

IN THE SUPREME COURT OF OHIO  
2012

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

AL E. FORREST,

Defendant-Appellee.

Case Nos. 12-415

12-416

On Discretionary and  
Certified-Conflict Appeal  
from the Franklin County  
Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 11AP-291

**MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO**

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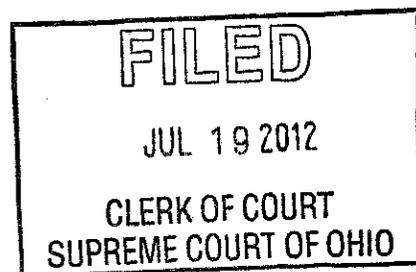
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## STATEMENT OF FACTS

On July 2, 2009, the grand jury indicted defendant on one count of possession of heroin, one count of trafficking in heroin, and one count of possession of cocaine – all fifth-degree felonies. (Trial Rec. 1) Defendant filed a motion to suppress the drugs. (Trial Rec. 34) After the State filed a memorandum opposing defendant's motion, (Trial Rec. 49), the trial court held a suppression hearing on March 1, 2010. (Tr. 1-31)

It is unnecessary here to discuss the facts surrounding the incident in detail. Suffice it to say here that the discovery of the drugs arose from a police officer's approach to a parked car in a high-crime area. (Tr. 8-9, 25-26) Because defendant made a furtive movement with his right hand as if to hide something in the middle console area, because defendant then turned his body as if to shield what he had just hidden, and because defendant failed to comply with two commands to exit the car, the officer found it necessary to grab defendant from the vehicle. (Tr. 6, 8-9, 10, 20, 21, 23, 24) The officer thereupon saw a baggie of heroin in the console area, and a subsequent search of the car led to the discovery of baggies of cocaine. (Tr. 10, 13) A fuller discussion of the facts can be found in the "Statement of Facts" in the State's memorandum supporting jurisdiction in No. 12-415.

After taking the matter under advisement at the conclusion of the hearing, (Tr. 30), the court on March 4, 2010, granted the motion to suppress. (Tr. 32; Trial Rec. 68)

The State appealed, and the Tenth District reversed on December 2, 2010,

concluding that the trial court had violated Crim.R. 12(F) by failing to provide essential findings in support of its holding that there had been no reasonable suspicion. *State v. Forrest*, 10th Dist. No. 10AP-481, 2010-Ohio-5878.

On March 23, 2011, the trial court on remand issued a decision and entry granting the motion to suppress again. (Trial Rec. 92)

The State appealed again, asserting two assignments of error. Under the first assignment of error, the State argued that several factors warranted the conclusion that reasonable suspicion existed to grab defendant from the vehicle, including the high-crime nature of the area, defendant's quick furtive movement to hide something, and his effort to shield the hidden object from the officer. (Appeals Rec. 11)

Under the second assignment of error, the State argued that the Fourth Amendment violation, if any, did not rise to the level of a deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights. (Id.) The State relied on *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), and argued that the good-faith exception discussed therein should apply.

On December 6, 2011, the Tenth District unanimously affirmed the order of suppression, ruling that the officer lacked reasonable suspicion and that the good-faith exception only applies when the police believe a warrant exists. *State v. Forrest*, 10th Dist. No. 11AP-291, 2011-Ohio-6234.

The State timely filed a combined document seeking reconsideration, seeking en banc consideration, and requesting certification of a conflict. (Appeals Rec. 28-29) The State also moved for the participation of all eight full-time judges to rule on the application for en banc consideration. (Id.)

The State sought reconsideration based on three grounds: (1) the panel had omitted material facts from its summary of the incident; (2) the panel had wrongly claimed that it could not find reasonable suspicion because the officer had not seen outward criminal activity; and (3) the panel had erred in failing to apply the good-faith exception, which applies even to avowedly warrantless actions. (Id. at pp. 3-9, 9-14, 14-19)

Insofar as error (2) was concerned, the State noted that the panel decision repeatedly focused on the officer's testimony that he had not seen criminal activity before he grabbed defendant out of the car. (Id. at pp. 9-14) The State pointed out that the panel decision was highly erroneous in contending that "[t]he officer's statement that he saw no criminal activity \* \* \* is inconsistent with a stop and frisk." The State noted that this "innocent activity" argument had been repeatedly rejected by many courts, including the United States Supreme Court and the Tenth District. The State cited the decisions of the United States Supreme Court showing that nothing in the *Terry* doctrine requires outwardly-observable criminal activity to warrant a *Terry* seizure. *United States v. Arvizu*, 534 U.S. 266, 274-75, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *United States v. Sokolow*, 490 U.S. 1, 9-10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

The State also noted that, consistent with *Arvizu* and *Sokolow*, the Tenth

District had repeatedly rejected any requirement that the conduct creating reasonable suspicion be outwardly criminal. *State v. McClendon*, 10th Dist. No. 09AP-554, 2009-Ohio-6421, ¶ 12; *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶¶ 12-14; *State v. Taylor*, 10th Dist. No. 05AP-1016, 2006-Ohio-5866, ¶ 11.

In addition to seeking reconsideration based on the *Arvizu-Sokolow* error, the State also sought en banc consideration based on the intra-district conflict with the three aforementioned Tenth District decisions in *McClendon*, *Mendoza*, and *Taylor*. (Appeals Rec.28-29, at pp. 19-20) In asking for en banc consideration, the State specifically requested that the entire complement of eight full-time judges review the application for en banc consideration:

- “Under App.R. 26(A)(2), *all eight full-time judges* of this Court must decide whether to grant the application for en banc consideration, not just the original three-judge panel. Accordingly, the State’s application for en banc consideration is hereby accompanied by a motion for all eight full-time judges to perform such review.” (Emphasis sic)
- “The State specifically moves that the entire en banc court of eight full-time judges must review and determine whether to grant the application for en banc consideration.”
- “The State emphasizes that the entire en banc court must review this application for en banc consideration.”
- “A refusal to submit the application to the other full-time judges for their consideration amounts to a refusal to follow the rule.”

(Appeals Rec. 28-29, at pp. 1, 3, 20)

On January 26, 2012, the panel alone denied all of the motions, including the application for en banc consideration and the motion for full participation of

the eight full-time judges. *State v. Forrest*, 10th Dist. No. 11AP-291, 2012-Ohio-280. No rationale was offered for why the panel alone, instead of the entire en banc court, could rule on the application for en banc consideration.

The State then timely filed a motion to certify a conflict on the issue of whether the full en banc court must participate in the decision whether to grant or deny an application for en banc consideration. (Appeals Rec. 34)

On March 8, 2012, the panel granted the motion to certify a conflict. *State v. Forrest*, 10th Dist. No. 11AP-291, 2012-Ohio-938.

The State thereafter filed a discretionary appeal (No. 12-415) and certified -conflict appeal (No. 12-416). On May 23, 2012, this Court declined review of the first four propositions being raised by the State in its discretionary appeal regarding the good-faith exception, regarding the existence of reasonable suspicion for a *Terry* stop, and regarding the ability to use force during a *Terry* stop. But this Court granted review of the fifth proposition of law regarding whether all of the full-time judges of the appellate court must rule on an application for en banc consideration. This Court also recognized that a conflict existed and allowed the certified-conflict appeal to proceed.

## ARGUMENT

Proposition of Law. When a party files an application for en banc consideration pursuant to App.R. 26(A)(2), all full-time judges of that Court of Appeals who are not recused or disqualified from the case must participate in determining whether to grant or deny the application. (*McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, and App.R. 26(A)(2), applied)

Certified-Conflict Question. Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

The answer to the certified question is a simple one. Yes, the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration. This answer is supported by the language of the rule itself and by the policies underlying en banc review.

A.

“[I]f the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they *must* convene en banc to resolve the conflict.” *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, paragraph two of the syllabus (emphasis added). Appellate Rule 26(A)(2)(a) states that en banc consideration will not be ordered unless it is “necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.”

If a majority of all of the judges in a court of appeals determines that an intra-district conflict exists, the majority may order that the appeal be considered en banc. App.R. 26(A)(2)(a). The rule states that “a majority of the en banc

court may order that an appeal or other proceeding be considered en banc.” Id.

The rule further provides that “[t]he en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case.” Id.

The rule is clear enough. A majority vote of the “en banc court” decides whether an intra-district conflict exists. If such a conflict exists, the application is granted, and the en banc court proceeds to resolve the conflict.

It makes sense that the decision whether to allow en banc consideration is itself a decision of the “en banc court.” A court’s decision whether it will convene itself as an “en banc court” should be a collective decision of the entire en banc court, not just the decision of as few as two judges on a three-judge panel. Moreover, the rule does not purport to authorize panel-only review of the question of whether an intra-district conflict exists. The rule only mentions that the “en banc court” will make that determination.

A failure to submit a party’s application for en banc consideration to the entire en banc court affirmatively defeats the ability of the other full-time judges to rule on the application and potentially grant it, as the rule plainly allows. The entire en banc court cannot grant what is not submitted to them. Panel-only review affirmatively deprives other members of the en banc court of their prerogative under the Rule to form a majority to grant en banc consideration in a given case.

In the Tenth District, the five judges not sitting on the three-judge panel can outvote the three panel members, 5-3, to grant en banc consideration. But

the State's application was not even submitted to them for their review. The panel alone denied the application without any circulation to the "en banc court" as a whole..

B.

Policies underlying en banc review support the need for non-panel members to participate in the process of deciding whether an intra-district conflict exists. As stated in *McFadden*, "[t]he principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court." *McFadden*, ¶ 16 (internal quotation marks omitted). Panel-only review deprives the majority of the en banc court of the opportunity to exercise this institution-wide control.

In the Tenth District, this is partly a numbers game. A three-judge panel would never constitute a majority of the eight full-time judges on the en banc court, and so participation of all full-time judges would be necessary to determine whether a majority would vote to grant en banc consideration.

But the issue involves more than just raw numbers. The Rule requires that a majority of the "en banc court" decide whether to grant the application. Deliberations by the panel alone do not ensure that the "en banc court" has participated in

the decision or that the court as a whole is “maintain[ing] its integrity as an institution \* \* \*.” “En banc is defined as ‘[w]ith all judges present *and participating*; in full court.’” *McFadden*, ¶ 10 (emphasis added). The process should involve full participation by all full-time judges on an institution-wide basis.

In many situations, the non-panel members would be able to bring a wealth of judicial experience and knowledge to the review of the application. The non-panel member(s) may have written the earlier decision(s) that are now claimed to be in conflict. The non-panel members may be aware of legal nuances that the panel members in the current case did not fully appreciate.

Also, the participation of non-panel members helps ensure a fairer review of the application. Practically speaking, the panel members have a vested interest in denying such an application, as the panel would not be inclined to concede that their decision conflicts with the decision of any earlier panel. The perspectives of other members of the en banc court, particularly the members who approved the earlier, potentially-conflicting decision(s), are needed to bring a full perspective to the question of whether an intra-district conflict exists.

In other words, it would be rather insular for the three-judge panel to decide, on its own, whether a conflict exists with earlier decisions. The deliberations of the court would be fuller, and fairer, if all members of the court participate in the process. Again, as *McFadden* states, the court as a whole acts through the en banc process “to maintain its integrity as an institution by making it

possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions \* \* \*.” *McFadden*, ¶ 16. Non-panel members would be deprived of having a voice in such institution-wide control if applications for en banc consideration were only reviewed by the panel.

C.

When the State filed the application for en banc consideration and moved to have all eight full-time judges determine that application, the panel alone denied the application and the motion without any circulation of the application or motion to the other judges. The panel provided no rationale for how the panel alone had the authority to deny the application.

When the State later filed a motion to certify conflict, the panel granted the motion to certify and opined on its panel-only review policy.

{¶ 2} The State of Ohio is correct in its assertion that different courts of appeals handle motions for en banc consideration differently. Some submit the motion to the entire membership of the court. Some, as the Tenth District, submit the motions to the panel who decided the case originally to ascertain if there is arguable merit to the motions and only after that decision is made submit the issue to the full membership of the court.

\* \* \*

{¶ 4} The rule does not literally state who shall make an initial determination that two or more decisions in a district are in conflict. The procedure used by the Tenth District is more efficient, especially in the vast majority of cases where no arguable merit is present. Many prisoners initiated cases fall into this category. Also, cases where one of the parties simply wants to delay, routinely fit into this category.

These passages are correct in one respect. There is a clear conflict. In

at least two other districts, the en banc court participates in the decision to grant or deny en banc review. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-5973; *Kelley v. Ferraro*, 8th Dist. No. 92446, 2010-Ohio-4179; 8th Dist. Loc.R. 26(D).

In other respects, however, these passages are severely flawed. The Rule *does* literally state who shall make the initial determination. The Rule specifies that “[u]pon a determination that two or more decisions of the court on which *they sit* are in conflict, *a majority of the en banc court* may order that an appeal or other proceeding be considered en banc.” (Emphasis added) The Rule then specifies that “[t]he en banc court shall consist of *all full-time judges* of the appellate district who have not recused themselves or otherwise been disqualified from the case.” (Emphasis added) The contrast is clear. Only the “en banc court” can grant en banc review, and, therefore, only the “en banc court” could grant an application for such review. The rule says nothing about the panel alone reviewing the application. Notably, the Tenth District panel does not explain how the “en banc court” could ever work its will if the panel monopolizes the application to itself and denies the application without circulating it to the “en banc court.” Under this Rule, the panel simply cannot purport to speak for the “en banc court” as a whole.

The Tenth District panel also contends that panel-only review serves a “more efficient” gatekeeping role by weeding out applications that have “no arguable merit” and/or are interposed for delay. But this previously-unstated rationale

is not supported by any language in App.R. 26(A)(2) and is inconsistent with the language of *McFadden*.

According to the Tenth District panel's logic, the Rule sets up a three-stage procedure: (1) panel-only gatekeeping review to determine whether the movant's claim of intra-district conflict has arguable merit; (2) "en banc court" review of whether intra-district conflict exists; and (3) full determination of the conflict issue by the "en banc court." But the Rule simply does not mention step (1) at all. It *does* set forth steps (2) and (3), but the express inclusion of these steps, and the omission of any step (1), shows that no step (1) was ever intended. "The canon *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other." *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, ¶ 21 (internal quotation marks omitted).

This Court as rule-maker knows how to set up the kind of gatekeeping step advocated by the Tenth District panel. In the very same rule, App.R. 26(B)(5) requires an initial application for reopening to satisfy a "genuine issue" standard, to be followed by a second step of full briefing if the court finds a "genuine issue. By setting up a gatekeeping step under App.R. 26(B), while not setting up such a step under App.R. 26(A)(2), it is clear that this Court did not intend that panels would act as gatekeepers under App.R. 26(A)(2). See, e.g., *Maggiore v. Kovach*, 101 Ohio St.3d 184, 2004-Ohio-722, 803 N.E.2d 790, ¶ 27 (legislature "knows how \* \* \* to include specific language" when it desires to do so). The

decision to grant or deny en banc review rests with the “en banc court,” not with the panel alone.

In any event, under the proposed gatekeeping function, the State’s application for en banc consideration *still* should have been submitted to the full court, as it easily satisfied the newly-stated “arguable merit” standard in setting forth a true intra-district conflict. The panel’s refusal to find “arguable merit” would *support* the State’s position that panel-only review disserves the interests underlying en banc review.

The State respectfully requests that this Court sustain the proposition of law and answer “Yes” to the certified question.

D.

The State wishes to make a few final points regarding the procedural posture of the case. With this Court having declined review of the State’s first four propositions of law, defendant might contend that the Fourth Amendment issue at the center of the State’s application for en banc consideration is now a moot issue. The State would disagree with that assertion.

This Court very likely declined review of the Fourth Amendment issues because it calculated that the State would prevail on the fifth proposition of law concerning the need for all full-time judges to review the State’s application for en banc consideration. This Court very likely viewed it as premature to reach any of the Fourth Amendment issues when the case would need to be remanded for the “en banc court” of the Tenth District to assess whether it will grant the application

for en banc consideration regarding one of those issues.

Such remand will return the case to the point where the error occurred. *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982).

In this reinstated posture, and with the State's appeal rights again tolled pending the outcome of the application for en banc consideration, see S.Ct.Prac.R. 2.

2(A)(6), the case will occupy a position in which the State would be able to appeal on the Fourth Amendment issues if the "en banc court" on remand denies the application for en banc consideration. At that point, the State's Fourth Amendment arguments will again be ripe for review in this Court.

Any claim of "mootness" would also be flawed because this Court clearly wished to review the en-banc-consideration issue. In effect, this Court has already determined that its decision to decline review of the Fourth Amendment issues has not mooted the State's appeal on the en-banc-consideration issue.

Finally, the State wishes to note that it has referred here to the Fourth Amendment issues as necessary background to the en-banc-consideration issue. But the State has not fully briefed those issues here because of the limited grant of discretionary review and because of the limitations on certified-conflict review. See S.Ct. Prac.R. 4.3 (limiting briefing to certified-conflict issue). Accordingly, if this Court in any way intends to weigh the merits of the Fourth Amendment issues in deciding the en-banc-consideration question now before it, the State would respectfully request that the Court provide notice of such intent and give the parties the opportunity to be heard regarding those Fourth Amendment issues. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d

298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

### CONCLUSION

The State respectfully requests that this Court reverse the Tenth District's judgment denying en banc review and remand the case to the Tenth District so that the proper complement of all full-time judges of that Court can review and determine the State's application for en banc consideration.

Respectfully submitted,



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Counsel for Plaintiff-Appellant

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 19<sup>th</sup> day of July, 2012, to Stephen P. Hardwick, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Defendant-Appellee.



STEVEN L. TAYLOR 0043876

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
2012**

**STATE OF OHIO,**

**Plaintiff-Appellant,**

**-vs-**

**AL E. FORREST,**

**Defendant-Appellee**

Case No.

**12-0415**

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 11AP-291

**NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO**

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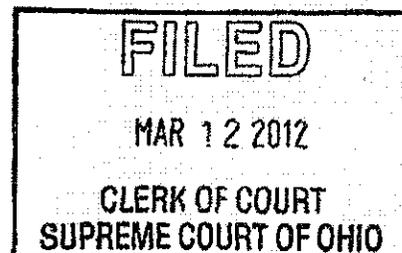
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**NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO**

Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Forrest*, 10<sup>th</sup> Dist. No. 11AP-291, on December 6, 2011, and from the journal entry entered in the same case on January 26, 2012.

This appeal is being timely filed pursuant to S.Ct.Prac.R. 2.2(A)(5) and (A)(6). The State timely filed applications for reconsideration and en banc consideration in the Tenth District on December 16, 2011, and the Tenth District denied those applications by decision and journal entry both filed on January 26, 2012.

Because new errors arose in the January 26, 2012 decision and journal entry, the State's appeal here is also timely in relation to that decision and journal entry as well.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents substantial constitutional questions, presents questions of public or great general interest, and involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245

Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

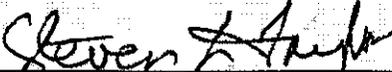
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Counsel for Plaintiff-Appellant

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 12<sup>th</sup> day of Mar., 2012, to MICHAEL SIEWERT, 307 East Livingston Avenue, Columbus, OH 43215; Counsel for Defendant-Appellee.

Pursuant to S.Ct.Prac.R. 14.2(A)(3), a copy was also sent by regular U.S. mail on this 12<sup>th</sup> day of Mar., 2012, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



STEVEN L. TAYLOR

Chief Counsel, Appellate Division

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
2012**

**STATE OF OHIO,**

**Plaintiff-Appellant,**

**-vs-**

**AL E. FORREST,**

**Defendant-Appellee**

Case No. **12-0416**

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 11AP-291

**NOTICE OF CERTIFIED CONFLICT  
OF PLAINTIFF-APPELLANT STATE OF OHIO**

**RON O'BRIEN 0017245**  
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373 South High Street, 13<sup>th</sup> Floor  
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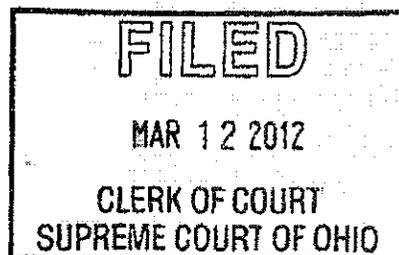
and

**STEVEN L. TAYLOR 0043876 (Counsel of Record)**  
Chief Counsel, Appellate Division

**COUNSEL FOR PLAINTIFF-APPELLANT**

**MICHAEL SIEWERT 0012995**  
307 East Livingston Avenue  
Columbus, Ohio 43215  
Phone: 614-224-6488

**COUNSEL FOR DEFENDANT-APPELLEE**



**NOTICE OF CERTIFIED CONFLICT  
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Plaintiff-appellant, the State of Ohio, hereby gives notice that, on March 8, 2012, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict in *State v. Forrest*, 10th Dist. No. 11AP-291, on the following question of law pursuant to its authority under Section 3(B)(4), Article IV, of the Ohio

Constitution:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

Attached are the Tenth District journal entry certifying the conflict and the Tenth District decisions. Also attached are the conflicting cases in *Kelley v. Ferraro*, 8th Dist. No. 92446, 2010-Ohio-4179, and *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-5973, in which those courts, unlike the Tenth District, had the en banc court participate in the decision whether to grant or deny the application for en banc consideration.

Respectfully submitted,

RON O'BRIEN 0017245  
Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

Chief Counsel, Appellate Division

Counsel for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

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Pursuant to S.Ct.Prac.R. 14.2(A)(3), a copy was also sent by regular U.S. mail on this 12<sup>th</sup> day of Mar., 2012, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

  
STEVEN L. TAYLOR  
Chief Counsel, Appellate Division

FRANKLIN COUNTY  
COMMON PLEAS  
COURT

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2011 DEC -6 PM 12:08  
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Al E. Forrest,

Defendant-Appellee.

No. 11AP-291  
(C.P.C. No. 09CR-07-3935)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 6, 2011, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

TYACK, J., BRYANT, P.J., & BROWN, JJ.

By *Mary Tyack*  
Judge G. Gar Tyack

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Cookcroft J.V. 6

COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2011 DEC -6 PM 12:08  
CLERK OF COURTS

State of Ohio, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. :  
 :  
 Al E. Forrest, :  
 :  
 Defendant-Appellee. :

No. 11AP-291  
(C.P.C. No. 09CR-07-3935)  
(REGULAR CALENDAR)

DECISION

Rendered on December 6, 2011

*Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.*

*Michael Siewert, for appellee.*

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} The State of Ohio is appealing from the rulings of a judge of the Franklin County Court of Common Pleas who sustained a motion to suppress evidence. The State assigns two errors for our consideration:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT MISAPPLIED THE LAW AND INCORRECTLY DECIDED AN ULTIMATE ISSUE IN THE CASE WHEN IT GRANTED DEFENDANT'S MOTION TO SUPPRESS.

**SECOND ASSIGNMENT OF ERROR**

**EVEN IF A CONSTITUTIONAL VIOLATION DID OCCUR, THE TRIAL COURT ERRED BY ORDERING SUPPRESSION WITHOUT DETERMINING WHETHER THE VIOLATION RESULTED FROM DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT POLICE MISCONDUCT, OR FROM RECURRING OR SYSTEMIC NEGLIGENCE.**

{¶2} Al E. Forrest ("appellee") was in a 2003 Ford Explorer parked along the side of the road in a residential neighborhood in Columbus, Ohio, when two police officers stopped their cruiser behind the Explorer. One of the officers, Kevin George, testified in an evidentiary hearing that he saw no illegal activity before he walked up to the vehicle. He also acknowledged that he saw no criminal activity as he approached the vehicle. He testified that he and his partner stopped their cruiser to "check on the well being" of the Explorer's occupants. (Tr. 17.)

{¶3} When appellee looked out of the window on the driver's side and saw Officer George standing beside the Explorer, appellee was surprised. His eyes seemed to get bigger and his mouth dropped open. The man in the passenger seat of the Explorer glanced at the officer and then looked straight ahead. The officer claimed he asked Forrest if he was "okay."

{¶4} Appellee moved his right hand from his lap toward the center console of the Explorer and then turned back toward Officer George.

{¶5} Officer George interpreted appellee's surprise as "nervousness" and his turning toward the officer as an effort to block the officer's view of the interior of the vehicle, even though the officer was asking Forrest a question.

No. 11AP-291

- 3 -

{¶6} At the hearing on the motion to suppress, Officer George testified he could see both of appellee's hands and knew appellee was not holding a weapon. Officer George next noticed appellee had some money in his left hand and ordered appellee out of the vehicle. Appellee did not immediately get out of the vehicle. Instead, he rolled up the driver's window and took the keys out of the ignition.

{¶7} Officer George ordered appellee out of the vehicle a second time. Appellee merely looked straight ahead and held the keys. At the hearing, Officer George acknowledged that he still had not seen any illegal activity.

{¶8} Officer George next opened the door to the Ford Explorer, reached across appellee's body and grabbed his right hand. The officer started to pull appellee out of the vehicle.

{¶9} At no time did the officer have a warrant, either a search warrant or an arrest warrant. Warrantless searches and/or seizures are "per se unreasonable, subject to a limited number of well-delineated exceptions." See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. For the State of Ohio to justify the warrantless seizure of Forrest and the search of Forrest's vehicle, the State had the burden of proving the existence of and applicability of one of the well-delineated exceptions. The trial judge who conducted the evidentiary hearing on Forrest's motion to suppress found that the State of Ohio did not prove the applicability of any of the well-delineated exceptions and sustained the motion to suppress.

{¶10} We note initially that the police needed no suspicion of activity, legal or illegal, in order to walk up to or approach the Ford Explorer. What a person willingly displays in public is not subject to Fourth Amendment protection. However, Officer

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George went far beyond approaching the vehicle. He ordered Forrest out of the vehicle and then physically grabbed Forrest and started to pull him out of the Ford Explorer when Forrest did not honor the officer's order.

{¶11} The State of Ohio has analogized the facts here to a "stop" justified by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. The trial court judge did not reject the State's "Terry stop" theory without consideration. Instead, the trial court judge described the officer's state of mind as "nothing more than a hunch." The trial court also expressly found that the police "did not have an objective evidentiary justification to initiate the stop and conduct any search." The reference to "initiate the stop" is an apparent reference to the State of Ohio's argument that the law of "stop and frisk" under *Terry* applied here.

{¶12} The trial court clearly rejected the State of Ohio's assertion that the stop and frisk exception to the warrant requirement applied and was demonstrated. We also note the attempt to apply *Terry* to the facts here is inconsistent with Officer George's claim that he and his partner stopped to check the well-being of the Explorer's occupants. The officer's statement that he saw no criminal activity right up to the time he decided to order appellee out of the vehicle and then to physically remove appellee from the vehicle when appellee did not get out voluntarily is inconsistent with a stop and frisk.

{¶13} The State of Ohio has argued other warrant exceptions on appeal, none of which are persuasive. The automobile exception requires probable cause to search. See, for instance, *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and the many cases following it. It similarly requires no probable cause to arrest Forrest as the State argues probable cause to arrest and then search incident to arrest are present, but both fall because they are premised on Forrest's wrongfully refusing to obey the order to

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step out of the vehicle. The officer, however, had no basis to order Forrest out of the vehicle because he lacked reasonable articulable suspicion of criminal activity when Officer George reached across Forrest's body to grab his hand and pull him out of the vehicle. Since there was no lawful arrest, the search and seizure cannot be justified as a search incident to a lawful arrest.

{¶14} In short, the trial court's rejection of the State of Ohio's proffered exception to the warrant requirements was consistent with the evidence before it and the officer's own admissions.

{¶15} The first assignment of error is overruled.

{¶16} In the second assignment of error, the State of Ohio asserts the trial court should have applied the 2009 United States Supreme Court case of *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 to this case and used it as a basis to reach a different ruling on the motion to suppress.

{¶17} Simply stated, the facts in *Herring* bear little similarity to the facts of the present case. In *Herring*, police officers made an arrest based upon a warrant listed in a neighboring county's database. A search incident to that arrest yielded drugs and a gun. Later, the arresting officers discovered that the warrant listed in their computer records had been recalled months earlier. The failure of police in the adjoining county to update their database was, by the United States Supreme Court, seen as a simple act of negligence, but not such an error as to render the arrest illegal. The officers who arrested Herring had an honest, legitimate belief that a valid arrest warrant existed.

{¶18} The officers involved in the search and seizure of appellee had no warrant and had no basis for believing a warrant existed. *Herring* has no applicability to appellee's case. The trial court did not err by failing to apply it.

{¶19} The second assignment of error is overruled.

{¶20} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

**BRYANT, P.J., and BROWN, J., concur.**

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FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO 2012 JAN 26 PM 12:56

TENTH APPELLATE DISTRICT CLERK OF COURTS

State of Ohio, :

Plaintiff-Appellant, :

v. :

Al E. Forrest, :

Defendant-Appellee. :

No. 11AP-291  
(C.P.C. No. 09CR-07-3935)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on January 26, 2012, it is the order of this court that appellant's motions are denied.

TYACK, J., BROWN, P.J., & BRYANT, J.

By: *Gary Tyack*  
Judge G. Gary Tyack

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Cocroft, JV5

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
JAN 26 PM 12:46  
CLERK OF COURTS

State of Ohio, :  
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 Plaintiff-Appellant, :  
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 v. :  
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 Al E. Forrest, :  
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 Defendant-Appellee. :

No. 11AP-291  
(C.P.C No. 09CR-07-3935)  
(REGULAR CALENDAR)

DECISION

Rendered on January 26, 2012

*Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.*

*Michael Siewert, for appellee.*

ON MOTION

TYACK, J.

{¶1} The State of Ohio has filed a compound application and motion entitled: "Plaintiff-Appellant's Application for Reconsideration, Plaintiff-Appellant's Application for En Banc Consideration, Plaintiff-Appellant's Motion for Review of this Application for En Banc Consideration by all Eight Judges, [and] Plaintiff-Appellant's Motion to Certify a Conflict."

{¶2} The case involves the warrantless seizure of the person of Al E. Forrest, followed by a search of the motor vehicle in which he was present. A trial court judge

conducted an evidentiary hearing in which she found the State of Ohio had not justified the warrantless seizure and search. As a result, she ordered suppression of the evidence.

{¶3} The State of Ohio appealed and a panel of this court remanded the case for additional findings and additional clarity as to the trial court's rulings.

{¶4} The trial judge conducted a second hearing and again ordered suppression of the evidence.

{¶5} The State of Ohio appealed once again and a different panel of this court affirmed the trial court's ruling.

{¶6} The State of Ohio wants to argue again that the police officer who seized Forrest had the right to do so under the stop and frisk rights granted to police under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶7} This is not a stop and frisk situation. Forrest was in the driver's seat of a parked vehicle. The police did not stop him. They did not frisk him. Instead, a police officer opened the door of the vehicle, reached across Forrest's body, grabbed Forrest's arm which was the closest to the center of the vehicle and pulled Forrest from the vehicle. The officer acknowledged during the evidentiary hearing on the motion to suppress that he had seen no illegal activity when he first ordered Forrest to get out of the vehicle and then seized Forrest. The officer's actions went far beyond stopping a citizen on a public sidewalk and patting the citizen down for weapons, the facts in *Terry*. Again, this was not a stop and frisk situation and *Terry* does not apply. The State of Ohio's discussion of a reasonable articulable suspicion of criminal activity all assumes a *Terry* stop occurred. No such stop occurred.

{¶8} The State's argument at times seems to imply that persons who live in a minority neighborhood have fewer rights under the Fourth Amendment to the United States Constitution than persons who live elsewhere if a police officer calls the neighborhood a "high crime neighborhood" or asserts that other persons have been arrested in the area. The Fourth Amendment applies throughout the nation. The strong preference for requiring police to get a warrant before seizing a person has been the law of the land for over 40 years, at least since the decision in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507.

{¶9} The Fourth Amendment jurisprudence has not proceeded to the point that a police officer can pull a citizen out of a parked vehicle merely because the citizen is parked in a minority neighborhood and acts surprised when he or she suddenly sees a police officer standing right outside his or her vehicle.

{¶10} The State of Ohio also, asserts once again, that the decision of the United States Supreme Court in *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 somehow worked a major change in Fourth Amendment law. It did not.

{¶11} In *Herring*, police officers made an arrest based upon an assertion from a nearby police agency that an active warrant existed. In fact, unbeknownst to the arresting officers and at least some officers of the nearby district, the warrant had been recalled. The United States Supreme Court found that the fruits of the arrest should not be suppressed under the circumstances.

{¶12} The differences from Forrest's case are striking. The officers here knew they had no warrants. They claimed they were approaching the vehicle to check on the

well-being of the occupants. They made no claim to having seen any illegal activity until after they had seized Forrest.

{¶13} The good-faith exclusionary rule claimed by the State of Ohio exists only in the context of searches and arrests where police believe they have a valid warrant. The rule does not apply to situations where no warrants exist or are believed to exist. The rule does not apply to Forrest's factual situations, which involves a deliberate seizure of the person, not negligent record keeping.

{¶14} The cases alleged by the State of Ohio as being in conflict with our decision in this case all involve stop and frisk situations. As noted above, the seizure of Forrest was not a stop or a frisk. No conflict exists such that a conflict should be certified.

{¶15} We do not find that two or more decisions of this appellate court are in conflict, so the requirements of App.R. 26(A)(2) are not met and en banc consideration is not permitted.

{¶16} As a result of the foregoing analysis, the State of Ohio's application for reconsideration is denied. The State's application for en banc consideration and related motions are denied. The motion for certification of a conflict is also denied.

*Motions denied.*

BROWN, P.J., concurs in judgment only.  
BRYANT, J., concurs separately.

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BRYANT, J., concurring separately.

{¶17} Although I agree with the majority that the state's motions be denied, I disagree to some extent with the majority opinion and so write separately.

{¶18} The majority points out that this case does not involve a stop and frisk. I do not interpret the state's motion to suggest the case involves a stop and frisk as the officers approached defendant's vehicle. Rather, the state contends that the officers, on arriving at the vehicle, developed a reasonable suspicion that defendant was engaged in criminal activity. Our prior decision addressed that contention and found it unpersuasive.

{¶19} The state's motion for reconsideration does not raise issues this court failed to address in deciding the state's appeal. Accordingly, I would deny the state's motion for reconsideration. For the reasons the majority states, I, too, would deny the state's motions related to en banc consideration and its motion to certify a conflict.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2012 MAR -8 PM 1:02  
CLERK OF COURTS

State of Ohio, :  
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 Plaintiff-Appellant, :  
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 v. :  
 :  
 Al E. Forrest, :  
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 Defendant-Appellee. :

No. 11AP-291  
(C.P.C. No. 09CR-07-3935)  
(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on March 8, 2012, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgments of other Courts of Appeals is sustained, and, pursuant to the Ohio Constitution, Article IV, Section 3(B)94), the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

TYACK, J., BROWN, P.J., & BRYANT, J.

By *Mary Tyack*  
Judge G. Gary Tyack

m

COPIED J.  
COURT OF APPEALS  
N. CO. OHIO

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
CLERK OF COURTS

State of Ohio, :  
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Plaintiff-Appellant, :  
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v. :  
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Al E. Forrest, :  
 :  
Defendant-Appellee. :

No. 11AP-291  
(C.P.C. No. 09CR-07-3935)  
(REGULAR CALENDAR)

DECISION

Rendered on March 8, 2012

*Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.*

*Michael Siewert, for appellee.*

ON MOTION TO CERTIFY CONFLICT

TYACK, J.

{¶ 1} The State of Ohio has filed a second motion to certify a conflict in this case. The issue to be certified is:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

{¶ 2} The State of Ohio is correct in its assertion that different courts of appeals handle motions for en banc consideration differently. Some submit the motion to the entire membership of the court. Some, as the Tenth District, submit the motions to the panel who decided the case originally to ascertain if there is arguable merit to the motions and only after that decision is made submit the issue to the full membership of the court.

{¶ 3} App.R. 26(A)(2)(a) reads:

Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

{¶ 4} The rule does not literally state who shall make an initial determination that two or more decisions in a district are in conflict. The procedure used by the Tenth District is more efficient, especially in the vast majority of cases where no arguable merit is present. Many prisoners initiated cases fall into this category. Also, cases where one of the parties simply wants to delay, routinely fit into this category.

{¶ 5} Since there is a conflict among the districts as to the correct interpretation of App.R. 26(A)(2), the conflict is best resolved by the Supreme Court of Ohio.

{¶ 6} The motion to certify a conflict is granted. The issue set forth above is certified to the Supreme Court of Ohio for review.

*Motion to certify a conflict granted.*

BROWN, P.J., and BRYANT, J., concur.

**Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.**

**(A) Application for reconsideration and en banc consideration.**

**(1) Reconsideration**

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

**(2) En banc consideration**

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the

mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App. R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

**(B) Application for reopening.**

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App. R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

[Effective: July 1, 1971; amended effective July 1, 1975; July 1, 1993; July 1, 1994; July 1, 1997; July 1, 2010; July 1, 2011; July 1, 2012.]

#### Staff Note (July 1, 2010 amendment)

App. R. 26(A) has now been subdivided into two provisions: App. R. 26(A)(1) governs applications for reconsideration (former App. R. 26(A)), while App. R. 26(A)(2) is a new provision governing en banc consideration.

The amendment to former App. R. 26(A) (now App. R. 26(A)(1)) contemplates a future amendment to the Supreme Court Practice Rules that will extend the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration in the court of appeals. It also ensures a responding party's full ten-day response period, even if that party does not receive the application on the day it is filed. Because the ten-day response period now begins to run from the date of service, a party served by mail now has an extra three days to file an opposition. See App. R. 14(C). Finally, the amendment permits the moving party a reply in support of the application within seven days of service of the opposition; this clarification avoids any ambiguity about the right to file a reply in support of a motion under App. R. 15(A).

The addition of App. R. 26(A)(2) is designed to address the Supreme Court's decision in *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672 and, in particular, the holding that "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *Id.*, paragraph two of the syllabus. The new provision establishes a standard for parties to seek en banc consideration under the same procedures that govern applications for reconsideration under App. R. 26(A)(1), except that a party may also seek consideration en banc within ten days of a judgment or order ruling on an application for reconsideration if that ruling itself creates an intra-district conflict that did not appear from the panel's original decision. The new provision also allows courts of appeals to establish their own procedures to the extent consistent with the statewide rule.

Former App. R. 26(C), which required courts of appeals to decide applications for reconsideration within 45 days, has been eliminated in anticipation of an amendment to the Supreme Court Rules of Practice that will toll the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration or en banc consideration in the court of appeals.

#### Staff Note (July 1, 2011 amendment)

There are two amendments to App. R. 26(A)(1)(a). The first changes the event that starts the running of the ten-day period for filing an application for reconsideration. Under the former rule, the motion was due before the judgment or order of the court was approved by the court and filed by the court with the clerk for journalization or within ten days of the announcement of the court's decision, whichever was later. Under the amended rule, the motion is due within ten days after the clerk complies with the mailing and docketing requirements of App. R. 30(A). And because the timing requirements for applications for reconsideration under App. R. 26(A)(1)(a) also govern the timing for filing an application for en banc consideration under App. R. 26(A)(2), the clerk's compliance with the mailing and docketing requirements of App. R. 30(A) also now trigger the time to file an application for en banc consideration. The second amendment to App. R. 26(A)(1)(a) deletes language warning that an application for reconsideration did not extend the time to appeal to the Ohio Supreme Court; effective July 1, 2010, a timely filed application for reconsideration under App. R. 26(A)(1) or for en banc consideration under App. R. 26(A)(2) does extend the time to appeal to the Ohio Supreme Court under S.Ct. Prac. R. 2.2(A)(5) and (6).

There are also several amendments to App. R. 26(A)(2). Two of them are clarifications. The first clarification appears in App. R. 26(A)(2)(a) and is designed to clarify that a majority of the "en banc court", a defined term that does not include judges who have recused themselves or been disqualified, must agree to consider a case en banc. By contrast, under App. R. 26(A)(2)(d), in order to render an en banc decision, "a majority of the full-time judges of the appellate district" including those who do not actually participate in the en banc consideration, must agree. The second clarification appears in App. R.

26(A)(2)(b), which expressly permits the en banc court to decide sua sponte to consider a case en banc. No substantive changes are intended by either of these amendments.

Two substantive amendments to App. R. 26(A)(2)(c) govern the process for sua sponte en banc consideration. First, the rule now specifies that any sua sponte decision to consider a case en banc must be made within ten days of the date the clerk complies with the mailing and docketing requirements of App. R. 30(A). The former rule included no time limit for a sua sponte decision to consider a case en banc, and this addition was intended to ensure finality to the appellate process. Second, if the court decides sua sponte to consider a case en banc, it must vacate the judgments or orders in the case that will be considered en banc so that the time for a party to appeal to the Ohio Supreme Court does not run concurrently with the court's sua sponte en banc consideration. A recent amendment to the Supreme Court Practice Rules extends the time to appeal to the Ohio Supreme Court in the event that a party files a timely application for en banc consideration, but there is no such provision in the event the court of appeals decides sua sponte to consider a case en banc. See S.Ct. Prac. R. 2.2(a)(6).

#### Staff Notes (July 1, 2012 amendment)

The amendment to App.R. 26(A)(2)(c) removes language added in 2011 that required a court of appeals to vacate a panel decision in the event of a *sua sponte* decision to consider a case en banc. That language was added to ensure that a party's time to appeal to the Supreme Court would not begin to run while en banc consideration was pending. But the language is no longer necessary in light of a 2011 amendment to S.Ct.Prac.R. 2.2.