

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. 04-1554
Donald Lavell Craig, :
Appellant. : Death Penalty Case

On Appeal From The Court Of Common Pleas
Of Summit County, Case No. 2003-06-1638

Application For Reopening Pursuant To S.Ct. Prac. R. XI, Section 5

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Counsel of Record

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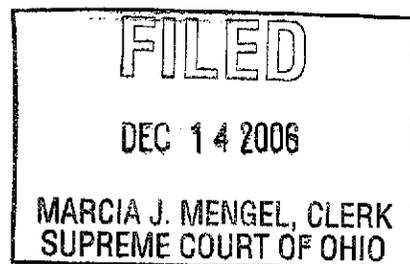
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In The Supreme Court Of Ohio

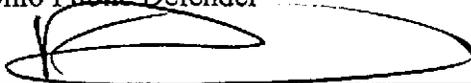
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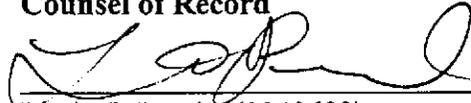
Appellant Craig asks this Court to grant his Application for Reopening under S.Ct. Prac. R. XI, Section 5(A) and State v. Murnahan, 63 Ohio St. 3d 60, 583 N.E.2d 1204 (1992), because of the denial of effective assistance of counsel during Craig's direct appeal. A Memorandum in Support is attached and incorporated by reference.

Respectfully submitted,

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Memorandum In Support

State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), and S.Ct. Prac. R. XI, Section 5(A) establish the procedure for raising claims of ineffective assistance of appellate counsel in this Court.

A. Procedural History

A Summit County Court of Common Pleas jury convicted Appellant Donald Lavell Craig of aggravated felony murder; one count of kidnapping; and one count of rape. The trial court sentenced him to death. Craig was represented at trial by attorneys Kerry O'Brien and Brian Pierce.

Attorneys Nathan A. Ray and George C. Pappas, Jr. represented Craig on his direct appeal to this Court. On September 20, 2006, this Court affirmed Craig's sentence. State v. Craig, 110 Ohio St. 3d 306, 2006-Ohio-4571 (2006).

B. Reopening Is Required

After a review of the direct appeal brief that was filed on behalf of Craig, it is apparent that his appellate counsel were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial. (See Exhibit A). Therefore, this Court must reopen his appeal.

C. Propositions Of Law¹

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). Had Appellant's direct appeal counsel presented the following four propositions of law to this Court, the outcome of this appeal would have been different:

¹ Due to the page limitation imposed by S. Ct. Prac. R. XI, Section 5(D), Appellant is unable to fully brief the issues not raised by prior appellate counsel.

Proposition of Law No. 1:

A capital defendant has a right to be present at all proceedings. U.S. Const. amends. V, VI, and XIV; Ohio Const. Art. I, §§ 2, 5, 10, 16, 20.

The trial court failed to secure Craig's presence at all stages of his capital trial. U.S. Const. amends. V, VI, and XIV; Ohio Const. Art. I, §§ 2, 5, 10, 16, 20; O.R.C. § 2945.12 and Ohio R. Crim. P. 43(A). On December 2, 2003, the trial court held a hearing on defense motions to suppress and challenge the admission of DNA evidence. Craig was not present for this hearing in which testimony was taken nor was his waiver secured. (Tp. 2-3, Dec. 2, 2003). Again, Craig's waiver was not secured for a hearing on a motion to quash, in fact trial counsel waived Craig's presence. (Tp. 1585-86).

A defendant is required to be present at every stage of the trial except when he voluntarily declines to attend the proceedings. Hopt v. Utah, 110 U.S. 574, 579 (1884); Lewis v. United States, 146 U.S. 370, 372 (1882); Crowe v. United States, 200 F.2d 526, 528 (6th Cir. 1952); Ohio Const. Art. I, § 10. This Court in State v. Williams, held that both the Ohio and federal constitutions mandate the presence of the defendant at all stages of the proceedings absent a knowing waiver of the right or other extraordinary circumstances. 6 Ohio St. 3d 281, 286, 452 N.E.2d 1323, 1330 (1983). See also Illinois v. Allen, 397 U.S. 337, 338 (1970). This right is also secured by statute and procedural rule. O.R.C. § 2945.12 and Ohio R. Crim. P. 43(A). Failure to permit an accused to be present during any portion of the proceedings is error. State v. Roe, 41 Ohio St. 3d 18, 27, 535 N.E.2d 1351, 1362 (1989).

The trial court violated Craig's rights by failing to secure his presence at all stages of the proceedings absent a waiver. Although trial counsel waived his presence once, the record lacks a knowing waiver by Craig. The court was aware the waiver was necessary - it did secure his waiver one time. (Tp. 2438). Craig's right to be present at all stages was violated. His presence

was not knowingly waived at the suppression hearing, when the trial court took testimonial evidence.

Proposition of Law No. 2

Where trial counsel's performance in the trial phase in a capital case falls below professional standards for reasonableness, counsel has rendered ineffective assistance, thereby prejudicing the defendant in violation of his constitutional rights.

Counsel's duty to advocate and to use professional skill under Strickland includes the duty to object to errors and to otherwise preserve errors for federal review. See e.g. Gravelly v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992); Combs v. Coyle, 205 F.3d 269, 286 (6th Cir. 2000). Craig's trial counsel were deficient to his prejudice because they failed to object to the trial court's incorrect verdict forms.

The trial court gave verdict forms that did not mandate the jury to find Craig guilty beyond a reasonable doubt. (Tp. 2783-83, Verdict forms). The verdict forms simply required the jury to find Craig guilty. This permitted the jury to find Craig guilty on a burden less than reasonable doubt. These verdict forms were materially inaccurate. They misled the jury as to its essential role as fact finder of guilt beyond a reasonable doubt. It is the trial court's responsibility to properly instruct the jurors as to its duty to determine guilt beyond a reasonable doubt. See e.g. Kelly v. South Carolina, 534 U.S. 246, 256 (2002).

Trial counsel also failed to secure Mr. Craig's presence at all stages of the proceedings absent a waiver. Although trial counsel waived his presence once, the record lacks a knowing waiver by Craig. Trial counsel was aware the waiver was necessary as his waiver was secured one other time. (Tp. 2438). Craig's right to be present at all stages was violated. Trial counsel

failed to secure a knowingly waiver at the suppression hearing, when the trial court took testimonial evidence.

These errors infringed upon Craig's right to due process and his right to a reliable trial. See e.g. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). As a result, Craig was deprived of the effective assistance of counsel, and was thereby prejudiced by his counsel's errors. Strickland v. Washington, 486 U.S. 668 (1984).

Proposition of Law No. 3

When the state fails to introduce sufficient evidence of kidnapping, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I, §§ 9, 16.

The State failed to produce evidence demonstrating that Craig kidnapped Rosanna Davenport. Resultantly, Craig's conviction for the substantive offense of kidnapping, as well as the offense where kidnapping served as the aggravated murder count, violate his rights to substantive and procedural due process. Craig was denied this right through his attorneys substandard performance that prejudiced the outcome of his capital trial. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I, §§ 9, 16.

The State of Ohio presented evidence of when and where Davenport last was seen alive. (Tp. 1670, 1703). The State presented evidence of when and where Davenport's body was found. (Tp. 1746-47). However, the State presented no evidence of what transpired between the time Davenport left Michelle Lindsay's home and the time that Michael Johnson found her body at 156 Maple Street.

Kidnapping is defined "as the forceful removal or restraint of another in order to hold the victim for ransom or as a hostage or shield, to facilitate the commission of a felony, to terrorize

or inflict serious physical harm on the victim or another, or to engage in sexual activity against the victim's will." Johnson v. Coyle, 200 F.3d 987 (6th Cir. 2000). No evidence was presented where Davenport was killed. In order to prove kidnapping, the exact location of the killing must be proved to establish the "purpose" element under O.R.C. § 2905.01(A)(2) or (3). Id. Thus no rational jury could find beyond a reasonable doubt that Craig committed kidnapping under those subsections. As a result, Craig was deprived of his constitutional rights and was thereby prejudiced.

Proposition of Law No. 4

Where trial counsel's performance in the penalty phase in a capital case falls below professional standards for reasonableness, counsel has rendered ineffective assistance, thereby prejudicing the defendant in violation of his constitutional rights. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

Craig had the constitutional right to the effective assistance of counsel during the penalty phase of his trial. Strickland v. Washington, 466 U.S. 668 (1984). Craig was denied this right through his attorneys substandard performance that prejudiced the outcome of his capital trial.

1. Defense counsel failed to properly use appointed mitigation expert.

Attorneys in capital cases have the duty to investigate the defendant's background for mitigating factors. Wiggins v. Smith, 539 U.S. 510, 524 (2003). This includes properly screening and supervising experts. Richey v. Mitchell, 395 F.3d 660, 685 (6th Cir. 2005), rev'd on other grounds, Bradshaw v. Richey, 546 U.S. 74 (2005).

During mitigation, trial counsel called Dr. Joseph Bendo, court-appointed mitigation expert. During direct examination of Dr. Bendo it became clear that counsel had hired a psychologist unqualified to be a mitigation expert. Dr. Bendo acknowledged that he read articles to identify relevant mitigation topics and compared it to the scant information he collected on

Craig in order to present a mitigation case. (Tp. 2984). Dr. Bendo simply relied upon limited testing results, military records, prison records, and very little social history of Craig. (Tp. 2978-95). Trial counsel failed to properly supervise Dr. Bendo in conducting a thorough investigation of Craig's background. Wiggins, 539 U.S. at 523. See also Glenn v. Tate, 71 F.3d 1204, 1208 (6th Cir. 1995).

Trial counsel's failure to properly supervise Dr. Bendo and present a thorough background prejudiced Craig and violated his rights under the United States and Ohio Constitutions.

2. Failure to object to definition of mitigation.

Trial counsel failed to object when the State examined Dr. Bendo. The prosecutor asserted his goal was to "explain [Craig's] behavior" in the mitigation phase. (Tp. 3028). It is well settled that mitigating evidence must not be construed as an excuse for legal culpability. State v. Williams, 99 Ohio St. 3d 493, 515-16, 794 N.E.2d 27, 52 (2003) (citing State v. Bey, 85 Ohio St. 3d 487, 498, 709 N.E.2d 484 (1999)); Eddings v. Oklahoma, 455 U.S. 104, 113 (1982); Tennard v. Dretke, 542 U.S. 274, 285 (2004). Rather, the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death.'" Tennard, 542 U.S. at 285 (citing Skipper v. South Carolina, 476 U.S. 1, 5 (1986)).

The State's question was misleading because it directed the jury to look at a cause and effect relationship between the crime and Craig's proffered mitigation. No such casual nexus is required under the law. Id. Trial counsel's failure to object violated Craig's rights under the United States and Ohio Constitutions.

3. Failure to object to improper standard of proof used to admit gruesome photographs at the penalty phase.

Trial counsel failed to object when the State argued that it must use the photographs to prove that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt at the penalty phase. (Tp. 3080). The State argued that the photographs must be admitted under Ohio R. Evid. 403.

Ohio R. Evid. 403 requires mandatory exclusion where the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury. However, there is a stricter evidentiary standard in capital cases. State v. Morales, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 274 (1987). Thus, the probative value of each photograph must outweigh any potential danger of prejudice to the defendant. Id. The trial court's failure to evaluate whether to admit the photographs under the Morales standard violated Craig's Eighth and Fourteenth Amendment guarantee "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). See also State v. Thompson, 33 Ohio St. 3d 1, 9, 514 N.E.2d 407, 416 (1987). Trial counsel's failure to object to the introduction of the photographs under R. Evid. 403 denied Craig of his right to a fair trial, due process, and a reliable determination of his guilt in a capital case as guaranteed by United States and Ohio Constitutions.

4. Conclusion.

Craig was denied the effective assistance of counsel at the penalty phase of his capital trial. Strickland, 466 U.S. 668. Counsel's failure to render the effective assistance of counsel prejudiced Craig in violation of his constitutional rights and his death sentence must be vacated. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

Proposition of Law No. 5

Misconduct by the prosecutor at the penalty phase of this capital trial violated Craig's due process right to a reliable death sentence. U.S. Const. amends. VIII, XIV.

Craig's right to a reliable death sentence was prejudiced by the cumulative effect of misconduct by the prosecutor at the penalty phase of this capital trial. First, the prosecutor cross-examined Dr. Bendo that the goal of mitigation was to "explain [Craig's] behavior." (Tp. 3028). It is well settled that mitigating evidence must not be construed as an excuse for legal culpability. State v. Williams, 99 Ohio St. 3d 493, 515-16, 794 N.E.2d 27, 52 (2003) (citing State v. Bey, 85 Ohio St. 3d 487, 498, 709 N.E.2d 484 (1999)); Eddings v. Oklahoma, 455 U.S. 104, 113 (1984); Tennard v. Dretke, 542 U.S. 274, 285 (2004). Rather, the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death.'" Tennard, 542 U.S. at 285 (citing Skipper v. South Carolina, 476 U.S. 1, 5 (1986)).

The State's question was misleading because it directed the jury to look at a cause and effect relationship between the crime and Craig's proffered mitigation. No such casual nexus is required under the law. Id.

The State also improperly argued that the standard for introducing photographs at the penalty phase is under Ohio R. Evid. 403. (Tp. 3080). However, the admission of photographs at the penalty phase must be admitted under State v. Morales, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 274 (1987). Unlike the Ohio R. Evid. 403, Morales looks to the probative value of each photograph must outweigh any potential danger of prejudice to the defendant. Id. Ohio R. Evid. 403 only requires mandatory exclusion where the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury. It does not look at the prejudice to the defendant. There is a stricter

evidentiary standard for the introduction of photographs in capital cases. Morales, 32 Ohio St. 3d at 257-58, 513 N.E.2d at 274. The State argued the incorrect standard.

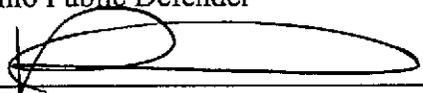
The State's misstatements of the law violated Craig's rights to a fair sentencing determination under the United States and Ohio Constitutions.

E. Relief Requested

Appellant Donald L. Craig has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Craig requests that this Application for Reopening be granted and that he be afforded an opportunity to file a new appellate brief with supporting materials in order to establish that prejudicial errors were made in the trial court, and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to this Court.

Respectfully submitted,

David H. Bodiker
Ohio Public Defender



Robert K. Lowe (0072264)
Assistant State Public Defender
Counsel of Record



Linda E. Prucha (0040689)
Assistant State Public Defender

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Counsel For Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPLICATION FOR REOPENING was forwarded by regular U.S. mail to the offices of Richard Kasay, Assistant Summit County Prosecuting Attorney, 53 University Avenue, Akron, Ohio 44308 on the 14th day of December, 2006.

A handwritten signature in black ink, appearing to read 'Robert K. Lowe', is written over a horizontal line. The signature is stylized with a large loop at the end.

Robert K. Lowe
Counsel for Appellant

220800

Exhibit A

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No. 04-1554
Donald Lavell Craig,	:	
Appellant.	:	Death Penalty Case

Affidavit Of Robert K. Lowe

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Robert K. Lowe, after being duly sworn, hereby state as follows:

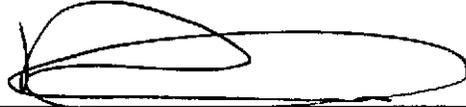
1. I am an attorney licensed to practice law in the state of Ohio since 2000. I have been an Assistant State Public Defender in Ohio since 2001. My only area of practice is capital litigation. I am certified under Sup. R. 20 as appellate counsel in capital cases.
2. Due to my focused practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed or recommended.
3. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. Evitts v. Lucey, 469 U.S. 587 (1985).
4. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05 (Anderson 1995); State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E.2d 625 (1986).

5. After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.
6. For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.
7. Since the reintroduction of capital punishment in response to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.
8. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and-fact-related issues, unique to the case, that impinge on federal constitutional rights.
9. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.
10. It is important that appellate counsel realize that the capital reversal rate in the state of Ohio is eleven percent on direct appeal and less than one percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Therefore, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, the real audience of the direct appeal is the federal court.

11. Based on the foregoing standards, I have identified five propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in Craig's application for reopening were not presented to this Court.

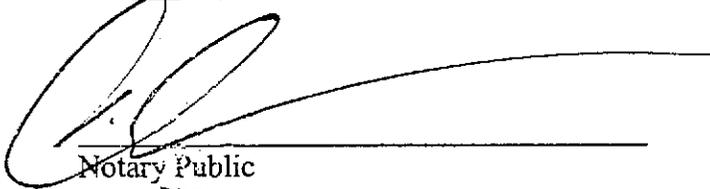
13. Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, those errors would have been preserved for federal review.

14. Therefore, Donald Lavell Craig was detrimentally affected by the deficient performance of his former appellate counsel.



Robert K. Lowe
Counsel for Appellant Donald Lavell Craig

Sworn to and subscribed before me
this 14th day of December, 2006.



Notary Public

THOMAS KENNETH LEE, ATTORNEY
NOTARY PUBLIC • STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 O.R.C.