

ORIGINAL

IN THE SUPREME COURT OF OHIO

15-0905

STATE OF OHIO,
Appellee,

On Appeal from the Delaware
County Court of Appeals,
Fifth Appellate District

vs.

Court of Appeals
Case No. 14CAA-04-0021

ZACHARY THOMPSON,
Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ZACHARY THOMPSON

ZACHARY THOMPSON#A625-149 (PRO SE)
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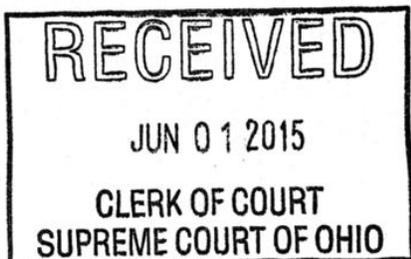
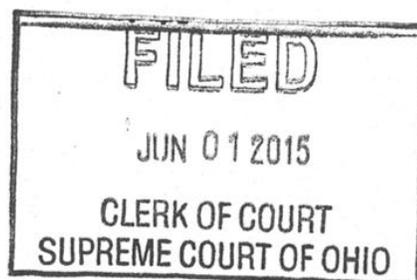


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

The issue here is whether a trial court may deny a motion to withdraw a guilty plea when the trial court is made aware that trial counsel did not effectively represent the defendant prior to the plea hearing and after a hearing to withdraw that guilty plea. Where it is apparent that a guilty plea is being entered in large part because of the severity of the auto accident, two individuals died as a result of the automobile accident, thus the defendant does not remember being in a accident, while represented by ineffective counsel, the trial court must not accept the subsequent guilty plea and grant a motion to withdraw a guilty plea when a manifest injustice has occurred.

A defendant's request to withdraw his guilty plea is governed by Ohio Crim. R. 32.1, which states in pertinent part, "to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Courts have determined that "[m]anifest injustice relates to some fundamental flaw in the proceedings which result in a miscarriage of justice or is inconsistent with the demands of due process." State v. Pitts (Ohio App. 10th Dist. 2005) 2005 WL 1515328; State ex rel. Schneider v. Kleiner (1998), 83 Ohio St.3d 203, 208 (defining manifest justice as a "clear or unjust act"); State v. Smith (1977), 49 Ohio St.2d 261 (defining manifest justice as "an extraordinary and fundamental flaw in the plea proceeding.")

Under the manifest injustice standard, a "post-sentence withdrawal motion is only allowable in extraordinary cases." Smith, 49 Ohio St.2d at 264. The burden to establish the existence of manifest injustice is upon the movant. *Id.* "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal and later withdrawing the plea if the sentence is unexpectedly severe." State v. McGuire (Ohio Ct. App. 8th Dist. 2006), 2006 WL 726884, citing, State v. Caraballo (1985), 17 Ohio St.3d 66.

Generally, it is within the sound discretion of the trial court to determine the merits of a post-sentence motion to withdraw a guilty plea. Smith, 49 Ohio St.2d at 264, citing, United States v. Washington (3rd Cir. 1965), 341 F.2d 277 (stating that good faith, credibility, and weight of the movant's assertions in support of the motion are also matters to be resolved by the trial court.) Further, reviewing courts will not disturb a trial courts decision absent an abuse of

discretion. Caraballo, 17 Ohio St.3d 66. "Abuse of discretion" is more than a "mere error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

Around 2010, Toyota received the first of what would eventually be thousands of reports of unintended acceleration in several models of both the Toyota and Lexus brand vehicles. These reports continued through the last decade and were the subject of at least eight investigations by the National Highway Traffic and Safety Administration ("NHTSA") between 2000 and 2010. Toyota identified driver error and non-standard or misaligned floor mats as the source of the problem.

In the meantime, Toyota began acquiring internal evidence that the unintended acceleration might have been due to a more serious mechanical or electrical defect in the design of the cars themselves. Toyota technicians were able to reproduce unintended acceleration not related to floor mat placement on several occasions. In early 2010, in the face of increasing reports of accidents related to unintended acceleration, Toyota was forced to admit that many of its vehicles were subject to several design defects. In fact, numerous NHTSA investigations permitted the inference that, "[g]iven the gravity of the issue, it is at least as likely to be true that Toyota were aware of the competing possibility of a serious mechanical design flaw in their vehicles as it is that they remained blissfully unaware of the mounting evidence produced by Toyota engineers and service technicians, as well as the accumulating reports of unintended acceleration that probably could not all be attributed to misaligned floor mats. Toyota did not claim to be uncertain, it affirmatively pointed the finger at floor mat placement and driver error. Therefore, it was — at the very least — deliberately reckless to mislead investigators into believing that Toyota had definitively identified the source of the unintended acceleration problem. Toyota covered up dangerous unintended acceleration condition," that involves not only the so-called "sticky pedal" issue but other defects, including defective floor mats.

In April 2010, Mr. Thompson, on account that Toyota had come clean about the unintended acceleration problems with its Toyota Camry's from their deliberate cover up, he filed a motion to withdraw his guilty. The trial court appointed counsel and set a hearing upon the motion to withdraw the guilty plea for February 14, 2011.

On February 14, 2011, the trial court conducted a hearing upon Mr. Thompson's motion to withdraw his guilty plea and of course, Attorney John Cornely was not prepared. Counsel

failed to investigate or present any evidence to the trial court in support of Mr. Thompson's motion to withdraw his guilty plea. The trial court stated to Mr. Thompson (as it pertained to another case in another State concerning the intended acceleration problem), that Mr. Lee submitted not only affidavits and testimony from other Camry drivers involved in similar accidents and expert witnesses regarding the vehicle defect, defendant presented no such testimony, affidavits or corroboration and that Mr. Thompson's newly discovered evidence is nothing more than speculation. The trial court denied Mr. Thompson's motion to withdraw his guilty plea.

Thereafter, Mr. Thompson, through relatives, hired Frank Daniel a private investigator employed with All-State Security as a security engineer and technician with over two decades of experience in the area of investigation work and technical accident investigation and consulting on accidents to thoroughly investigate his vehicle for any signs of unintended acceleration problems, and evidence of braking prior to the crash. Once the results of the investigation declared that Mr. Thompson's 1996 Toyota Camry did in fact have show signs of the unintended acceleration problem, and braking at the time of the accident that took two lives, Mr. Thompson filed another motion to withdraw his guilty plea under ineffective assistance of counsel for his failure to investigate on May 28, 2013.

On March 14, 2014, the trial court denied Mr. Thompson's motion to withdraw his guilty plea as barred by the doctrine of res judiciata. Mr. Thompson's timely appealed.

On January 13, 2015, the Court of Appeals, Fifth Appellate District, Delaware County, affirmed the trial courts March 14, 2014 judgment.

On March 11, 2015, Mr. Thompson file a Application for Re-Opening pursuant to Ohio App.R. 26(B) claiming he was denied effective assistance of counsel of his second appeal when counsel failed to argue 1) the trial court erred when it denied his motion to withdraw his pleas based on res judiciata; 2) the trial court erred in denying his motion to withdraw for lack of correlating evidence; 3) the trial court erred when it found no manifest injustice when it accepted his guilty pleas; 4) the trial court erred when it believed intoxication and driving left to center were the cause of the accident, not unintended acceleration.

Without any justification to Mr. Thompson's claim of ineffective assistance of appellate counsel, the Court of Appeals denied his application for re-opening on May 4, 2015.

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of

counsel on a criminal appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). See, e.g., Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987); Peoples v. Bowen, 791 F.2d 861 (11th Cir. 1986). Appellate counsel must act as advocates and support the cause of the client to the best of their ability. See, e.g., Anders v. California, 386 U.S. 738 (1967); Penson v. Ohio, 488 U.S. 75 (1988). Here, appellate counsel did the opposite. One of the strongest issues in Adams' case, and an issue of import to this Court, is being raised herein. This issue was not strategically bypassed; it was forgone solely due to the ineffective assistance of Mr. Thompson's appellate counsel. As such, because appellate counsel were ineffective when they failed to raise this Proposition of Law's in Mr. Thompson's second direct appeal, this Court should reverse and remand this case with instructions that the Fifth District Court of Appeals re-open Mr. Thompson's second direct appeal and consider these claims in its entirety.

It is submitted that the facts and circumstances in the instant matter render res judicata inapplicable. Applying res judicata to a ineffective assistance of counsel claim that has not been litigated previously - as the trial court erroneously did - would cause a manifest injustice, thus it is requested that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

STATEMENT OF THE CASE AND FACTS

On March 20, 2008, Zachary Thompson got into his 1996 Toyota Camry, preparing to go home after a night out with a colleague. Shortly after Mr. Thompson put the car into gear, it raced forward while stumping on the breaks, rear ending a vehicle at a intersection, shooting across the intersection hitting another vehicle head on, throwing Mr. Thompson, his passenger, and the other driver of the other vehicle out their respective windshields of their vehicles. The head on crash was so violent that it killed Mr. Thompson's passenger and the other occupant of the other vehicle involved in the accident. Mr. Thompson spent five days in the Intensive Care Unit recovering from a sever traumatic brain injury.

On August 8, 2008, the Delaware County Grand jury indicted Mr. Thompson on five counts: Two Counts of Aggravated Vehicle Homicide in violation of R.C. 2903.06, and One Count of Operating A Vehicle Under the Influence of Alcohol in violation of R.C. 4511.19. Mr. Thompson was arrested and bail was posted.

Mr. Thompson retained Attorney Tony Heald to represent him in this matter. Mr. Thompson informed his attorney that he had no knowledge before or after of the accident that killed his passenger or driver of the other vehicle. Counsel reluctantly failed to investigate the accident, thus through plea negotiations, on December 1, 2009, Appellant entered a plea of guilty to two counts of aggravated vehicular homicide, in violation of R.C. §2903.06(A)(1)(a) and R.C. §2903.06(A)(2)(a).

On January 27, 2010, the trial court sentenced Mr. Thompson to five (5) years in prison, the first two years being mandatory, on each of the two counts, the sentences to be served consecutively. The trial court further ordered Mr. Thompson pay costs and restitution in the sum of \$11,466.29. In addition, Mr. Thompson's driver's license was suspended for life.

In April 2010, Mr. Thompson, on account that Toyota had come clean about the information they kept hidden from the public and the National Highway Traffic and Safety Administration concerning the unintended acceleration problems with its Toyota Camry's, he filed a motion to withdraw his guilty. The trial court appointed counsel, Attorney John R. Cornely and set a hearing upon the motion to withdraw the guilty plea for February 14, 2011.

Through written correspondence with Attorney John Cornely, counsel stated that he was not going to investigate, look through the documents collect by Mr. Thompson, or the

investigators report until the trial court granted Mr. Thompson's motion to withdraw his guilty plea.

On February 14, 2011, the trial court conducted a hearing upon Mr. Thompson's motion to withdraw his guilty plea and of course, Attorney John Cornely was not prepared. Counsel failed to investigate or present any evidence to the trial court in support of Mr. Thompson's motion to withdraw his guilty plea. The trial court stated to Mr. Thompson (as it pertained to another case in another State concerning the unintended acceleration problem), that Mr. Lee submitted not only affidavits and testimony from other Camry drivers involved in similar accidents and expert witnesses regarding the vehicle defect, defendant presented no such testimony, affidavits or corroboration and that Mr. Thompson's newly discovered evidence is nothing more than speculation. The trial court denied Mr. Thompson's motion to withdraw his guilty plea.

Mr. Thompson, through relatives, hired Frank Daniel a private investigator employed with All-State Security as a security engineer and technician with over two decades of experience in the area of investigation work and technical accident investigation and consulting on accidents to thoroughly investigate his vehicle for any signs of unintended acceleration problems, and braking. Once the results of the investigation declared that Mr. Thompson's 1996 Toyota Camry did in fact have show signs of the unintended acceleration problem, and braking at the time of the accident that took two lives, Mr. Thompson filed another motion to withdraw his guilty plea under ineffective assistance of counsel for his failure to investigate on May 28, 2013.

On March 14, 2014, the trial court denied Mr. Thompson's motion to withdraw his guilty plea as barred by the doctrine of res judicata. Mr. Thompson's timely appealed.

On January 13, 2015, the Court of Appeals, Fifth Appellate District, Delaware County, affirmed the trial courts March 14, 2014 judgment holding that "[B]ecause defendant already raised his arguments related to unintended acceleration in a previous motion, which the trial court denied, res judicata barred him from raising them a third time in a Crim.R. 32.1 subsequent motion to withdraw his guilty plea to aggravated vehicular homicide under R.C. 2903.06(A); [2]-Based on the facts of the case, specifically that the accident which resulted in two deaths was caused by defendant being intoxicated and driving left of center and causing a head-on collision, defense counsel's decisions to focus on arguments other than "unintended acceleration" did not

rise to the level of incompetence; [3]-Even if res judicata did not operate to bar the claims in defendant's motion to withdraw his plea, the trial court did not abuse its discretion in overruling the motion.

On March 11, 2015, Mr. Thompson file a Application for Re-Opening pursuant to Ohio App.R. 26(B) claiming he was denied effective assistance of counsel of his second appeal when counsel failed to argue 1) the trial court erred when it denied his motion to withdraw his pleas based on res judiciata; 2) the trial court erred in denying his motion to withdraw for lack of correlating evidence; 3) the trial court erred when it believed intoxication and driving left to center were the cause of the accident, not unintended acceleration.

Without any justification to Mr. Thompson's claim of ineffective assistance of appellate counsel, the Court of Appeals denied his application for re-opening on May 4, 2015.

This case involves matters of public and great general interest and a substantial constitutional question. Mr. Thompson request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

MEMORANDUM IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: Ineffective Assistance of Appellate Counsel.

"A criminal appellant is constitutionally entitled to the effective assistance of counsel in his direct appeal." Franklin v. Anderson, 434 F.3d 412, 429 (6th Cir. 2006). In determining whether a defendant-appellant has received ineffective assistance of appellate counsel, the two-pronged analysis from Strickland v. Washington, 466 U.S. 668, 687 (1984) should be applied: conduct that fell below an objective standard of reasonableness and a reasonable probability the result would have been different. See State v. Were, 120 Ohio St. 3d 85, 896 N.E.2d 699 (2008). Thus, the applicant must prove that counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *Id.* at 88, 896 N.E.2d at 702, citing State v. Sheppard, 91 Ohio St. 3d 329, 330, 744 N.E.2d 770 (2001). In seeking reopening, the appellant bears the burden of demonstrating that there is a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of appellate counsel. *Id.*, citing State v. Spivey, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

The Sixth Circuit in Mopes v. Coyle, 171 F.3d 408, 427-28 (6th Cir 1999), listed several factors to consider when adjudicating an IAAC claim, saying "this list is not exhaustive, and neither must it produce a correct 'score.'" This list includes inquiries such as the strength of an omitted issue, whether "clearly stronger" issues were passed by for weaker issues, and whether omitted issues were preserved at trial. *Id.* at 427-28. Other factors include inquiries into appellate counsel's strategy and discussions with the client. *Id.*

In the case in chief, appellate counsel, William Creamer raised one assignment of error on second direct appeal, **"THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS."** The entire issue raised in Mr. Thompson's second motion to withdraw his guilty plea was based on ineffective assistance of counsel during the February 14, 2011, hearing upon Mr. Thompson's motion to withdraw his guilty plea at which Attorney John Cornely was not prepared and bluntly told Mr. Thompson that he was not going to investigate or provide the trial court with any information relative to the April 2010 motion to withdraw guilty plea until the trial court grants the motion to withdraw. The February 14, 2011 hearing was granted to present evidence of unintended acceleration,

however, counsel was unaware of the facts and evidence in this case. Once the trial court informed Mr. Thompson's what evidence he lacked and overruled his motion to withdraw his guilty plea, Mr. Thompson's, through family members hired Frank Daniel a private investigator employed with All-State Security as a security engineer and technician with over two decades of experience in the area of investigation work and technical accident investigation and consulting on accidents to thoroughly investigate his vehicle for any signs of intended acceleration problems. Once the results of the investigation declared that Mr. Thompson's 1996 Toyota Camery did in fact have show signs of the intended acceleration problem at the time of the accident that took two lives, Mr. Thompson filed another motion to withdraw his guilty plea under ineffective assistance of counsel for Attorney John Cornely's failure to investigate, present evidence of unintended acceleration at the February 14, 2011 hearing on May 28, 2013. Further, it was error for the trial court to declare Mr. Thompson's May 28, 2013 second motion to withdraw his guilty plea barred by the doctrine res judicata. Even though the trial court did error in denying Mr. Thompson's May 28, 2013 second motion to withdraw his guilty plea, appellate Attorney William Creamer failed to raise any argument in support as to why the trial court abused its discretion and denied the motion as being barred by the doctrine of res judiciata. A reasonable competent knowledgeable attorney who is skilled in law would have at the very least raised, 1) the trial court erred when it denied his motion to withdraw his pleas based on res judiciata; 2) the trial court erred in denying his motion to withdraw for lack of correlating evidence; 4) the trial court erred when it believed intoxication and driving left to center were the cause of the accident, not unintended acceleration. Mr. Thompson's supports this contention as follows:

A. The trial court erred when it denied his motion to withdraw his pleas based on res judiciata

Res judicata is not applicable and the trial court's and court of appeal's conclusions directly conflict with this Court's holding in State v. Perry, 10 Ohio St. 2d 175, 182, 226 N.E.2d 104, 109 (1967). In Perry, the petitioner raised claims in post-conviction identical to those raised at trial and on direct appeal. Id. at 182, 226 N.E.2d at 109. Perry's position did not have the support of evidence de hors the record, and did not allege that there was other evidence that, if discovered, would support his claims. Id. All of Perry's post-conviction claims could have been determined from the trial court record and fully addressed by the Court on direct appeal.

The Perry Court understood the distinction between claims supported by evidence de hors the record and those that were not. Thus, the syllabus states that res judicata only applies to constitutional issues that "have already been or could have been fully litigated...on direct appeal." Id. at 175, 226 N.E. 2d at 224, syl. 7 (emphasis added). A claim cannot be "fully litigated" unless a party has the ability to present all of the evidence in support of the claim.

Mr. Thompson's second motion to withdraw his guilty differs significantly from the petition at issue in Perry. While the subject matter of Mr. Thompson's second motion arose, from matters not on the face of the trial court record, he supported his second motion with the affidavit of Frank Daniel a private investigator employed with All-State Security as a security engineer and technician with over two decades of experience in the area of investigation work and technical accident investigation and consulting on accidents and other martial documentation that was not presented to the trial court on the February 14, 2011 hearing , which are credible evidence de hors the record. This ineffective assistance of postconviction counsel claim was not raised at trial nor could it have been raised on direct appeal.

In addition, the evidence submitted in Mr. Thompson's second motion to withdraw his guilty plea, was evidence withheld for the Toyota Motor Corp, which is evidence paramount to Mr. Thompson's case. Res Judicata would not bar evidence that is illegally withheld from Mr. Thompson, the federal government or the public, and out of his control.

Following its decision in Perry, this Court has specifically identified ineffective assistance of counsel claims as being raised most appropriately in post-conviction proceedings, rather than on direct appeal. State v. Keith, 79 Ohio St. 3d 514, 537, 684 N.E.2d 47, 68 (1997); State v. Madrigal, 87 Ohio St. 3d 378, 391, 721 N.E.2d 52, 65 (2000). How much more inadequate representation does one attorney has to be in order to be declared an ineffective attorney when he was already completely unprepared for a hearing that is set for the purpose of presenting evidence, documentation, affidavits, and testimony of experts? Attorney John Cornely denied Mr. Thompson the effective assistance of counsel at the February 14, 2011 hearing.

It is inconceivable and a manifest injustice if the doctrine of res judicata is allowed to stand in this case. The doctrine of res judicata does not bar Mr. Thompson's second motion for relief. The lower courts erred in subsequently applying res judicata and denying Mr. Thompson's relief.

B. The trial court erred in denying his motion to withdraw for lack of correlating evidence.

In the March 28, 2011 judgment entry, the trial court intimated that evidence of Mr. Thompson's attempting to brake was the primary evidence it wanted to see in order to withdraw Mr. Thompson's guilty plea. In Mr. Thompson's second motion to withdraw his guilty plea filed May 28, 2013, he presented the trial court with this specific evidence.

In the affidavit of Frank Daniel, he states more than once that it is clear Mr. Thompson's brake pedal is bent forward and that evidence points to Mr. Thompson braking during the accident.

Furthermore, photo's of Mr. Thompson's brake pedal immediately following the accident clearly show the brake pedal bent forward in a depressed manner. The trial court stipulated as to what evidence it needed to view in order to grant Mr. Thompson's motion to withdraw, and Mr. Thompson's supplied that evidence in his second motion, however, the trial court still denied his motion. The trial court totally erred and contradicted itself. The trial court stipulated specific evidence because the only real evidence unintended acceleration happens in any case, is evidence the driver was attempting to brake, yet the vehicle continues to accelerate.

C. The trial court erred when it believed intoxication and driving left to center were the cause of the accident, not unintended acceleration.

During the April 2009 hearing to suppress the B.A.C. Test, the officer's who witnessed the fatal crash that took two lives, described Mr. Thompson's vehicle prior to the head on collision as having "mechanical problems". This information affirms the investigator Frank Daniel affidavit and report that Mr. Thompson's 1996 Toyota Camry did in fact have show signs of braking at the time of the accident that took two lives. The report specifically states that Mr. Thompson's vehicle went left of center due to front end damage, steering and tire problems..... from the previous rear ending of a vehicle at the intersection at 40 miles per hour while braking or foot on the brake. No where in the record or in any evidence provided to the trial court whether directly or indirectly evidence pertaining to intoxication as being the source or cause of the left of center and ultimate deaths herein. As a matter of scientific fact, it is proven beyond any doubt that the fatal collision was caused by the unintended acceleration of Mr. Thompson's vehicle and subsequent damages to the front end of his vehicle, not intoxication as the trial court

mistakenly asserts.

In Frank Daniel's report, after speaking with the officer's who witnessed the fatal accident, the vehicle continued after the first accident and then pulled to the side of the road way as the officer's stated, it again rapidly accelerated down the road way which again they are seeing a very damaged vehicle in which the driver could be having a problem stopping the vehicle and especially controlling the steering and braking of the vehicle depending on the damage from the first accident. The evidence in the photo's show the brake pedal in Mr. Thompson's vehicle is bent as to show braking and is also backed up by his injuries which is noted in his hospital report and the damage to his leg and foot. Frank Daniel conclusion is that due to Mr. Thompson being intoxicated, the officer's concentrated on convicting of DUI and Aggravated Vehicle Homicide and failed to start and complete the technical aspects of the investigation, thus it is his belief that the factors of unintended acceleration and damage to Mr. Thompson's vehicle, caused the fatal left of center maneuver.

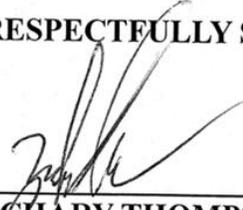
A manifest injustice is continuing to occur in this case. There is an abundance of evidence, directly and indirectly in support that the unintended acceleration of Mr. Thompson's vehicle is the primary source and cause of the fatal collision. Frank Daniel has over 20 years of experience in investigating these kinds of accidents, thus if was error for the trial court to conclude that intoxication caused Mr. Thompson to go left of center which cause the fatal collision. Mr. Thompson's second motion to withdraw his guilty plea should have been granted and a trial had.

CONCLUSION

Had Attorney John Cornely presented the evidence and testimony necessary during the February 14, 2011 hearing, Mr. Thompson would not had to file a second motion to withdraw his guilty plea under ineffective assistance of counsel. Further, it was ineffective assistance of appellate counsel when he failed to raise trial counsel ineffectiveness. It is reasonable to conclude that a reasonable competent knowledgeable appellate attorney should at least be familiar with these issues Mr. Thompson raised in his application for re-opening. The specific facts of Mr. Thompson's case warranted these challenges on direct appeal as oppose to what was challenged. The issues herein are of obvious strength as compared with what was raised on direct appeal.

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

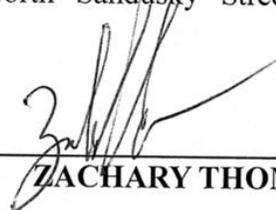
RESPECTFULLY SUBMITTED,



**ZACHARY THOMPSON#A625-149
Noble Correctional Institution,
15708 McConnelsville Road
Caldwell, Ohio 43724**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail to the Delaware County Prosecutor at 140 North Sandusky Street, Delaware, Ohio 43015 on this 27 day of May, 2015.



ZACHARY THOMPSON

IN THE COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

CASE NO. 14CAA-04-0021

-vs-

ZACHARY THOMPSON

JUDGMENT ENTRY

Defendant-Appellant

This matter came before the Court on Appellant's Application for Re-Opening pursuant to App.R.26(B), filed March 11, 2015, and the State of Ohio's Memorandum Contra, filed April 10, 2015, and Appellant's Memorandum in Response, filed April 20, 2015.

Appellate Rule 26(B)(1) provides:

"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."

In his motion, Appellant argues that he was denied effective assistance of appellate counsel because appellate counsel in his second appeal failed to argue 1) the trial court erred when it denied his motion to withdraw his pleas based on res judicata; 2) the trial court erred in denying his motion to withdraw for lack of correlating evidence; 3) the trial

JAN ANTONOPLOS
CLERK OF COURTS
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Court of Appeals
Delaware Co., Ohio

I hereby certify the within be a true copy of the original on file in this office.

Jan Antonoplos, Clerk of Courts
By Jan Antonoplos Deputy

court erred when it found no manifest injustice when it accepted his guilty pleas; 4) the trial court erred when it believed intoxication and driving left of center were the cause of the accident, not unintended acceleration.

The standard when reviewing an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, *i.e.*, errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

The Supreme Court of Ohio, in *State v. Smith*, 95 Ohio St.3d 127, 766 N.E.2d 588, 2002-Ohio-1753, has once again examined the standards that must be applied to an application for reopening as brought pursuant to App.R. 26(B). In *Smith*, the Supreme Court of Ohio specifically held:

"Moreover, to justify reopening his appeal, [Appellant] 'bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of counsel on appeal.' *State v. Spivey*, 84 Ohio St.3d at 25, 701, 706 N.E.2d 323, N .E.2d 696.

"*Strickland* charges us to 'appl[y] a heavy measure of deference to counsel's judgments,' 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' *Id.* at 689, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 761 N.E.2d 18." *State v. Smith*, 95 Ohio St.3d 127, 766 N.E.2d 588, 2002-Ohio-1753, at 7.

Upon review, we find no error under *Pelfry*, *supra*, and further find no evidence that Appellant's counsel was ineffective or that his representation was deficient in failing to present such arguments.

We therefore find Appellant's Application for Reopening not well-taken and hereby deny same.







JUDGES