

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	
	:	Case Nos. 2024-0401; 2024-0539
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Medina County Court of Appeals,
	:	Ninth Appellate District
THOMAS B. CLARK,	:	
	:	COA Case No. 20CA0020-M
Defendant-Appellant.	:	

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**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER  
IN SUPPORT OF APPELLANT THOMAS B. CLARK**

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“In circumstances where an appellant’s application for [reopening] is granted under App.R. 26(B)(5) on the grounds that there was a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal but appellant then fails to separately address in their brief the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency as required by App.R. 26(B)(7), can the appellate court presume appellant is arguing that appellate counsel was ineffective for failing to raise the arguments set forth in his new assignments of error, or must the court affirm its previous judgment due to appellant’s failure to comply with the explicit requirements set forth in App.R. 26(B)(7)?” .....	3
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In the alternative, if an appellant receives ineffective assistance of counsel on a reopened appeal due to counsel’s failure to properly demonstrate ineffective assistance of prior appellate counsel under App.R. 26(B)(7), then the appellant shall be permitted to apply for delayed reconsideration in the court of appeals due to the ineffective assistance of counsel on the reopened appeal under <i>State v. Murnahan</i> , 63 Ohio St.3d 60, 584 N.E.2d 1204 (1991), so as not to foreclose on appellants opportunity to vindicate his right to the effective assistance of counsel on direct appeal. ....	3
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## **STATEMENT OF THE CASE AND FACTS**

Amicus curiae adopts the statement of the case and facts set forth in Thomas Clark’s merit brief.

## **STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency that represents indigent criminal defendants, coordinates criminal-defense efforts throughout Ohio, and contributes to the promulgation of Ohio law. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems. The OPD has an interest in this case because it will determine briefing requirements for indigent litigants after an appellate court reopens their appeal pursuant to App.R. 26(B).

## **INTRODUCTION**

After presenting a timely application and gaining clearance through an initial gatekeeping stage—see App.R. 26(B)(1), (2), and (5); *see also generally State v. Leyh*, 2022-Ohio-292, ¶ 13-39—ineffective-assistance-of-appellate-counsel claims proceed before the appellate court “as on an initial appeal...except that the court may limit its review to those assignments of error and arguments not previously considered.” App.R. 26(B)(7). During this “new-but-limited” review, “[t]he 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.” *Id.* The issue presented here, via both a certified-conflict question and discretionary appeal, is what constitutes compliance with this “shall-address” mandate?

Arguably, any argument of a new claim in the reopened briefing as required by App.R. 26(B)(7) innately addresses ineffectiveness due to the combination of (1) the appellate court’s

obligation to determine ineffectiveness under App.R. 26(B)(9) after reopening and (2) the “genuine issue of a colorable claim” determination on ineffectiveness made at the gatekeeping stage established in App.R. 26(B)(5). *See also State v. Murnahan*, 63 Ohio St.3d 60, 66 (1992); *State v. Spivey*, 84 Ohio St.3d 24, 25 (1998). If this court does not interpret the “shall-address” mandate in that manner, OPD requests that this court hold that this requirement operates as a claim-processing, rather than jurisdictional, rule. *See Hamer v. Neighborhood Housing Servs. of Chicago*, 583 U.S. 17, 20, 25 (2017) (explaining that *only* statutory procedural mandates are jurisdictional, and *all* others constitute waivable and/or forfeitable claim-processing requirements that must be enforced by a party).

## ARGUMENT

**Accepted Certified-Conflict Question:** “In circumstances where an appellant’s application for [reopening] is granted under App.R. 26(B)(5) on the grounds that there was a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal but appellant then fails to separately address in their brief the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency as required by App.R. 26(B)(7), can the appellate court presume appellant is arguing that appellate counsel was ineffective for failing to raise the arguments set forth in his new assignments of error, or must the court affirm its previous judgment due to appellant’s failure to comply with the explicit requirements set forth in App.R. 26(B)(7)?”

**Accepted Proposition of Law 1:** In reviewing the merits of an assigned error in a reopened appeal, if the appellate court finds reversible error, the requirement that appellant demonstrate ineffective assistance of prior appellate counsel pursuant to App.R. 26(B)(7) has been satisfied.

**Accepted Proposition of Law 2:** In the alternative, if an appellant receives ineffective assistance of counsel on a reopened appeal due to counsel’s failure to properly demonstrate ineffective assistance of prior appellate counsel under App.R. 26(B)(7), then the appellant shall be permitted to apply for delayed reconsideration in the court of appeals due to the ineffective assistance of counsel on the reopened appeal under *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1991), so as not to foreclose on appellants opportunity to vindicate his right to the effective assistance of counsel on direct appeal.

If the “shall-address” mandate is not inherently satisfied through new claims presented in the reopened briefing as suggested by the text, operation, and practical consequences of the entirety of App.R. 26(B)—*see* App.R. 26(B)(1), (2), (5), (7), and (9)—this court should hold that it operates as a waivable and/or forfeitable claim-processing requirement. *See Hamer*, 583 U.S. at 20, 25.

While statutory procedural mandates are jurisdictional, non-statutory ones are claim-processing rules that must be enforced by a litigant. *Id.* at 25. And, although “courts are obliged to notice jurisdictional issues and raise them on their own initiative” because such issues are not subject to waiver or forfeiture, “mandatory claim-processing rules are less stern” and can “be

waived or forfeited.” *Id.* at 20, citing *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011), *Manrique v. United States*, 581 U.S. 116, 121 (2017), and *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

Here, the prosecution did not enforce the “shall-address” mandate in its brief. *See* Feb. 2, 2023 Prosecution Brief. Instead, it argued the merits of the respective issues. *See id.* Thus, the prosecution forfeited enforcement of the “shall-address” mandate. *See Hamer* at 20, 25; *see also id.* at 20, fn. 1 (distinguishing waiver—a *willing relinquishment*—from forfeiture—a *failure to timely assert*).

This approach fits with this court’s long-held preference for decisions on the merits as a fundamental tenet of judicial review to best serve fairness and justice. *See Perotti v. Ferguson*, 7 Ohio St.3d 1, 3 (1983); *State ex rel. Montgomery v. R & D Chem. Co.*, 72 Ohio St.3d 202, 204 (1995); *see also State v. Carver*, 2023-Ohio-2839, ¶ 9 (4th Dist.); *State v. Talley*, 2023-Ohio-883, ¶ 4 (11th Dist.). And there are alternatives in line with this preference, as lower courts in Ohio—when facing unenforced claim-processing requirement failures—have (1) issued a warning, or (2) remanded for new appellate counsel and briefing. *See State v. Reinhardt*, 2004-Ohio-6443, ¶ 17 (10th Dist.) (warning issued); *see also State v. Hill*, 1993 WL 471440, \*1 (5th Dist. Nov. 9, 1993) (remanded for new appellate counsel).

Given the ineffectiveness “genuine issue of a colorable claim” terminus a quo of App.R. 26(B)(5), and the back-end ineffectiveness court obligation established in App.R. 26(B)(9), merits decisions should not be bypassed absent litigant enforcement of the claim-processing requirement in App.R. 26(B)(7).

## **CONCLUSION**

For the reasons stated above, and those presented in Mr. Clark's merit brief, the decision below should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Thomas B. Clark was electronically delivered to the following parties on this 21st day of October, 2024:

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