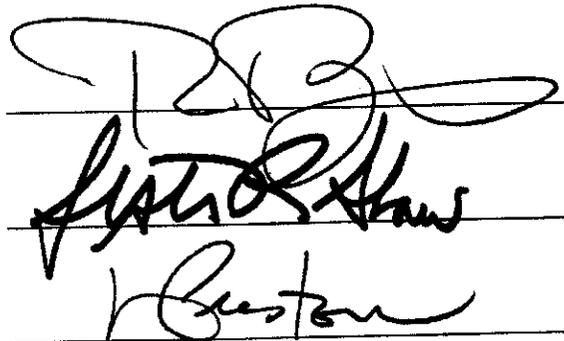
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Case No. 6-07-22

cause for being filed untimely, as required by App.R. 26(B)(1) and 26(B)(2)(b). Appellant alleges only that he re-filed the instant application as "instructed" by the United States District Court, Northern District, Eastern Division, to make clear for purpose of a habeas corpus proceeding that all claims in State Court have been exhausted. There is, however, no reason given for the delay of more than two years in filing the application.

Accordingly, the application for reopening is not timely and should be denied.

It is therefore **ORDERED** that Appellant's application for reopening direct appeal be, and the same hereby is, **DENIED** at the costs of the Appellant for which judgment is hereby rendered.



JUDGES

DATED: February 15, 2011  
/jnc