

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. 03-1766
Robert Bethel, :
Appellant. : Death Penalty Case

On Appeal From The Court Of Common Pleas
Of Franklin County, Case No. 00CR-11-6600

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

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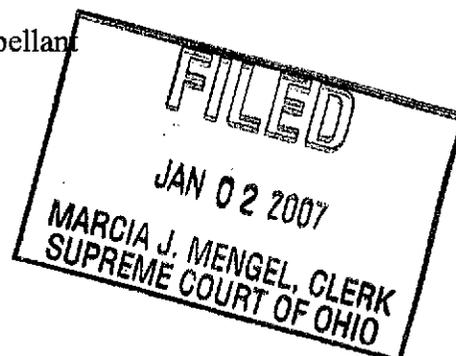
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In The Supreme Court Of Ohio

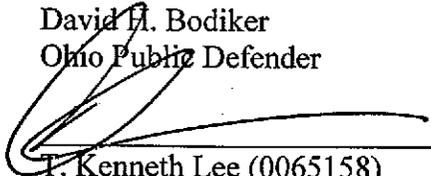
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Application For Reopening Pursuant To S.Ct. Prac. R. XI, Section 5

Appellant Bethel 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 Bethel's direct appeal. A Memorandum in Support is attached and incorporated by reference.

Respectfully submitted,

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Ohio Public Defender



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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 Franklin County Court of Common Pleas jury convicted Appellant Robert Bethel of two counts of aggravated felony murder; each carrying a death specification. The trial court sentenced him to death. Bethel was represented at trial by attorneys Richard Ketcham and Kirk McVay.¹

Attorney Ravert J. Clark represented Bethel on his direct appeal to this Court. On October 4, 2006, this Court affirmed Bethel's sentence. State v. Bethel, 110 Ohio St. 3d 416, 845 N.E. 2d 150, 2006-Ohio-4853 (2006).

B. Reopening Is Required

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

¹ Bethel was represented by Ronald B. Janes and W. Joseph Edwards during the initial proceedings where he pled guilty. Janes and Edwards were subsequently replaced by Dane C. Chavers and Frederick D. Benton, when Janes and Edwards were allowed to withdraw as counsel after Bethel's plea was withdrawn. Chavers and Benton withdraw after representing Bethel at some of his pre-trial motions hearings. They were allowed to withdraw and Ketcham and McVay were subsequently appointed to represent Bethel at trial.

C. Propositions Of Law²

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

Proposition of Law No. 1:

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 under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Bethel had the federal constitutional right to effective assistance of counsel at the trial stage. Strickland v. Washington, 466 U.S. 668, 686 (1984). He was denied this right when counsel failed to:

- call Gary Phillips at the suppression hearing (Tr. 6/7/02, pp. 4-207; Tr. 6/17/03, Vol. XIV, pp.5-35);
- move for a new trial and renew their request to have Bethel's proffer suppressed after Gary Phillips testified (Tr. 6/17/03, Vol. XIV, pp. 5-35);
- proffering and admitting all of the tape recorded conversations between Bethel and Donald Langbein (Tr. 6/10/03, Vol. XI, pp. 46-79, 83-91, 111-116; Tr.6/11/03, Vol. XII, pp. 159-168; Tr. 6/12/03, Vol. XIII, pp. 3-219; Tr. 6/17/03, Vol. XIV, p. 35-46, 86-87);
- proffering and admitting the tape recorded conversation between Bethel and police officers (Tr. 6/12/03, Vol. XIII, pp. 130-137; Tr. 6/17/03, Vol. XIV, p. 35-46);
- adequately cross-examine Donald Langbein on the terms and conditions of his probation (Tr. 6/10/03, Vol. XI, pp. 105-106);
- argue that Bethel's proffer was inadmissible because it was not preceded by a Miranda warning (Tr. 6/7/02, pp. 4-207); and

² Due to the page limitation imposed by S. Ct. Prac. R. XI, Section 5(D), Bethel is unable to fully brief the issues not raised by prior appellate counsel. As such, Bethel's failure to fully brief every single point outline should not be the basis of a waiver of that issue or point.

- request a Mills instruction (Tr. 7/8/03, Vol. XVI, pp. 3-41). See State v. Mills, 62 Ohio St.3d 357, 375 (1992).

Suppression Hearing:

When a criminal defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. See Bradshaw v. Stumpf, 545 U.S. 175 (2005); Dando v. Yukins, 461 F.3d 791, 800 (6th Cir. 2006).

At the suppression hearing counsel failed to call Gary Phillips, the investigator hired by Janes and Edwards (Bethel's initial court appointed trial attorneys). Had counsel called Phillips, Phillips could have established that Bethel's plea was not knowing, voluntary, or intelligent. This would also have allowed the court adequately assess Janes and Edwards credibility. According to Phillips, he was not contacted until three weeks before Bethel was scheduled to go to trial and was not hired until ten days before trial. (Tr. 6/17/03, Vol. XIV, p. 7-8). Phillips testified that until he was hired, no investigation had been done and that the defense team was in panic mode. (Tr. 6/17/03, Vol. XIV, pp. 7, 31). Trial counsel made clear to Phillips that his purpose was not to investigate the case or interview witnesses, but solely to help counsel convince Bethel to take the plea deal. (Tr. 6/17/03, Vol. XIV, pp 16, 18, 20, 29, 31).

Because counsel had not investigated the State's case or talked to Bethel's witnesses; counsel could not assess Bethel's case. The failure to investigate "undermines the knowing[, intelligent], and voluntary nature of [the] plea;" because it is a plea based on uninformed advice. Dando, 461 F.3d at 800.

Cross-examination:

Donald Langbein was a key witness against Bethel. See (Tr.. 6/10/03, Vol. XI, pp. 10-144). Counsel needed to ensure that the jury understood that Langbein was not credible because

he received a lower sentence in federal court and because he had violated his probation. See Davis v. Alaska, 415 U.S. 308 (1974); State v. Greer, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988); (Tr. 6/10/03, Vol. XI, pp. 105-106).

During cross-examination counsel elicited from Langbein that he was “playing the system.” (Tr. 6/10/03, Vol. XI, pp. 105-106). Counsel, though, did not inform the jury why Langbein’s violations were important, nor did counsel elicit from him any other terms or conditions he was violating his probation by “hanging out” on Fourth and Morriell. (Tr. 6/10/03, Vol. XI, p. 25, 104, 109). Had counsel done an adequate cross of Langbein the jury would have heard that he was in violation of his probation for drinking, gambling, or being in the company of known gang members Cheveldes and Jeremy Chavis and James Reynolds a known drug dealer. (Tr. 6/10/03, Vol. XI, p. 25, 104, 109).

As this Court found in Greer, “[a] violation of [probation] is an appropriate subject for impeachment oriented cross-examination since such a violation constitutes a specific instance of failure to keep one’s word and thus is usually probative of truthfulness or untruthfulness.” Greer, 39 Ohio St.3d at 243; 530 N.E.2d at 393.

Counsel’s duty to advocate and to use professional skill under Strickland also includes the duty to object to errors and to otherwise preserve errors for federal review. See e.g. Gravely 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). Bethel’s trial counsel were deficient to his prejudice because they failed to object to:

- the prosecutor’s use of a recorded statement that was never adopted by the declarant Theresa Cobb Campbell in violation of Ohio R.Evid. 803(5) (Tr. 6/10/03, Vol. XI, pp. 159-164);
- the introduction of the excessive amount of shell casings recovered, that had no relation to the murder, to demonstrate Bethel is a bad person, a person with a propensity

to commit criminal offenses (Tr. 6/9/03, Vol. X, pp. 77-79; 85-86; 125-128; 139-141; Tr. 6/11/03, Vol.XII, pp. 162, 164, 167);

- hearsay testimony presented by the State (Tr. 6/9/03, Vol. X, pp. 168- 169, 172);
- the prosecutor's use of leading questions (Tr. 6/10/03, Vol. XI, pp. 6-7, 25);
- the prosecutor eliciting information regarding uncharged offenses to demonstrate Bethel was a bad person, a person with a propensity to commit criminal offenses (Tr. 6/10/03, Vol. XI, pp. 22-26, 33-34, 40-42);
- the prosecutor challenging for cause and the court excusing for cause veniremen Eaton, Johnston, O'Hara, and Carpenter (Tr. 6/4/03, Vol.VII, pp. 124-168; Tr. 6/5/03, Vol. VIII, pp. 130-206);
- the prosecutors injecting their own testimony when examining witnesses (Tr. 6/10/03, Vol. XI, pp. 26, 172-173, 178);
- the closure of the courtroom during the discussion of Bethel's plea agreement in violation of his constitutional right to a public hearing as guaranteed in the Sixth Amendment and Crim.R. 11(F) (Tr. 8/30/01 – Plea Hearing, p. 2);
- the introduction of gang-affiliation testimony to demonstrate Bethel was a bad person, a person with a propensity to commit criminal offenses (Tr. 6/10/03, Vol. XI, pp. 12-15, 17-18)
- during closing arguments when the State shifted the burden of proof (Tr. 6/17/903, Vol. XIV, pp. 125-126); and
- the numerous instances of prosecutorial misconduct outlined in Proposition of Law #3, fully incorporated herein.

Counsel's failure to render the effective assistance of counsel prejudiced Bethel in violation of his constitutional rights and his death sentence must be vacated. Strickland v. Washington, 486 U.S. 668 (1984); U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20. As a result, Bethel is entitled to relief.

Proposition of Law No. 2

The trial court deprived Bethel of his Fourth and Fourteenth Amendment rights when it overruled his motion to suppress the search warrant of his home, since it was not based on a reliable informant.

The State failed to produce evidence sufficient to obtain a search warrant of Bethel's home on Westrun. U.S. Const. Amends. IV, XIV. See (Tr. 6/9/03, Vol. X, pp. 111-119).

The affidavit produced by the State in support of the search warrant fails under Illinois v. Gates, 462 U.S. 213 (1983). It fails for three reasons.

First, the affidavit attached to the search warrant is conclusory. (Tr. 6/9/03, Vol. X, pp. 111-119). Second, Cobb does not say what kind of weapons Bethel allegedly had, nor does she describe the weapons in sufficient detail to establish that they are "like [the guns] used in the murder of Hawks and Reynolds." (Tr. 6/9/03, Vol. X, 115). Finally, the State at no time presented any information to the court as to the reliability of the informant. (Tr. 6/9/03, Vol. X, pp. 111-119).

As a result, Bethel was deprived of his constitutional rights and was thereby prejudiced.

Proposition of Law No. 3

Bethel was deprived of his right to a fair trial, due process and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments due to the misconduct by the prosecution.

Bethel's right to a reliable trial was prejudiced by the effect of prosecutor misconduct at the trial phase of his capital trial. The misconduct is extensive:

- purposefully misleading the jury in closing arguments into believing that Bethel had no idea what Theresa Cobb would testify to when the State knew that Bethel had seen her taped statement prior to entering his plea. (Tr. 6/7/02, Vol. IV, pp. 173-174, 176-178, Tr. 6/11/03, Vol. XII, p. 150; Tr. 6/18/03, Vol. XIV, pp. 15-16, 123);
- improperly introducing Bethel's suppression hearing testimony and the transcripts of the suppression hearing when the trial court specifically told the State that Bethel's suppression hearing testimony may not be used for any other purpose (Tr. 6/7/02, Vol. IV, p. 63; Tr. 6/12/03, Vol. XIII, p. 172, 175-177, 179, 209-210; State's trial EX. M-1);
- misstating the bullet wound entrance and exit wounds (Tr. 6/11/03, Vol. XII, pp. 50-72, 78-98; Vol. XIV, pp. 118-119);

- shifting the burden of proof during closing arguments (Tr. 6/17/903, Vol. XIV, pp. 125-126);
- introducing an excessive amount of shell casings and bullets that had no relation to the murder in an effort to demonstrate Bethel was a bad person, a person with a propensity to commit criminal offenses (Tr. 6/9/03, Vol. X, pp. 77-79; 85-86; 125-128; 139-141; Tr. 6/11/03, Vol. XII, pp. 162, 164, 167);
- presenting hearsay testimony (Tr. 6/9/03, Vol. X, pp. 168-169, 172; Tr. 6/12/03, Vol. XIII, pp. 105-106);
- using leading questions (Tr. 6/10/03, Vol. XI, pp. 6-7, 25);
- eliciting information regarding uncharged offenses to demonstrate to demonstrate Bethel was a bad person, a person with a propensity to commit criminal offenses (Tr. 6/10/03, Vol. XI, pp. 22-26, 33-34, 40- 42);
- the prosecutors injecting their own testimony when examining witnesses (Tr. 6/10/03, Vol. XI, pp. 26, 172-173, 178, 204-206; Tr. 6/11/03, Vol. XII, p. 148; Tr. 6/12/03, Vol. XIII, pp. 92, 101-102, 120-122, 127-128, 184, 188-191, 193, 195-196, 200-205, 207- 208, 218);
- eliciting alleged gang affiliation testimony to demonstrate Bethel as a bad person, a person with a propensity to commit criminal offenses (Tr. 6/10/03, Vol. XI, pp.12-15, 17-18); and
- vouching for the credibility of witnesses (Tr. 6/12/03, Vol. XIII, p.105; Tr. 6/17/03, Vol. XIV, p. 56)

The State's acts of misconduct violated Bethel's rights to a fair trial under the United States and Ohio Constitutions. See Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974); Berger v. United States, 295 U.S. 78, 89 (1935).

Proposition of Law No. 4

Bethel was deprived of his right to a fair trial, due process and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments when the trial court allowed the State to introduce a statement that was never adopted by the witness in accordance with Ohio Evid.R. 803(5).

Over the objection of defense counsel, the court admitted and allowed Cobb to read a statement she never adopted at the time it was allegedly given to the police. (Tr. 6/10/03, Vol. XI, pp. 159-164).

The “statement” affected Bethel’s right to a fair trial in two ways. First, the “statement” is hearsay, since Cobb never adopted it at the time it was made, so Bethel could not cross-examine her on it because she was not the maker of the statement. See Crawford v. Washington, 541U.S. 36 (2004); U.S. Const. amend. VI and Ohio Evid.R. 803(5). Second, the “statement” was used as a means to bolster Cobb’s credibility and other statements she allegedly made to the police.

Bethel’s inability to cross-examine Cobb about the alleged statement deprived him of his constitutional right to confront the witnesses against him. As such, the trial court erred in admitting and allowing Cobb to read the alleged statement.

Proposition of Law No. 5

Bethel was deprived of his right to a fair trial, due process and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments when the trial court admitted Bethel’s proffer and plea as it was not given knowingly, voluntarily & intelligently.

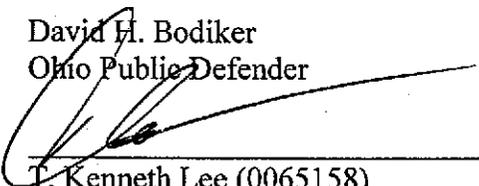
Bethel provided enough information during the suppression hearing and at trial to establish that his proffer and plea were not given knowingly, intelligently, and voluntarily. (Tr. 6/7/02, Vol. IV, pp. 4-222; Tr. 6/11/03, Vol. XII, pp. 151-154; Tr. 6/12/03, Vol. XIII, pp. 166-168, 179-184; Tr. 6/17/03, Vol. XIV, pp.5-35). The failure of the court to suppress the statements and to order a new trial deprived Bethel of his constitutional right to a fair trial, due process and equal protection. See Brady v. U.S., 397 U.S. 742, 748 (1970); Kercheval v. U.S., 274 U.S. 220 (1927); State v. Engel, 74 Ohio St.3d 525, 600 N.E.2d 450 (1996).

E. Relief Requested

Appellant Robert Bethel has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Bethel 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



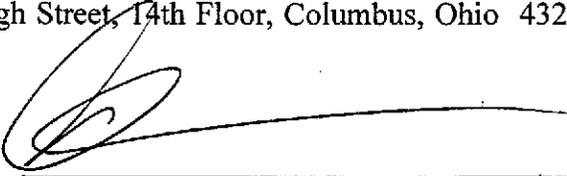
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Reopening was forwarded by regular U.S. mail to the offices of Steven Taylor and Richard Termuhlen, II, Franklin County Assistant Prosecutors, 373 S. High Street, 14th Floor, Columbus, Ohio 43215 on this 2nd day of January, 2007.



T. Kenneth Lee
Counsel for Appellant

Exhibit A

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No. 03-1766
Robert Bethel,	:	
Appellant.	:	Death Penalty Case

Affidavit Of T. Kenneth Lee

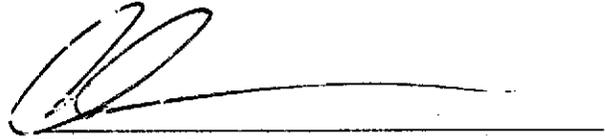
STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, T. Kenneth Lee, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 1995. I have been an Assistant State Public Defender in Ohio since 1997. 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).

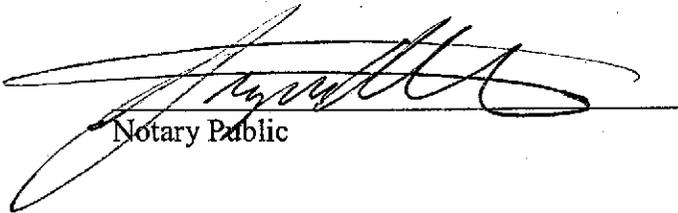
5. After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.
6. For counsel to properly identify issues, they must have a good knowledge of 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 Bethel'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, Robert Bethel was detrimentally affected by the deficient performance of his former appellate counsel.



T. Kenneth Lee
Counsel for Appellant Robert Bethel

Sworn to and subscribed before me
this 7th day of January, 2007.



Notary Public



STEPHEN P. HARDWICK, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.