

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-v-

WARREN LOVE,

Defendant-Appellant.

Case No. 14-1963

On Appeal for the Hocking
County Court of Appeals
Fourth Appellate District

C.A. Case No. 13-AP-0016

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT WARREN LOVE

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 Decision rendered on October 2nd 2014

A-1

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

This cause presents several substantial Constitutional questions, of even “structural errors” (constitutional dimensions), and centers upon the very fundamental right to have every single element of each criminal charge proven beyond a reasonable doubt, and innocence presumed until then. Sixth and Fourteenth Amendments, U.S. Constitution; Ohio Constitution, Article I; O.R.C. § 2901.05 (A). In this case the appeals court never reviewed the case on the merits although it could have. The case was previously reviewed on direct appeal but due to ineffective appellate counsel, certain errors were not brought or articulated in front of the appeals court. The Fourth District Court of Appeals has ruled that it upholds Appellant's conviction because the evidence is sufficiently legal for reasonable minds to reach the conclusion that it did (See Fourth District opinion filed April 10 2014, Supreme Court Case #2014-0861). The Fourth District Court of Appeals erred in making this determination. And that, as such, the appellate court may not rely upon the “trier of fact” (jury), to determine the weight to be given to the credibility of the witness or evidence. Cf. State v Dehass, 10 Ohio St. 2d 230 (1967). Instead it is submitted that the appellate court is required to analyze that evidence issue as a question of pure law, and likewise sits as the 13th juror, pursuant to State v Thompkins, 78 Ohio St. 3d 380, 387 (1997). To say anything other would be to misplace the facts versus the law, in turn ignoring the errors as if it were a factual issue limited to the jury's determination. However, as a matter of law, the jury may not ever determine or apply the law; and the jury's task is purely factual determination.

Determination of application of evidence rules is a question of law; and nothing else. Yet in this case on review, the Fourth District improperly treated it all as being only within the purview of the jury. In actuality, these violations of evidence rules served to undermine the entire case, and facilitate a finding of guilty, without the prosecution having to prove each and every element beyond a reasonable doubt, which is mandated before a verdict can be rendered by the judge. See, eg. Rule 29 and Sullivan v Louisiana, 508 U.S. 275, 278(1993); Mckenzie v Smith, 326 F.3d 721, 728 (6th Cir. 2003); U.S. V O'brien, 130 S.Ct. 2169, 2174 (2010).

Therefore, the Fourth District, sitting as the 13th juror, was required to issue such a verdict pursuant to O.R.C. § 2953.07 (A), and it erred in failing to do so, as a matter of law (Oh.App.R.12(B)).

Appellant also proposes to this court, the question of whether, when Ohio rules mandates a procedure, and then those rules are plainly violated by the Court of Appeals and Clerk of the county, that such a circumstance turns that issue into purely a question of law for the reviewing court.? Here Appellant's rights were violated by the courts when the clerk of courts withheld Appellant's application for re-opening for six days and then filed it after the ninety day deadline. Appellant filed an affidavit of clarification explaining and proving that he sent his application in a timely manner. The Fourth District did not consider the evidence and dismissed the application on a procedural ground of not filing within the ninety day deadline.

This Supreme Court of Ohio must grant jurisdiction, hear this case on the merits, and set down precedent with a statewide mandate to adhere to Ohio Evidence rules in all cases of the courts of Ohio.

STATEMENT OF THE CASE AND THE FACTS

This case originates from a jury-trial in the Common Pleas Court of Hocking County, Ohio, (case no. 13CR0028), on June 11th 2013, with a guilty verdict being issued for one Aggravated robbery, one felonious assault, both with firearm specifications, one count of tampering with evidence, one count of aggravated trafficking, and one count of having weapons under disability. Appellant was sentenced to an aggregate sentence of twenty-three years as a result of his convictions.

This case then proceeded to a direct appeal-of -right in the Fourth District Court of Appeals of Ohio, (case no. 13-AP-0016), of which was the subject of a motion for jurisdiction, filed with this court on May 27th 2014 and declined on September 3rd 2014. This instant motion for jurisdiction is from the dismissal of Appellant's 26 (B) application to re-open appeal.

Appellant, Mr. Love, has in fact already presented the herein errors to the Fourth District by way of 26 (B).

The Fourth District Court of Appeals dismissed the application (26(B)) relying on the ninety day deadline rule without reviewing the merits of the case.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition no.1: THE CONVICTION OF THE DEFENDANT-APPELLANT WAS BASED ON INSUFFICIENT EVIDENCE TO SUSTAIN THE SAME IN VIOLATION OF SECTION 2, 10 AND 16 ARTICLE 1 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDEMENTS, U.S. CONSTITUTION

In an appeal of right, effective assistance of appellate counsel is guaranteed. Evitts v. Lucey, 469 U.S. 387, 396(1985); Douglas v. California, 372 U.S. 353, 355-57(1963); Betts v. Litscher, 241 F. 3d 594, 597(7th Cir.2001).

In order to find a genuine issue for reopening an Appellant must prove, despite the Fourth District's opinion {¶ 2}, that his (1) counsel on appeal is deficient for failing to raise the issues he presents in his request for reopening, (2) as well as showing that had counsel presented those claims on appeal, there is a reasonable probability that he would have been successful. State v. Buehner, 2004 Ohio 46. Using the two Prong analysis found in Strickland Infra.

The failure to prove, even one element, beyond a reasonable doubt, is fundamental due process violation, and a "structural error" requiring reversal.(incorporate Assignment of Error Six) Apprendi v. New Jersey, 530 U.S. 466, 488-92 (2000); U.S. v. O'Brien, 130 S.Ct. 2169,2174 (2010). Proof beyond a reasonable doubt is totally precluded, as a matter of law, when the state fails to prove [ALL] elements, O.R.C. 2901.05(A); that statute is clear. From the beginning the Prosecution stated that the witnesses' story will not be the same. (Tr.25; 241) The failure to prove all elements is a question of [law]. State v. Thompkins, 78 Ohio St. 3d 380, 386 (1997). Violations on matters of [Evidence], is also a question of [law]. The Due Process Clause of the Fourteenth Amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the offense charged. See In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). A trial court may not give a jury charge which shifts to the defendant the burden of proving a critical fact in dispute, see Mullaney v. Wilbur, 421 U.S. 684, 701, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975). An accused in a state criminal prosecution has a constitutional right to expect that all the facts necessary for his conviction will be established by proof beyond a reasonable doubt. See State v. Brown, 7 Ohio App. 3d 113, citing In re Winship Supra.

When an Ohio Evidence Rule mandates a procedure, only a [Judge] can apply the law to those facts. The [Jury's] task is purely of a "factual" determination, and the Jury may not ever determine or apply the law. A question is one for determination by the jury when "reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. See, State v. Bridgeman, 55 Ohio St. 2d 261. Accordingly, the trial court was required to apply the law to those facts. And the Fourth District necessarily must sit as the 13th Juror and review the entire merits of such presented error, rather than to pass it upon it as if the Jury, has any say at all, on a question of law. This is critical issue, because violations of Evidence Rules served to undermine the entire case, and facilitated a finding of guilty, without the Prosecution having to prove each and every element beyond a reasonable doubt. Otherwise a verdict of guilt is precluded, as a matter of law, and the judge must issue a directed verdict of acquittal. Oh.Crim.R.29; Cf. McKenzie v. Smith, 326 F. 2d 721, 728 (6th Cir.2003). Therefore, this Fourth District must issue such a verdict as a matter of law. Oh.App.R.12(B); O.R.C. 2953.07(A).(Tr.222 and Tr.278, Appellant's Rule 29 motion was denied)

Here appellate counsel was ineffective for failing to argue the legality of the charges as will be shown through out this application for reopening. See, State v. Lozada, -- Ohio App. 3d --, 2012 Ohio 8, --n.e. 2D --, 2012 Ohio App. LEXIS 16. Counsel's deficiency has caused this appeals court to rule against Appellant, the record will reflect that this court was not called upon to determine the credibility the witnesses. Fourth District's Opinion {¶15}. This court of appeals stated that "considering a sufficiency of the evidence challenge, as set forth above, we must assess whether the State's evidence, if believed, would support a conviction." The court also cites Thompkins Supra at 390 that states, "in conclusion, we find that the evidence presented by the state was sufficient as a matter of law to support the jury's verdict on the firearm specification. Based on Murphy, Jenks, and Dixon, supra, and R.C. 2923.11(B)(1) and (2), the state met its burden of proof." As a matter of law that would be correct because Counsel was deficient for not challenging the legality of the witnesses' testimony. Ms. Williamson is the only one that testified about trafficking drugs and it will blatantly be shown below how her testimony is legally insufficient. Which will call into question all essential elements charged in the indictment. And further will show how Appellant was prejudiced by Counsel's deficiency. The testimonies (evidence) cannot be believed if legally insufficient. In the Appellant's brief (appellant's brief p. 5) Counsel argues the sufficiency claim as if it were a manifest weight of the evidence claim and does not cite proper case laws (noncompliance with App.R.16).

The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in it's decision or raises an issue for our consideration that was either not considered at all or was not fully considered (the testimony of witnesses) by the court when it should have been. State v. Black, 78 Ohio App. 3D 130, (1991). And Mr. Love's appeals counsel was ineffective for failing to cite to these federal cases incorporated herein.

Without Sufficient Evidence, the case has no foundation and the State's case must fall.

Proposition no.2: THE TRIAL COURT COMMITTED HARMFUL ERROR IN THE SENTENCE OF THE DEFENDANT-APPELLANT VIOLATING SECTION 2, 10 AND 16 ARTICLE 1 OF THE OHIO CONSTITUTION; 5TH, 6TH, AND 14TH AMENDEMENTS, U.S. CONSTITUTION

As to Appellant's sentencing assignment of error Counsel was deficient for not bringing forth additional arguments in favor of concurrent sentences. It will be reflected from the record that the trial court did not meet the statutory requirements when sentencing Appellant to consecutive sentences. The trial court stated that it met the requirements but it didn't make the statutory findings as required by O.R.C. 2929.14 (C)(4). See, State v. Comer, 99 Ohio St. 463, 2003 Ohio 4165; State v. Clark, Franklin App. No. 02 Ap-1312, 2003 Ohio 4136. (Tr.329 trial court agrees that Appellant was not on probation) Other points of law that could have been brought, one is where the trial court is not clear about Appellant assessment as to recidivism. See, State v. Edmonson, 86 Ohio St. 3d 324, 1999 Ohio 110;

State v. Garlinger, Franklin App. No. 01 AP-744, 2002 Ohio 366.(Tr.345) The trial court not meeting the statutory requirements makes Appellant's sentence counter to law. See, O.R.C. 2953.08. The trial court failed to abide by O.R.C. 2929.19 (B) making Appellant's sentence statutory deficient. See, State v. Kalish, 120 Ohio St. 3d 23, 2008 Ohio 4912. The trial court failed to consider the overriding purposes of felony sentencing O.R.C. 2929.11 and O.R.C. 2929.12 making it an abuse of discretion. See eg., State v. Smith, 2003 Ohio 4062, 2003 Ohio App. Lexis 3617(¶33). (Tr.344, the trial court failed to consider the rehabilitation of Appellant) (trial court failed to consider that Appellant was a first time felony offender)

Appellate Counsel was also deficient for presenting the claim that the two gun specs in this case should merge, the language in O.R.C. 2929.14 (B) (1) (b) is clear and Counsel should have focused more on the points of law presented herein this error.

Proposition no.3 : TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR WAIVING APPELLANT'S SPEEDY TRIAL RIGHTS VIOLATING SECTION 2, 10 AND ARTICLE 1 OF THE OHIO CONSTITUTION; 5TH, 6TH, AND 14TH AMENDEMENTS, U.S. CONSTITUTION

Here Appellant was represented by the same Attorney (Mr. Sanderson) at trial and on direct appeal. Therefore , counsel could not have brought ineffective assistance of trial counsel on himself. State v. Davis(1999), 86 Ohio St.3d 212, 214, 1999 Ohio 160, 714 N.E.2d 384. Counsel cannot realistically be expected to argue his own incompetence, and for this reason, res judicata does not act to bar a defendant represented by the same counsel at trial and upon direct appeal from raising a claim of ineffective assistance of counsel in a petition for post-conviction relief (26(B)). State v. Cole (1982), 2 Ohio St. 3d 112, 443 N.E.2d 169; Morgan v. Eads, 104 Ohio St.3d 142(2004). In this instant case an actual conflict of interest adversely affected the Appellate lawyer's performance.

A waiver is the intentional relinquishment or abandonment of a known right. U.S. v. Olano, 507 U.S. 725,733, 113 S. Ct. 1770(1993). What Mr. Sanderson has done here is exactly that, waive all of Appellant's substantial rights that are now fairly presented herein this 26(B) application. As to Appellant's speedy trial violation, Appellant had the constitutional right (state and federal) to be brought to trial within 90 days from the day of his arrest. See, Barker v. Wings, 407 U.S. 514, 523; O.R.C. 2945.71; State v. Lewis, 70 Ohio App. 3D 624(1990); Sate v. O'Brien 1987, 34 Ohio St. 3d 7.

Appellant was arrested on the same day of the crimes (January 18, 2013). Appellant never made bail and never waived his speedy trial rights verbally or in writing.(Tr.325 the trial Judge states that he will return to jail) See, U.S. v. Marion, 404 U.S. 307, 313, 320 (1971); Dillingham v. U.S., 423 U.S. 64, 65 (1975). Appellant's trial was held on June 11, 2013. The Prosecutor credited 223 days in jail. (Tr.351). When reviewing the legal issues presented in a speedy trial claim, the court must strictly construe the relevant statute against the State. See, Brecksville v. Cook, &5 Ohio St. 3d 53, 57; State v. Mustard, 4th Dist. 2004 Ohio 4917 at 10. The speedy trial rights of an accused shall be strictly enforced by the courts of this state. See, State v. Pachay, (1980) 64, Ohio St.2d 218.

Counsel was ineffective for not filing a motion to dismiss the indictment based on a speedy trial violation before trial. The same for not bringing up the claim on appeal. The remedy for a speedy trial violation is to dismiss the indictment and vacate any sentence that has been imposed. See, Strunk v. U.S., 412 U.S. 434, 440 (1973). See, 18 U.S.C. Section 3164(a)-(c), trial must generally begin within 90 days of the government's detaining a defendant who is solely awaiting trial.

Therefore, Appellant's conviction should be vacated since the State cannot show that there was excusable tolling. Chapman Infra.

Proposition no.4 : TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR WAIVING THE ADMISSION OF APPELLANT'S PRIOR JUVINILE RECORD IN VIOLATION OF SECTION 2, 10 AND 16 ARTICLE 1 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH, U.S.

CONSTITUTION

In this error Counsel was ineffective for waiving the admission of Appellant's juvenile record causing him to go to trial with an extra charge of weapons under disability.(Tr.9-10) (Tr. 34) (Tr.225) (Tr.240) Counsel strategic decision prejudice the Appellant by allowing the jury deliberate on a charge that could have been dismissed before trial. Counsel's decision served no purpose except to prejudice Appellant. The General Assembly enacted O.R.C. 2151.358 that provides that evidence of **juvenile** adjudications is not admissible except as provided by divisions of the statute. In limiting the effect of such a statute, R.C. 2151.358, the Supreme Court held in State v. Cox (1975), 42 Ohio St.2d 200, 71 O.O.2d 186, 327 N.E.2d 639 second paragraph of the syllabus: **Although the general assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactments may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense.** Appellant's error should be well taken.

Proposition no.5: TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE DURING TRIAL IN VIOLATION OF SECTION 2, 10 AND 16 ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH, U.S. CONSTITUTION

Several points of the instant case and errors, establishes "presumed" prejudice, ineffective trial and appellant counsel. Counsel's failure to correct (additional receiving stolen property charge) a witness' testimony.(Tr.57) Where counsel failed to file a motion to suppress witness Mr. Bailey's testimony based on suggestive identification and prior criminal record.(Tr.115-116) (Tr.173-174, Ms. Williamson' identification of Appellant) Prejudice is presumed, when Counsel fails to subject prosecutions case to a meaningful adversarial testing, U.S. v. Cronin, 466 U.S. 648, 659 (1984)(Tr.297, Counsel failed to object to jury instructions as to the "knowingly" element); and when counsel fails to make a motion to suppress a witness' testimony, Thomas v. Varner, 428 F. 3d 491, 502 (3rd Cir. 2005) (Tr.200, testimony of Herrold's felony conviction); when counsel fails to conduct an investigation, Adams v. Bertrand, 453 F. 3d 428, 437 (7th Cir. 2006)(Tr.155) (Tr.235, Counsel waived appellant's right to question juror that knew Bailey); and failure to object to prosecutorial misconduct, Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir. 2005). (Tr.155 and Tr.172, Counsel failed to object to prosecutorial misconduct on a *Brady* issue) To proceed on a claim of **ineffective** assistance of counsel, a defendant must first show that his counsel's performance was so deficient that it was unreasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Then, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." And as specifically relevant to this instant case, Counsel's failure to object to suppressible evidence was prejudicial, because no other facts on the record could have convicted Appellant of the crime, Gentry v. Sevier, 597 F.3d 838, 851-52(7th Cir. 2010).

To find Counsel ineffective the burden of proof is high, given Ohio's presumption that a properly licensed Attorney is competent, State v. Newman, 2008 Ohio 5139, {¶ 27} (6th dist. 2008). However, Presumptions can be [rebutted], Oh. Evid.R.301. The arguments presented herein this 26(B) app. bursts the bubble of presumption, and the presumption accordingly disappears, Cf. Ayers v. Woodward, 166 Ohio St. 2d 138(1957).

As such it is an error of "constitutional dimensions." Having been set forth and established to this appeal court in prima facie fashion, the burden then is REQUIRED to shift back to the state (prosecution) to prove it "harmless beyond a reasonable doubt", and that it "made no contribution to the conviction." See, Chapman v. California, 386 U.S. 18, 23-26 (1967); State v. Tabasco, 22 Ohio st. 2d 36 (1970). Constituting prejudicial plain error affecting substantial rights.

Proposition no.6: THE TRIAL COURT ERRORED TO THE PREJUDICE OF APPELLANT BY

ADMITTING PERJURED TESTIMONY IN CRIMEN FALSI BY THE STATE'S STAR WITNESSES
IN VIOLATION SECTION 2, 10 AND 16 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH
AMENDEMENTS, U.S. CONSTITUTION

The heaviest evidence used to sustain Appellant's convictions was had by witness Sarah Williamson. Williamson admitted that she had lied on various occasions, on direct examination by Prosecution. Reversal is required when prosecution fails to correct a government witness' testimony. Shih v. Filton, 335 F.3d 119, 129 (2nd Cir. 2003). In fact it constitutes FRAUD. See, Disciplinary Counsel v. Jones, 66 Ohio St.3d 369, 369-71 (1993); Rules of Professional Conduct, R.3.8.

Perjury is: "a falsification is material if it can affect the course of the outcome or proceeding", O.R.C. 2921.11(B). "Contradictory statements" is enough to meet the elements of perjury, under part (D) of that statute. Which in turn makes this a question of [law], not within the purview of the Jury.

The result was inadmissible evidence via Prosecutorial misconducts, which is error. See, State v. Braxton, 102 Ohio App. 3D 28, 42 (8th Dist. 1995), citing State v. Smith, 14 Ohio St. 3d 13, 14 (1984). Furthermore supporting ineffective assistance of counsel claims, as Counsel "sat mute" through significant parts of it all. State v. Williams, 99 Ohio St. 3d 493, 526 (2003). Under Oh.Evid.R.402, "evidence which is not relevant is not admissible." Compare eg., State v. Boyd, 18 Ohio St. 3d 30 (1985); Swigv. Rose, 75 Ohio St. 355, 367-68 (1964). Ohio Evid.R.608(B)(1), governs prior acts, such as lies, of a principle witness. See, State v. Greer, 39 Ohio St. 3d 236 (1988). See, (Tr.175) The immunity/dismissal on all charges in exchange for testimony, establishes "Bias" of the state's witness, under Oh.Evid.R.616 requiring impeachment: (Tr.154-155)

Mr. Archer: I want to be clear, I've gotten three and four versions of what was going on so this is the first time that she's indicated to me that she was buying them for Mr. Bailey. That's not what she told me before so I want that clearly on the record.

The Court: Now are you allowing her use immunity?

Mr. Archer: I've indicated to her that we were not going to charge her out of this indictment.

The Court: Okay. so that would be transactional then?

Mr. Archer: Right.

(Tr.157) (see also Tr.152 and Tr.167)

Q Okay. And this is the first time you've told me that you brokered the deal for Thomas Bailey. Isn't that correct?

A Correct.

Q You did not tell me that previously?

A No.

Q Previously you told me you were getting the pills for yourself?

A Right.

Q Okay. And that in exchange for your testimony today, that I had to agreed not to prosecute on your involvement in the drug transaction on January 28th; isn't that correct?

A Correct.

Q So that's how it stands between you and the state; is that correct?

A Correct.

(Tr.166)

Q Now you gave the police a written statement, didn't you?

A Yes.

Q Is that statement anywhere near - - Well, let me rephrase that this way. That statement is not accurate with your testimony today?

A No. sir.

(Tr.173) Cross-examination

Q So you didn't tell him the truth either?

A No, I just never went into detail about the whole thing.

Q Okay. So at least on three different occasions that we know of, you had an opportunity to quote unquote tell the truth and you chose not to do that?

A Right. In fact on the 18th when the whole thing happened, I was scared. I was in shock, so yeah, I lied.

See, State v. Kehn, 50 Ohio St.2d 11 (1977); Ohio Dept. of Mental Health v. Milligan, 39 Ohio App. 3D 178 (1988); U.S. v. Abel, 469 U.S. 45 (1984). Resulting in a conviction based upon fabrication, perjury, and confusion. Further, the inconsistency statements of the witnesses, violates Oh.Evid.R.613(A), where any material variance between the testimony and the previous statement will suffice. The Evidence Rules "govern proceedings in the court of this state", pursuant to Evidence Rule 101(A); Summons v. State, 5 Ohio St. 325 (1856). The egregious violations of the evidence rules, amount to fraud upon the court as defined in Coulson v. Coulson, 5 Ohio St. 3d 12, 15 (1983).

Proposition no.7 : THE VERDICTS OF THE JURY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION SECTION 2, 10 AND 16 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDMENTS, U.S. CONSTITUTION

The convictions in this matter are against the manifest weight of the evidence because the witness-victim's testimony is fraught with inconsistencies and sensationally incongruous allegations.

When convictions are challenged on appeal as being against the manifest weight of the evidence, the appellate court "must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" State v. Adrian, 169 Ohio App. 3D 300, 2006-Ohio-4143, ¶6, quoting State v. Tompkins Supra. Essentially, this court sits as the "thirteenth juror" making its own assessment of the evidence and the credibility of the witnesses' testimony. State v. Bell 176 Ohio App. 378, 394, 2008 Ohio 2578.(Tr.66, Tr.182 and Tr.193; there was no gun shot residue found on Appellant's person) (Tr.184, the Prosecutor doesn't prove that the ammo. used in the crimes is "green" ammunition) (Tr.70, there was no finger prints of Appellant recovered from the crime scenes or evidence) (Tr.91, there was a witness that saw a person that disappeared behind a privacy fence) (Tr.145, there was a black female involved in the incident)

Nevertheless, there can be certain exceptional circumstances that warrant the reversal of a judgment as being against the manifest weight of the evidence. The Appellant asserts that the underlying record in this matter provides this court with those exceptional circumstances.

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Jenks, 61 Ohio St. 3d 269, (1991) paragraph of the syllabus.

In order to convict Appellant of the charges in the indictment the State had to prove that the Appellant, acting with the kind of culpability required for the commission of the offenses, aided or abetted another in committing the offenses, and further the State had to prove that the Appellant, in committing the offenses of robbery and felonious assault, or fleeing there after the offense, had a deadly weapon on or about his person or under his control and either displayed, brandished, or used the weapon. A deadly weapon in further defined in O.R.C. 2923.11 .

Proposition no.8 : THE APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT VIOLATING SECTION 2, 10, AND 16 ARTICLE 1 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDMENTS, U.S. CONSTITUTION

Throughout Appellants trial the prosecutor knew about all the statements the witnesses had

made. During trial there was an instance where it was revealed that the Prosecutor had not turned over every statement (written and recorded) made by the witnesses over to the Defense. Violating a right to a Fair Trial and Due Process. (Tr.155-156)

Suppressing evidence of statements and then allow perjury.(Tr.172) See, Mooney v. Holohan, 294 U.S. 103. Knowing use of perjured testimony is fundamentally unfair and conviction must be set aside if there is a reasonable likelihood that that the false testimony could have affected the judgment of the jury. Plye v. Kansas, 317 U.S. 213; Alcorta V. Texas, 355 U.S. 28; Napue V. Illinois, 360 U.S. 264; Miller v. Pate, 386 U.S. 1; Giglio v. United States, 405 U.S. 150; Donnelly v. DeChristofo, 416 U.S. 637. The denial of Due Process of Law vitiated the verdict and the sentence. See, Rodger v. Richmond, 365 U.S. 534, 545. The verdict is not saved because other competent evidence would support it. See, Culombe v. Connecticut, 367 U.S. 568, 621.

Proposition no.9 : THE CUMMULITIVE EFFECT OF THE ERRORS VIOLATED THE DUE PROCESS RIGHT TO A FAIR TRIAL 6TH AND 14TH AMENDEMENTS U.S. CONSTITUTION

The cumulative effect of all the errors presented here in this case, violated the Due Process guarantee of fundamental fairness, requiring reversal. Taylor v. Kentucky, 436 U.S. 478, 488 (1978); U.S. v. Canales, 744 F.2d 413, 430 (5th Cir.1984) It also constitutes "cumulative prejudice", violating Due Process. See, Engle v. Isacc, 456 U.S. 107, 109, 135 (1982); Wainwright v. Sykes, 433 U.S. 72, 91.

Proposition of law no.10:THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF SECTION2,10 AND16, ARTICLE1OF OHIO CONST.

In an appeal of right, effective assistance of counsel is guaranteed. Evitts v. Lucey, Douglas v. California, Betts v. Litscher Supra. Appellant now claims that *if* Counsel had presented the claims Appellant now brings, the outcome of the proceeding would have been different. The two prong analysis set forth in Strickland Supra applies on appeal and Appellant has met the burden of showing both. Appellant has also shown how there is a conflict of interest where Appellant had the same Counsel at trial and on appeal. When the Appellate court reviews this application, in light of all the evidence presented, the record will reflect Appeals Counsel's Ineffectiveness. And Appellant deems this statement to be the error of Ineffective Assistance of Appellate Counsel with the supplements to Assignments of Error 1, 2 and all additional errors presented. Furthermore, Appellant also gives his reasons herein for not bringing his ineffective appellate counsel claim at the "first opportunity" to the Supreme court of Ohio within the 45 day time limit. See, Kvasne v. Collins, 2010 U.S. Dist. LEXIS 91900; State v. Williams, 74 Ohio St. 3d 454; State v. Jackson, 2002-Ohio-5817; State v. House, 2003-Ohio-5066; State v. Jones, 2005-Ohio-1494. First Appellant was under the presumption that he was being represented by effective counsel guaranteed by the 6th Amendment of the United States Constitution; Section 10 Article 1 of the Ohio Constitution. Appellant wasn't expecting Counsel to be deficient throughout the trial or appellate proceeding. The Appellant had limited access to the courts in perfecting his appeal to the Supreme Court and preparing this 26(B) motion for reopening. Appellant living in 3 House at the time only had 4 and ½ hours a week to do research. See, Bouns v. Smith, 430 U.S. 817, 824, 828 (1977). Further proof can be seen in the filing that appellant made in the Supreme Court which was the same exact brief that Counsel filed in the appeals court. See, Exhibit 1, the Ross Correctional Institution library schedule. Appellant was mislead on legal advise by his Counsel. Appellant had wrote counsel inquiring about the statutes of limitations for speedy trials. Counsel responded Appellant with wrong information having Appellant to question his own logic on the interpretation of the law, setting him back for a significant amount of time to prepare documents if there was a case of a denial in the appeal. Not only did Appellant question his reasoning on the law but at the same time Appellant had faith in Counsel's advise. See, Exhibit 2, a letter from Appellant's Attorney (dated March 17, 2014) giving wrong information. Appellant also states that the way the laws are written for the Supreme Court and Appellate Court respectively to ineffective assistance of counsel

claims are misleading. Appellant finds it unreasonable that in order to fairly present ineffective assistance counsel claims to the Supreme Court and Appellate Court both memorandums have to be filed within the 45 day time limit of the Supreme Court shortening the 90 day deadline of App.R.26(B)(1). And having limited access to the courts hindered Appellant's research in finding this complex solution. The 45 day time constraint also prevented Appellant's timely filing and Appellate counsel contributed to Appellant missing his timely filing of his ineffective assistance of appellant counsel claim in the Supreme Court because Counsel's bad advise deterred Appellant's reasoning . In actuality Appellant only had 45 days to perfect his appeal to the Supreme Court (with ineffective assistance of appellate counsel claim) and file his 26(B) application. See, Kvasne v. Collins, 2010 U.S. Dist. LEXIS 80469. Appellant having went over his 45 day time limit to give the state Courts the "first opportunity" to resolve his ineffective assistance of appellate counsel claim gives these reasons why such has occurred. The Appellant must "give state courts a full opportunity to resolve any constitutional issues by involving 'one complete round' of the state's appellate review system." Caver v. Straub, 349 F.3d 340, 346 (6th Cir. 2003) (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2D 1 (1999)). Under these circumstances Appellant's Assignments of error should be well- taken as refusal to evaluate the procedurally defaulted claims would result in a manifest miscarriage of justice, and all of his convictions should be reversed.

PROPOSITION OF LAW NO. 11: THE APPELLATE COURT ERRED TO THE PREJUDICE OF APPELLANT FOR FAILING TO CONSIDER THE CLERK'S MISCONDUCT IN FILING APPELLANT'S APPLICATION FOR RE-OPENING AFTER THE NINETY DAY DEADLINE IN VIOLATION OF SECTION 2, 10 AND 16, ARTICLE 1 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDMENTS, U.S. CONSTITUTION

Appellant proposes to this court, the question of whether, when Ohio rules mandates a procedure, and then those rules are plainly violated by the Court of appeals and Clerk of the county, that such a circumstance turns that issue into purely a question of law for the reviewing court.? Here Appellant's rights were violated by the courts when the clerk of courts withheld Appellant's application for re-opening for six days and then filed it after the ninety day deadline. Appellant filed an affidavit of clarification explaining and proving that he sent his application in a timely manner. The Fourth District did not consider the evidence and dismissed the application on a procedural ground of not filing within the ninety day deadline. Violating Canon 2, A judge shall perform the duties of judicial office impartially, competently, and diligently; **Rule 2.2 Impartiality and fairness**

A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*; **Rule 2.6 Ensuring the right to be heard**

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to *law*.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement. See, Angus v. Angus, 2014-Ohio-4225.

After the direct appeal was denied (affirmed) on April 10, 2014 Appellant was required to bring his ineffective counsel claims to the Supreme Court within the forty five day deadline. Instead, due to counsel's ineffectiveness and misleading the Appellant, Appellant only submitted the errors that counsel briefed on appeal, leaving out the pro se errors that Appellant presented to the Fourth District via 26 (B) motion to re-open. This Court declined jurisdiction on September 3rd 2014. Before this court declined jurisdiction Appellant filed his motion for re-opening on July 14th 2014 (intended to be file on the July 9th 2014).

The court of appeals dismissed the application for re-opening based on reasons that were given in the application for re-opening to excuse Appellant for not bringing his claims to the Supreme Court "at the first opportunity". See, Fourth District judgment entry and opinion filed on October 2nd 2014 {¶6-11}. The Fourth District used the reasons given to the court to excuse Appellant for not presenting the claims to the Supreme Court first to dismiss the motion for re-opening after Appellant had filed the Affidavit of Clarification. See, PROPOSITION OF LAW NO. 10, THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. Clearly these reasons were not intended to be the reasons for a delayed 26(B). The 26(B) motion was not intended to be filed delayed, they were merely reason presented to the Fourth District for not having presented them to the Supreme Court before the expiration of the 45 day deadline, pursuant to Kvasne v Collins, 2010 U.S. Dist. LEXIS 91900. The Affidavit of Clarification was filed on September 8th 2014, explained and showed proof that Appellant had sent out his Motion to Re-open in a timely manner. The Affidavit of Clarification was submitted with exhibits, exhibit 1 is a cash withdraw slip of the date that his mail was processed and went out (July 7th 2014), exhibit 2 is a file stamp copy of Appellant's 26 (B) filed on the July 14th 2014, exhibit 3 is an envelope with a postage mark from July 15, 2014 to prove when the file stamp from clerk was sent out, exhibit 4 is a mail log from Ross Correctional Institution to prove when Appellant signed (signed on July 17th 2014) for his file stamp copy, proving that it took one day for the mail to get from the clerk to the institution because inmates have to wait one day so the mail can get processed and then sign for it on the second day that it arrived. This proves that the mail from the Hocking county to Ross county only takes one day. And mail from Ross county to Hocking county should not take more than two days to arrive. The Fourth District had all this information available at the time of it's ruling

and yet failed to consider it.

Appellant submits to this court that for the actions of the clerk of courts of Hocking County Appellant was deprived of a fair appellate proceeding. The Clerk of courts abusing it's discretion and using illegal tactics sabotaged Appellant's appeal. Appellant also has proof that the Clerk of courts withholds documents days after they are delivered. On September 2nd 2014 Appellant sent out a Motion for Summary Judgment and Appellant received a file stamp copy dated for September 5th 2014. A few days latter Appellant received an other file stamp copy of the same motion dated for September 8th 2014. Clearly the Clerk is mishandling litigant's document and creating harmful errors for the Appellant. Appellant also has proof that the clerk has attempted to confuse the Appellant by send him a file stamp copy (filed on October 14th 2014) of the decision of this Court declining jurisdiction in his direct Appeal (case no. 20014-0861). For what reason would the Clerk send Appellant a file stamp copy of the decision of this Court declining jurisdiction but to confuse the Appellant into making him think that he can not appeal to the Supreme Court.

For all the above reasons Appellant's Proposition of law should be found to have merit and Jurisdiction Accepted.

CONCLUSION

For the above stated reasons, this case involves matters of public interest and several substantial constitutional questions. Wherefore Appellant requests that this court accepts jurisdiction in this case and, appoint counsel, and review this case on the merits.

Respectfully Submitted,

November 10, 2014 Warren #687683
Warren Love #A687-683
Defendant-Appellant pro se
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT WARREN LOVE** and Notice of Appeal was forwarded by regular U.S. Mail to Hocking, County Prosecuting Attorney's Office at 88 South Market Street, Logan, Ohio 43138 on this 10 day of November, 2014.

Respectfully Submitted,

Warren #687683
Warren Love #A687-683
Defendant-Appellant pro se
Ross Correctional Institution
P.O. Box 7010
Chillicothe, Ohio 45601

for a stay into the proceedings,” requesting that the appellate case be stayed pending appeal to the Supreme Court of Ohio. This Court, however, denied Appellant’s motion based upon lack of jurisdiction on June 16, 2014, citing Appellant’s failure to include the proper case caption in the motion.

Subsequently, on July 14, 2014, ninety-five days after this Court’s appellate decision was journalized, Appellant filed an application for reopening pursuant to App.R. 26(B). The State has not filed a brief or otherwise responded to Appellant’s application for reopening. The matter is now before us for final review and determination.

{¶2} The Supreme Court of Ohio determined a number of years ago that claims of ineffective assistance of appellate counsel were to be raised by means of an "application for reconsideration." See *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204, paragraph two of the syllabus (1992). In so holding, the court called upon its Rules Advisory Committee to investigate whether a new rule was needed to better facilitate such claims. *Id.* at 66. Subsequent amendments to Ohio's appellate rules provided a new vehicle called "an application to reopen appeal" in response to the *Murnahan* decision. See App.R. 26(B); see, also, *State v. Wogenstahl*, 75 Ohio St.3d 273, 275, 662 N.E.2d 16 (1996).

{¶3} The standard to be employed in reviewing an ineffective assistance of appellate counsel claim is the same one used when considering

such a claim made with respect to trial counsel. See e.g. *State v. Nickelson*, 75 Ohio St.3d 10, 11, 661 N.E.2d 168 (1996); *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996). Thus, a conviction will not be reversed unless the claimant can show both defective performance as well as prejudice resulting therefrom. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); see, also, *State v. Goodwin*, 84 Ohio St.3d 331, 334, 703 N.E.2d 1251 (1999); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998); *State v. Loza*, 71 Ohio St.3d 61, 83, 641 N.E.2d 1082 (1994). An application to reopen an appeal will be granted only when an applicant can show that a "genuine issue" exists as to whether he was deprived of effective assistance of appellate counsel. *State v. Spivey*, 84 Ohio St.3d 24, 701 N.E.2d 696 (1998); App.R. 26(B)(5).

{¶4} The claimant must show that a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The failure to make such a showing precludes an applicant from prevailing on his application. See *State v. McGlone*, 83 Ohio App.3d 899, 903, 615 N.E.2d 1139 (4th Dist. 1992).

{¶5} In his application, Appellant sets forth the following assignments of error, which he claims should have been presented for review

as part of his direct appeal:

- I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS BASED ON INSUFFICIENT EVIDENCE TO SUSTAIN THE SAME IN VIOLATION OF SECTION 2, 10 AND 16 ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDEMENTS [SIC], U.S. CONSTITUTION.
- II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN THE SENTENCE OF THE DEFENDANT-APPELLANT VIOLATING SECTION 2, 10 AND 16 ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDEMENTS [SIC], U.S. CONSTITUTION.
- III. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR WAIVING APPELLANT'S SPEEDY TRIAL RIGHTS VIOLATING SECTION 2, 10 AND ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDEMENTS [SIC], U.S. CONSTITUTION.
- IV. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR WAIVING THE ADMISSION OF APPELLANT'S PRIOR JUVINILE [SIC] RECORD IN VIOLATION OF SECTION 2, 10 AND 16 ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH, U.S. CONSTITUTION.
- V. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE DURING TRIAL IN VIOLATION OF SECTION 2, 10 AND 16 ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH, U.S. CONSTITUTION.
- VI. THE TRIAL COURT ERRORED [SIC] TO THE PREJUDICE OF APPELLANT BY ADMITTING PERJURED TESTIMONY IN CRIMEN FALSI BY THE STATE'S STAR WITNESSES IN VIOLATION OF SECTION 2, 10 AND 16 OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDEMENTS [SIC], U.S. CONSTITUTION.
- VII. THE VERDICTS OF THE JURY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION [SIC] SECTION 2, 10 AND 16 OF THE OHIO CONSTITUTION; 5TH, 6TH

AND 14TH AMENDMENTS [SIC], U.S. CONSTITUTION.

VIII. THE APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT VIOLATING SECTION 2, 10 AND 16 ARTICLE I OF THE OHIO CONSTITUTION; 5TH, 6TH AND 14TH AMENDMENTS [SIC], U.S. CONSTITUTION.

IX. THE CUMMULATIVE [SIC] EFFECT OF THE ERRORS VIOLATED THE DUE PROCESS RIGHT TO A FAIR TRIAL 6TH AND 14TH AMENDMENTS [SIC] U.S. CONSTITUTION.”

{¶6} Before we turn our attention to the merits of the instant application, we must first address a threshold jurisdictional issue. App.R. 26(B)(1) provides, in part, that an application for reopening shall be filed “within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.” App.R. 26(B)(1); *State v. Davis-Bey*, 8th Dist. Cuyahoga No. 79524, 2004-Ohio-1105, ¶ 2; *State v. Norman*, 8th Dist. Cuyahoga No. 80702, 2004-Ohio-226, ¶ 3. Further, App.R. 26(B)(2)(b) requires that an application for reopening include “[a] showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.”

{¶7} Appellant is attempting to reopen the appellate judgment journalized on April 10, 2014. He failed to file his application for reopening until July 14, 2014, which was five days beyond the ninety-day timeframe. Thus, Appellant’s application is untimely on its face. See *Davis-Bey*, supra, at ¶ 3. Appellant seems to concede his untimely filing in that included in his

application is a provision attempting to establish good cause. Appellant asserts that his limited access to the courts, limited access to the prison library, and lack of legal training and understanding constitute good cause for his untimely filing. He also cites his belief that a ninety-day time limit for filing an application for reopening is “unreasonable.” Appellant further argues he was misled by his counsel with respect to “statutes of limitations for speedy trials.”

{¶8} We conclude Appellant’s claims do not establish good cause for the delay in filing the application. Courts have repeatedly rejected claims that limited access to the legal system, legal materials or a library constitute good cause for the late filing of an application for reopening. *State v. Norman*, supra, at ¶ 5-6; Citing *State v. Stearns*, 8th Dist. Cuyahoga No. 76513, 2002 WL 337697; see also *State v. Davis-Bey*, supra, at ¶ 6 (stating that “a prisoner’s limited access to legal materials also does not establish good cause[,] in addition to rejecting a claim based upon lack of lack of training.) Further, with respect to Appellant’s argument that he was unaware, based upon allegedly incorrect advice by counsel, that he had had a potential argument based upon speedy trial grounds, a similar argument was rejected in *State v. Carpenter*, 74 Ohio St.3d 408, 659 N.E.2d 786 (1996) (holding good cause did not exist where appellant claimed he was unaware he could raise a sufficiency of the evidence argument.).

{¶9} Finally, we reject Appellant’s argument that a ninety-day time limit for filing applications for reopening is unreasonable. In *State v. Gumm*, the Supreme Court of Ohio reasoned as follows with respect to the time requirements contained in App.R. 26(B):

“Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.” 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7.

The Court further reasoned as follows:

“Ohio and other states “may erect reasonable procedural requirements for triggering the right to an adjudication,” *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265, and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen.” *Id.* at ¶ 8.

{¶10} Ultimately, the Court held that Gumm could not rely upon “his own alleged lack of legal training to excuse his failure to comply with the deadline[,]” and that “[t]he 90-day requirement in the rule is ‘applicable to all appellants[.]’ ” *Id.* at ¶ 10; see also *State v. Winstead*, 74 Ohio St.3d 277,

658 N.E.2d 722 (affirming the dismissal of an application for reopening that was filed one day beyond the filing deadline, reasoning that “there is no denial of due process or equal protection in applying to this appellant a rule applicable to all appellants.”).

{¶11} As Appellant’s application was untimely filed and he has failed to show good cause for his late filing, we do not reach the merits of his application. Accordingly, based upon the foregoing, Appellant application for reopening is dismissed.

APPLICATION DISMISSED.

Abele, P.J. & Harsha, J.: Concur.

For the Court,

BY:



Matthew W. McFarland, Judge