

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CRAIG MORRIS,

Defendant-Appellant.

Case No. 09-1642

On Appeal from the Franklin Co. Court of  
Common Pleas  
County Court of Appeals  
Tenth Appellate District

C.A Case No. 05Ap-1139  
(C.P.C. No. 03Cr01-391)

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT CRAIG MORRIS

CRAIG MORRIS #469462

NOBLE CORECTIONAL INSTITUTION

15708 MCCONELSVILLE

CALDWELL, OHIO 43724

DEFENDANT-APPELLANT, PRO SE

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Judgment Entry and opinion, Court of Appeals, Franklin County, Ohio June 26<sup>th</sup> , 2009.

## STATEMENT OF THE CASE AND FACTS

APPEALANT CRAIG MORRIS WAS INDICTED IN FRANKLIN COUNTY ON 1-10-2003 ON FIVE COUNTS OF FEL. ASS. (RC 2903.11) W/ GUN SPEC.

ON 4-1-2004 I WAS FOUND GUILTY BY A JURY TRIAL , THEN PROCEEDED TO SENTENCING ON 4-20-2004 AND WAS SENTENCED TO A PRISON TERM OF 11 YEARS.

THEN AT THE SENTENCING ON 4-2-2004 MY TRIAL COUNSEL, (AFTER AMPLE EVIDENCE WHICH HAD SHOWN THAT JUROR " KATHREEN ROBINSON - JUROR NO. 12", HAD MADE AN ATTEMPT TO BRIBE THE DEFENDANT (ME) TO PAY HER \$ 2000.00 FOR A FAVORABLE JURY VERDICT, IF SHE WAS NOT PAID THEN A DIS-FAVORABLE OUTCOME FROM THE JURY WOULD OCCUR) , TRIAL COUNSEL FILED A MOTION FOR MIS-TRIAL.

THEN, AFTER REVIEW OF THE MOTION, JUDGE MILLER ORDERED AN IMMEDIATE INVESTIGATION OF THE JURY AND FURTHER ORDERED THAT SUCH INVESTIGATION BE FORWARDED TO THE FRANKLIN COUNTY SHERIFF DEPARTMENT. AND ORDERED THE PROSECUTION TO INVESTIGATE AS WELL.

THEN, (AFTER "NO" INVESTIGATION AFTER A COURT ORDER AND AFTER SEVERAL INQUIRIES INTO THE STATUS OF THE INVESTIGATION), THE MOTION, OUT OF THE BLUE, WAS DENIED ON 8-24-2004 (4 months later).

THEN ON 11-3-2004 I FILED A (TIMELY) PETITION FOR POST CONVICTION, RAISING THE FOLLOWING CLAIMS;

**1- TRIAL COURT IS IN VIOLATION OF THE CONSTITUTION WHICH DEMANDS FAIR TRIAL.**

**2- PETITIONER SUFFERS FROM PROSECUTOR MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL AND MISCARRIAGE OF JUSTICE.**

HOWEVER (EVEN AFTER A THREE YEAR WAIT WHICH TOOK A FEDERAL COURT ORDER FOR SUCH PETITION/WRIT TO BE RULED UPON ), THERE WAS NO ANSWER, NOR RULING ON SUCH WRIT OF POST CONVICTION WHICH COMPELLED ME TO FILE A WRIT OF MANDAMAS ON 6-8-05 IN THE TENTH DISTRICT APPEALS COURT, WHICH THE APPEALS COURT DENIED SUCH, WITHOUT REVIEW ON 11-29-05. (HOWEVER, LATER, THE FEDERAL DISTRICT COURT ORDERED FOR THE POST CONVICTION BE RULED ON).

THEN I FILED A (TIMELY) HABEAS ACTION ON 9-29-2005 WHICH ON 11-14-2005 THE MAGISTRATE JUDGE ORDERED A STAY OF ACTION WHILE I EXHAUST THE CLAIMS IN THE LOWER COURT (STAY GRANTED SEE: Morris v. Warden, Case No. 2:05-cv-903).

ON 10-25-05 I FILED A DELAYED APPEAL (DUE TO COUNSELS NEGLECT TO FILE A TIMELY APPEAL) , (SEE 2008 WL 781834, S.D.Ohio, March 24, 2008 (NO. 2:06-CV-324). WHICH WAS DENIED ON 12-6-05 THEN I PROCEEDED TO THE SUPREME COURT ON 01-3-06 WHICH WAS DENIED ON 4-12-06.

(THEN AFTER SUCH R&R WAS SATISFIED, WHICH REQUIRED ME TO BRING MY CLAIMS TO THE STATE COURTS FIRST, WHICH THE STATE FAILED TO CORRECT NOR REVIEW), ON 1-26-2007, THE FEDERAL DISTRICT COURT GRANTED REVIEW, APPOINTED COUNSEL AND HELD A HEARING ON GROUND THREE AND FOUR, WHICH RAISED:

**(CLAIM 3.) : "DENIAL EFFECTIVE COUNSEL"**  
**(CLAIM 4.) : "DENIAL RIGHT TO APPEAL"**

THEN AFTER REVIEW, ON CLAIMS THREE AND FOUR THE DISTRICT COURT "**GRANTED**" THE CLAIM(S), HOWEVER DEEMED THE OTHER CLAIMS (RAISED FOR HABEAS REVIEW) UNEXHAUSTED, THEREFORE ORDERING THAT THE STATE COURT EITHER GRANT DELAY APPEAL WITH APPOINTMENT OF COUNSEL, OR RELEASE DEFENDANT WITHIN 60 DAYS. (SEE: Morris v. Warden, 2:06-cv-324)

THE STATE, AS ORDERED BY THE FEDERAL COURT, ISSUED A DIRECT APPEAL ON 4-4-08 AND APPOINTED COUNSEL IN COMPLIANCE WITH THE DISTRICT COURT ORDER WHICH ALSO ORDERED ME, (THROUGH SUCH APPEAL) TO RAISE AND EXHAUST THE UNEXHAUSTED CLAIMS ON THE HABEAS CORPUS PETITION (SEE: Morris v. Warden, 2:06-cv-324),

THEN ON 11-16-08 THE APPOINTED COUNSEL FAILED TO RAISE THE GROUNDS WHICH THE FEDERAL DISTRICT COURT GRANTED A STATE APPEAL IN THE FIRST INSTANCE, AND EVEN AFTER SEVERAL (RECORDED) LETTERS TO CORRECT THE CLAIMS OF ERROR, NOT ONLY TO APPEAL COUNSEL, BUT ALSO TO THE TENTH DISTRICT APPEALS COURT, APPEAL COUNSEL AND THE APPEALS COURT REFUSED TO ACKNOWLEDGE NOR CORRECT THE ERROR BROUGHT FORTH TO THEIR ATTENTION AND INSTEAD, (EVEN AFTER REMINDING THEM THAT THE FEDERAL COURT ORDERED FOR THESE CLAIMS TO BE RAISED ON APPEAL), COUNSEL IGNORED SUCH WARNING, AND THE APPEALS COURT DID AS WELL AND THEN ALSO DENIED SUCH APPEAL ON 5-21-09

THEN ON 6-5-2009 A (TIMELY) REOPENING WAS FILED RAISING :

**"APPEAL COUNSEL PURPOSELY AND NEGLECTFULLY IGNORED A FEDERAL DISTRICT ORDER AND MY WISHES FOR CLAIMS TO BE RAISED."**

(WHICH IS THE SOLE PURPOSE FOR THE FEDERAL COURT GRANTING APPEAL IN THE FIRST PLACE).

THEN ON 8-20-2009 THE TENTH DISTRICT APPEALS COURT DENIED REOPENING OF APPEAL AND HELD:

**"APPELLATE COUNSEL NEED NOT RAISE .... ISSUES AND HAS WIDE LATITUDE TO DECIDE WHICH ISSUES AND ARGUMENTS TO RAISE."**  
**(EVEN THOUGH THIS VIOLATED THE DISTRICT COURTS RULING)**

Therefore,

I AM NOW BEFORE THIS COURT, TIMELY, FOR FAIR REVIEW AND RELIEF...

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

**REPORT AND RECOMMENDATION**

NORAH McCANN KING, United States Magistrate Judge.

On September 26, 2007, the Magistrate Judge held an evidentiary hearing on habeas corpus claims three and four, in which petitioner asserts that he was denied the right to appeal and the effective assistance of counsel because his attorney failed to file an appeal after being requested to do so. On November 14, 2007, respondent filed a post hearing memorandum. Doc. No. 29. On December 3, 2007, petitioner filed a post hearing memorandum. Doc. No. 34. After review of the entire record and consideration of evidence submitted at the evidentiary hearing, for the reasons that follow, the Magistrate Judge **RECOMMENDS** the petition for a writ of habeas corpus conditionally be granted on petitioner's claim of ineffective assistance of counsel for failure to file the appeal. It is **SPECIFICALLY RECOMMENDED** that the State be **DIRECTED** to release petitioner or reinstate his appeal within sixty (60) days. The Magistrate Judge further **RECOMMENDS** that claim four be **DISMISSED**, as moot, and that claim two and the remainder of petitioner's claims of ineffective assistance of counsel <sup>FN1</sup> be **DISMISSED** without prejudice as unexhausted, as these claims may be raised in petitioner's reinstated appeal in this case.

FN1. Petitioner asserts the ineffective assistance of counsel due to his attorney's failure to raise an issue under Blakely v. Washington, 542 U.S. 296 (2004) or "argue further to the fact of an altered jury and verdict." *Petition*, at 6.

**PROCEDURAL HISTORY**

\*6 This matter involves petitioner's April 1, 2004, convictions after a jury trial in the Franklin County Court of Common Pleas on four counts of felonious assault with specifications. *See Exhibit B to Return of Writ*. On May 20, 2004, the trial court sentenced petitioner to an aggregate prison term of eleven years. *Id.* On that same date, a hearing was conducted on petitioner's motion for mistrial, in which he alleged that one of the jurors had offered to return a "not guilty" verdict in exchange for money. *Exhibit C to Return of Writ*. On August 24, 2004, the trial court denied that motion. *Exhibit F to Return of Writ*. A timely notice of appeal was not filed. On October 5, 2005, petitioner filed a motion for delayed appeal. *Exhibit I to Return of Writ*. On December 6, 2005, the state appellate court denied petitioner's motion and, on April 12, 2006, the Ohio Supreme Court dismissed petitioner's subsequent appeal.

Petitioner pursued other forms of state court relief without success. On November 3, 2004, he filed a *pro se* post conviction petition in the state trial court; however, the record does not reflect that the trial court has ever issued a ruling on that petition. In that petition, petitioner alleged in relevant part:

Douglas W. Shaw filed a motion for mistrial. I was sentence[d] to eleven years. Directly after, I asked my lawyer to file for my appeal[;] however, he neglected to do so! Then four months later my motion for mistrial was denied.

On March 1, 2006, petitioner also filed a motion "to appeal consecutive and non-minimum sentences" in the state appellate court, alleging that his sentence violated Blakely v. Washington, 542 U.S. 296 (2004), as well as state law. *Exhibit N to Return of Writ*. On May 11, 2006, the appellate court denied

that motion as barred by Ohio's doctrine of *res judicata*. *Exhibit P to Return of Writ*. On April 27, 2006, petitioner filed a motion for re-sentencing in the state trial court. That action apparently remains pending as well.

On May 2, 2006, petitioner filed the instant *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>FN2</sup> He alleges that he is in the custody of the respondent in violation of the Constitution of the United States based upon the following grounds:

FN2. Petitioner filed a prior federal habeas corpus petition on September 29, 2005; however, that action was dismissed without prejudice as unexhausted on November 14, 2005. *See Morris v. Warden*, Case No. 2:05-cv-903 (S.D. Ohio, Eastern Division November 14, 2005); *Exhibits to Petition*.

1. State has/is depriving my right to access the courts and redress my injury.

A timely post conviction [petition] was filed on November 3, 2004, and pursuant to rule, the response/decision must be within 180 days. However, it [has] been almost 2 years and the courts refuse to respond even after numerous motions for State's and a writ of mandamus to compel a decision, which deprives my constitution rights and provision protection [sic].

2. State had deprived me my right to an impartial jury and fair trial.

Prosecution and trial court failed and ignored to submit the evidence that one of the jurors offered a bribe for a hung jury, and after the evidence was obtained to prove such, trial court ignored a motion for mistrial which enclosed the evidence to prove such, which then rendered altered verdict [sic].

\*7 3. Denial of effective counsel.

[Trial counsel failed] to argue maximum sentence and appeal the denial of the motion for mistrial and argue further to the fact of an altered jury verdict.

4. Denial of right to appeal.

I was deprived my right of appeal after the jury verdict. My counsel failed to file an appeal which deprived me of rights secured [sic].

On March 1, 2007, the Court dismissed claim one, deferred consideration of claim two, and appointed counsel to represent petitioner at an evidentiary hearing on the allegations contained in claims three and four. Doc. Nos. 12, 14. An evidentiary hearing was held on September 26, 2007. The parties filed supplemental memoranda and the record is now ripe for resolution of these claims.

#### **CLAIMS THREE AND FOUR**

In claim three, petitioner alleges that he was denied the effective assistance of counsel because his attorney failed to file an appeal after petitioner requested that he do so. Petitioner also asserts that his attorney improperly failed to object to his sentence or to pursue a claim of jury misconduct. In the related claim four, petitioner alleges that he was denied his right to appeal when the state court of appeals denied his motion for delayed appeal.

As discussed in this Court's prior *Report and Recommendation*, the failure of an attorney to file a timely appeal after being requested to do so by a defendant constitutes the ineffective assistance of counsel.

[E]very Court of Appeals that has addressed the issue has held that a lawyer's failure to appeal a judgment, in disregard of the defendant's request, is ineffective assistance of counsel regardless of whether the appeal would have been successful or not. See Castellanos v. United States, 26 F.3d 717, 719 (7th Cir.1994); United States v. Peak, 992 F.2d 39, 42 (4th Cir.1993); United States v. Horodner, 993 F.2d 191, 195 (9th Cir.1993); Bonneau v. United States, 961 F.2d 17, 23 (1st Cir.1992); United States v. Davis, 929 F.2d 554, 557 (10th Cir.1991); Williams v. Lockhart, 849 F.2d 1134, 1137 n. 3 (8th Cir.1988). We agree with those courts and hold that the failure to perfect a direct appeal, in derogation of a defendant's actual request, is a *per se* violation of the Sixth Amendment.

Ludwig v. United States, 162 F.3d 456, 459 (6th Cir.1998).

[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); cf. Peguero v. United States, 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999) (“[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit”). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

\*8 Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). Additionally,

[t]he Constitution is violated if a convicted defendant is not given the right to appeal “by reason of his lack of knowledge of his right and the failure of his counsel or the court to advise him of his right to appeal with the aid of counsel.” Jacobs v. Mohr, 265 F.3d 407, 419 (6th Cir.2001) (citing Goodwin v. Cardwell, 432 F.2d 521, 522-23 (6th Cir.1970))....

In order to be properly informed, a defendant must be told of his right to appeal, the procedures and time limits involved in proceeding with that appeal, and the right to have the assistance of appointed counsel for that appeal. White, 180 F.3d at 652 (5th Cir.1999), Norris v. Wainwright, 588 F.2d 130, 135 (5th Cir.), cert. denied, 444 U.S. 846, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979) The petitioner bears the burden of showing by a preponderance of the evidence that he was not advised of his rights. Faught v. Cowan, 507 F.2d 273, 275 (6th Cir.1974), cert. denied, 421 U.S. 919, 95 S.Ct. 1583, 43 L.Ed.2d 786 (1975). Further, a defendant cannot base a claim on the court's failure to inform him of his appellate rights if he has personal knowledge of these rights. Peguero, 526 U.S. at 29-30, 119 S.Ct. 961(citing Soto v. U.S., 185 F.3d 48, 54 (2d Cir.1999)).

Wolfe v. Randle, 267 F.Supp.2d 743, 747-748 (S.D.Ohio 2003).

Petitioner was represented before the trial court by Douglas Shaw, Esq. After a jury found petitioner guilty of four counts of felonious assault, the trial court revoked petitioner's bond pending sentencing. *Transcript, Evidentiary Hearing*, at 4-5. At the sentencing, all parties agree, the trial court judge failed to advise petitioner of his right to appeal, in contravention of Ohio R.Crim. P. 32. See *Petitioner's Exhibit A*. Although his testimony was inconsistent in many of its details, petitioner expressly testified that he asked Shaw to file an appeal on petitioner's behalf:

I just asked [Shaw] to make sure he filed my appeal, and from my understanding it was yes because he filed a motion for a mistrial during my sentencing.

*Transcript, Evidentiary Hearing*, at 6. Petitioner did not ask the court to appoint new counsel on appeal because he did not know that he had the right to court-appointed appellate counsel. *Id.*, at 18. Petitioner learned that no appeal had been filed in October 2004, following which he filed a post conviction petition. *Id.*, at 10. At no time did petitioner intend to waive his right to appeal.

Shaw does not ordinarily handle criminal appeals and typically communicates this to clients. *Id.*, at 36. It is a part of his standard practice to inform clients that his representation does not extend to an appeal. *Id.*, at 37. Although Shaw had no specific recollection of many of the specifics of his representation of petitioner, he was nevertheless confident that he did in fact advise petitioner of his appellate rights:

\*9 The conversation that I am certain that I had with him was during the period after the jury had been sent back to deliberate and prior to them reaching a verdict, something I do in every case where there's a jury deliberating, among other things, I explained that it was likely that if there was a jury-a bad verdict, a conviction on any of the felony accounts [sic] with the gun specification it was likely his bond would be revoked....

I explained to him that in that event, with him being locked up, it's likely that he would be determined to be indigent by the court.... [H]e would be eligible for appointed counsel, and that appointed counsel would not be me.

I remember explaining to him that that new lawyer could then point out mistakes that I made either at trial, on the record kind of mistakes that would be transcribed by a court reporter, or matters off the record that didn't necessarily have to happen in the trial or in the courtroom, but might be procedural or technical decisions.

*Id.*, at 26. Shaw testified petitioner did not ask him to file an appeal. Shaw would have done so had petitioner asked, as he has for other clients. *Id.*, at 42. Nevertheless, Shaw knew that petitioner intended to pursue an appeal. *Id.*, at 30. Shaw described petitioner's reaction to the jury's guilty verdict as "shocked" and "devastated." *Id.*, at 30. When asked why petitioner might have assumed that he was going to file the notice of appeal or act as appellate counsel, Shaw stated:

He may have been confused. I liked Craig. He knew that I believed in his case and his innocence. He may have assumed that I would do this other work....

*Id.*, at 27. Indeed, Shaw vaguely recalled stopping by the office of the trial judge to see who had been appointed as appellate counsel. *Id.*, at 31.

And then I heard nothing more from Craig or his family and assumed that they had either made other arrangements and hired other counsel or that counsel had been appointed for him.

*Id.* However, Shaw never affirmatively inquired whether an appeal had been filed on petitioner's behalf. *Id.*, at 32.

As a preliminary matter, respondent contends that petitioner has not properly raised in this habeas corpus petition a claim that he was denied his right to appeal by reason of the trial court's failure to advise him of his appellate rights, in contravention of Ohio law. *See Respondent's Post Hearing Memorandum*, at 8. Alternatively, respondent contends that any such claim has been procedurally

defaulted because petitioner did not raise in the state courts an issue regarding the trial court's failure to advise him of his appellate rights. *See id.*

Respondent argues that, to the extent that petitioner raises an issue regarding a violation of Ohio R.Crim. Pro. 32, such claim fails to present a claim appropriate for federal habeas corpus review. A federal court may review a state prisoner's habeas petition only on the grounds that the challenged confinement is in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a perceived error of state law." Pulley v. Harris, 465 U.S. 37, 41 (1984); Smith v. Sowders, 848 F.2d 735, 738 (6th Cir.1988). A federal habeas court does not function as an additional state appellate court reviewing state courts' decisions on state law or procedure. Allen v. Morris, 845 F.2d 610, 614 (6th Cir.1988). "[F]ederal courts must defer to a state court's interpretation of its own rules of evidence and procedure" in considering a habeas petition. *Id.* (quoting Machin v. Wainwright, 758 F.2d 1431, 1433 (11th Cir.1985)). Only where the error resulted in the denial of fundamental fairness will habeas relief be granted. Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir.1988). Such are not the circumstances here.

\*10 In any event, however, petitioner does not appear to have separately raised this claim in these proceedings. The crux of petitioner's argument in claims three and four is that petitioner was denied the effective assistance of counsel and the right to appeal. As detailed in this Court's prior *Report and Recommendation*, petitioner alleged in the state courts that his attorney improperly failed to file the appeal after being requested to do so, and that petitioner "did not have the knowledge of doing so on [his]own due to being late." *See Exhibit N to Return of Writ; see also Exhibits I and G to Return of Writ*. The fact that the trial court failed to advise petitioner of his right to appeal lends evidentiary support to petitioner's allegation in this regard.

After review of the entire record, this Court credits Shaw's testimony that he advised petitioner, while the jury was deliberating its verdict, of his right to appeal and of his appellate rights. Petitioner therefore was aware of his right to appeal even though the trial court failed to separately advise petitioner of that right. However, the Court also finds that petitioner believed that Shaw would file a notice of appeal on petitioner's behalf. To the extent that there was confusion on this point, as between petitioner and Shaw, it was because Shaw failed to clarify petitioner's expectations of him.

In Roe v. Flores-Ortega, *supra*, 528 U.S. at 476, the United States Supreme Court considered whether an attorney may be deemed constitutionally ineffective for failing to file a notice of appeal where the defendant fails to clearly convey his wishes one way or the other. *Id.* The Supreme Court stated:

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, *and making a reasonable effort to discover the defendant's wishes*. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal.... If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance.

*Id.*, at 478 (emphasis added) (citation omitted). An attorney's performance would not be constitutionally unreasonable in failing to affirmatively consult with his client regarding an appeal, for example, where the defendant pleads guilty, is sentenced as anticipated, advised by the trial court of his right to appeal, expresses no interest in appealing, and there exist no nonfrivolous grounds for appeal. *Id.*, at 479. Similarly, an attorney's performance would not be constitutionally unreasonable in failing to affirmatively consult with his client regarding an appeal, for example, where the

\*11 sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information.

*Id.*, at 479-480. However, neither of the foregoing scenarios are present here.

Under circumstances such as those presented in this case,

counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.... Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

\* \* \*

We expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal.

*Id.*, at 480-481.

Although the record does not indicate whether or not Shaw believed that petitioner had potentially meritorious grounds for appeal, since the case followed a jury trial and subsequent denial of a motion for new trial, and in view of counsel's statement that he believed in petitioner's innocence, it is unlikely that there would have been no non-frivolous grounds to appeal. Further, while Shaw advised petitioner of his rights to appeal and to court-appointed counsel, and of the time limits for filing an appeal,<sup>FN3</sup> he did so during jury deliberations, and almost two months prior to sentencing.<sup>FN4</sup> Moreover, the fact that the trial court failed to advise petitioner of his appellate rights or to inquire whether petitioner desired that counsel be appointed for purposes of an appeal, both increased the likelihood of confusion on petitioner's part and Shaw's obligation to clarify the situation.

<sup>FN3</sup>. Under Ohio's Appellate Rule 5(B)(3), the trial court's decision on petitioner's motion for a new trial served to extend the time by which a notice of appeal must be filed:

Criminal post-judgment motion. In a criminal case, if a party timely files a motion for

arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered.

However, there is no evidence that Shaw advised petitioner of this fact.

FN4. Petitioner was found guilty on April 1, 2004. He was sentenced on May 20, 2004.

Under these circumstances, and in view of defense counsel's understanding that petitioner intended to pursue an appeal, this Court concludes that counsel had a duty to further consult with petitioner regarding the appeal so as to ensure that petitioner's appellate rights were preserved. Counsel's failure to do so amounted to constitutionally deficient performance. *See Roe v. Flores-Ortega, supra*.

\*12 Still, petitioner must establish prejudice by reason of counsel's failure to further consult with his client. In order to establish prejudice, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.*, at 484.

Respondent argues that, even assuming that defense counsel performed in a constitutionally ineffective manner, petitioner has failed to establish prejudice because he took no action to pursue his appeal until October 5, 2005, when he filed his own motion for delayed appeal. This Court is not persuaded by respondent's argument. Petitioner filed a petition for post conviction relief on November 3, 2004, shortly after he learned, in October 2004, that no appeal had been filed. *Transcript, Evidentiary Hearing*, at 10. In support of his post conviction petition, petitioner alleged the ineffective assistance of counsel due to his attorney's failure to file a timely appeal. *See Exhibit G to Return of Writ*. Petitioner testified at the evidentiary hearing that he filed his post conviction petition "because [there] was no appeal on record." *Transcript, Evidentiary Hearing*, at 10.

[B]y the time I noticed there wasn't nothing filed, I filed a post conviction, and I'm thinking that's what I was supposed to be doing. So I'm waiting on the answer for that. I didn't have any money or anything, so I couldn't afford no other attorney. I was in prison. So I didn't get no answer from my post conviction, so I filed a couple other motions to try to see if I can get some relief.

*Id.*, at 11-12.

[F]rom my understanding and thinking Doug filed my appeal. And when I found out it was never filed, I was-I got sentenced to 11 years. I didn't want to sit and do 11 years, so I tried to file my post conviction to help myself out.

*Id.*, at 12. The trial court has never issued a decision on petitioner's post conviction petition, despite petitioner's *pro se* petition for a writ of mandamus.<sup>FN5</sup> On October 5, 2005, petitioner filed his motion for delayed appeal. *Exhibit I to Return of Writ*.

FN5. That petition was dismissed for failure to comply with state law. *See Morris v. Franklin County Court of Common Pleas*, 2005 WL 3160845 (Ohio App. 10 Dist. November 29, 2005).

Thus, petitioner's delay in filing his motion for delayed appeal does not appear to reflect a lack of diligence on petitioner's part or insincerity in his interest in pursuing an appeal, as respondent suggests. *Post Hearing Memorandum*, at 7. Any delay appears instead to have been the result of his *pro se* status as an incarcerated prisoner and lack of knowledge as to proper legal procedures. See, e.g., *DiCenzi v. Rose*, 452 F.3d 465, 469-70 (6th Cir.2006)(rejecting argument that prisoner did not exercise diligence for statute of limitations purposes in learning about right to appeal because he failed to call the public defender), citing *Granger v. Hurt*, 90 Fed.Appx. 97, 99-101 (6th Cir. Jan. 23, 2004) (unpublished); *Wims v. United States*, 225 F.3d 186, 190 n. 4 (2d Cir.2000); *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir.2004); *Aron v. United States*, 291 F.3d 708, 712 (11th Cir.2002).

\*13 In sum, this Court concludes that petitioner has established that, but for counsel's failure to properly consult with him about filing an appeal, there is a reasonable probability that petitioner would have timely appealed his conviction and sentence. See *Roe v. Flores-Ortega*, supra, 528 U.S. at 484.

Under these circumstances, it is **RECOMMENDED** that the petition for a writ of habeas corpus be conditionally granted on petitioner's claim of ineffective assistance of counsel for failure to file the appeal. It is **FURTHER RECOMMENDED** that the State be **DIRECTED** to release petitioner or reinstate his appeal within sixty (60) days. The Magistrate Judge further **RECOMMENDS** that claim four be **DISMISSED**, as moot, and that claim two and the remainder of petitioner's claims of ineffective assistance of counsel <sup>FN6</sup> be **DISMISSED** without prejudice since these claims might be raised in petitioner's reinstated appeal.

FN6. Petitioner asserts the ineffective assistance of counsel due to his attorney's failure to raise an issue under *Blakely v. Washington*, 542 U.S. 296 (2004) or "argue further to the fact of an altered jury and verdict." *Petition*, at 6.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within ten (10) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir.1987); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

S.D.Ohio,2008.

Morris v. Wolfe

Not Reported in F.Supp.2d, 2008 WL 781834 (S.D.Ohio)

So as this Honorable court can see, I was granted an appeal to raise the un-exhausted claims in the lower court, however appeal counsel neglected and plainly ignored the federal courts holding and sole purpose for an appeal in the first place.

Therefore, pursuant to the following which held;

In addition to raising each claim in appropriate forum, habeas litigant, in order to preserve his constitutional claims for habeas review, must present those claims through entire state court system.  
And

Ineffective assistance of trial counsel claims presented to state courts in appeal from denial of that petition were exhausted could be considered in federal habeas action. **Van Hook v. Anderson**  
127 F.Supp.2d 899  
S.D.Ohio,2001.

And

the result of the appellant's legal proceeding would have been different had defense counsel provided proper representation. Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; State v. Brooks (1986), 25 Ohio St.3d 144.....

therefore,

This Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. See Strickland v. Washington (1984), 466 U.S. 668, 688; State v. Bradley (1989), 42 Ohio St.3d 136, 142 Under this standard, a defendant..... And only agree that counsel failed and/or simply ignored a federal court order for my claims to be raised, which previously had been un-exhausted to the state courts for fair review.

Therefore in final it will be a miscarriage of justice and waive of subject matter jurisdiction for this court to not act now and correct a federal ruling which falls in the line of contempt. According to the district court, because petitioner presented his claims to the courts on direct review, the courts, not petitioner, bear the blame for their failure to recognize and to rule upon that claim. *Id.* The district court found that the state courts' failure to recognize and to address petitioner's presented claims in denying petitioner relief on direct review constituted a constructive denial of in denying petitioner relief on direct review constituted a constructive denial of those claims which was the sole purpose of the federal decision in the first instance, the district court further found that denying petitioner's claims constituted an unreasonable application of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **Hicks v. Straub**  
377 F.3d 538  
C.A.6 (Mich.),2004.

END.

## PROPOSITION OF LAW

*Proposition no. one;*

### **Appellate counsel failed to exhaust proper claims.**

The federal court, granted an appeal "ON" the issues which had been un-exhausted, and counsel failed to exhaust those claims properly.

*Proposition no. two;*

### **Appeal court abused their discretion when permitting the wrong claims to be raised against the federal court ruling.**

The appeals court, upon the obviousness of a federal court order granting me an appeal, "knew" or should have known, that such appeal was granted on the sole basis of the other claims which the federal court deemed un-exhausted, and when the appeals court refused to acknowledge, correct, or re-instate such, created a miscarriage of justice when abusing their discretion.

*Proposition no. three;*

### **The "over-all" errors, have constituted a clear miscarriage of justice, and denial to access the courts to equal justice.**

All the above, and for such a repulsive repeated travel in and out of the courts to exhaust claims which I have been denied to have totally lost way and been mocked, abused and cruelly treated by the state courts and the equal protection of the laws of the land.

*Proposition no. four;*

### **denial of right of appeal.**

The right to appeal was recognized by the federal court, after numerous denials by the lower state courts which based on the federal ruling denied me federal constitutional rights, to now again be denied the right to appeal, with 'effective' counsel and fair and just decision.

*Proposition no. five;*

**denial of effective counsel on appeal**

for not raising errors which were to be raised.

*proposition no. six;*

**the appeals court abused their discretion when falsely quoting 'state vs. foster';**

The appeal court denied my claim based on the foster decision, but wrongly quoted the holding of foster which "IF" it had been read correctly, relief would be granted.

**END**

## CONCLUSION

*Supreme "JUSTICE" is needed in this case which without would demean the meaning for this supremacy created to over-look as well as correct and safeguard all citizens within the power of the justices.*

*When is enough-enough ? How many times does one must travel IN-AND-OUT of the state courts to receive justice ?*

*The federal court, not once but TWICE has served the constitution in my case and in brief remanded my case to be given fair review.*

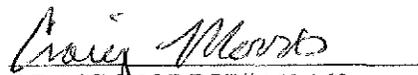
*FAIR REVIEW has been denied from the plain eye view of the record.*

*the authoritative support, as well as the plain information provided in this action will show this honorable court that an abuse(s) of discretion(s) have occurred throughout this entire remedial path, and no relief has been given, nor constitutionally credited, nor taken seriously within my case, but repeated deceptions to thwart the courts of the 'true' underlining claims which from day one has been submitted to the courts, but ignored. The federal court realized this, not once, but twice, and now I need to come to the federal court again to easily show from the record that once again, the court has juggled the truth and destroyed the very spiritual meaning of just and fairness and review. Which now, due to the previous federal court order, the lower court has not only abused their discretion, but has also placed themselves in contempt of court by the federal court order which had ordered and affirmed that all un-exhausted claims be presented in a appeal, but this was ignored from the plain record.*

*Therefore, if this court is to maintain its reputation as being a 'constitutional' court of law, then it can only determine that this denial of a federal order is not only repulsive and in direct violation to the 8<sup>th</sup> and 14<sup>th</sup> am., but also the integrity of the judicial process and system of truth in sentencing with all fairness pursuant to the equal protection clause.*

For the above stated reasons, this Court should accept jurisdiction.

Respectfully submitted,



CRAIG MORRIS#469462

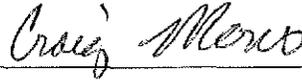
NOBLE CORECTIONAL INSTITUTION  
15708 MCCONELLSVILLE ROAD  
CALDWELL, OHIO 43724  
DEFENDANT-APPELANT, PRO SE

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in support of Jurisdiction was forwarded by regular

U.S. Mail to Ron O'brien, Prosecuting Attorney, 373 South High Street 14<sup>th</sup> floor Columbus, Ohio

43215 on the 10 day of September.

  
\_\_\_\_\_

CRAIG MORRIS #469462  
NOBLE CORECTIONAL INSTITUTION  
15708 MCCONELLSVILLE ROAD  
CALDWELL, OHIO 43724  
DEFENDANT-APPELANT, PRO SE

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	
	:	Case No. _____
Plaintiff-Appellee,	:	
	:	On Appeal from the Franklin Co. Court of
	:	Common Pleas
vs.	:	County Court of Appeals
	:	Tenth Appellate District
	:	
CRAIG MORRIS,	:	
	:	C.A Case No. 05Ap-1139
Defendant-Appellant.	:	(C.P.C. No. 03Cr01-391)

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**APPENDIX TO  
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT CRAIG MORRIS**

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT.

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2009 AUG 24 AM 9:30  
CLERK OF COURTS

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 05AP-1139  
 : (C.P.C. No. 03CR01-391)  
 Craig Anthony Morris, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on August 20, 2009, it is the order of this court that the defendant's application to reopen his appeal is denied.

KLATT, J., FRENCH, P.J., & BRYANT, J.

By: William A. Klatt  
Judge William A. Klatt

MORRIS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OH.  
2009 AUG 20 PM 12:15  
CLERK OF COURTS

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 05AP-1139  
 : (C.P.C. No. 03CR01-391)  
 :  
 Craig Anthony Morris, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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MEMORANDUM DECISION

Rendered on August 20, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Craig Anthony Morris*, pro se.

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ON APPLICATION FOR REOPENING

KLATT, J.

{¶1} On June 5, 2009, defendant-appellant, Craig Anthony Morris, filed a pro se application for reopening pursuant to App.R. 26(B). He attempts to reopen the appellate judgment that was rendered by this court in *State v. Morris*, 10th Dist. No. 05AP-1139, 2009-Ohio-2396. In that appeal, defendant, through counsel, argued that the trial court improperly overruled a challenge for cause to a juror, improperly sustained an objection to certain hearsay testimony, and improperly sentenced him in violation of his constitutional rights. He also alleged that his convictions for felonious assault were not supported by

sufficient evidence and were against the manifest weight of the evidence. Lastly, he contended that he received ineffective assistance of counsel. This court disagreed with defendant's arguments and affirmed defendant's convictions.

{¶2} Defendant now seeks to reopen his appeal based on ineffective assistance of appellate counsel. The State of Ohio has filed a memorandum in opposition to defendant's application. For the following reasons, we deny defendant's application.

{¶3} In order to prevail on an application to reopen an appeal, the defendant must establish "a colorable claim" of ineffective assistance of appellate counsel. *State v. Sanders* (1996), 75 Ohio St.3d 607. The defendant must set forth one or more errors or arguments omitted by appellate counsel and demonstrate that the appellate court did not consider these matters. App.R. 26(B)(2). The application will be granted where there is "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel." App.R. 26(B)(5). In determining whether the applicant has established ineffective assistance of counsel, we apply the standard in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. *Sanders*, supra. Under *Strickland*, the defendant must show that counsel was deficient for failing to raise the issue he now presents and that there was a reasonable probability of success had that issue been presented on appeal.

{¶4} Defendant claims that appellate counsel was ineffective for failing to assert errors that he instructed his counsel to raise. It is well-settled that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶7. In addition, an appellate attorney

has wide latitude and thus the discretion to decide which issues and arguments will prove most useful on appeal. *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, at ¶17.

{¶5} Defendant submitted six claims for his appellate counsel to raise: (1) his sentence was contrary to law, (2) the trial court sentenced him before an investigation occurred into an alleged jury conspiracy, (3) the jury was tainted, (4) ineffective assistance of counsel, (5) insufficient evidence, and (6) denial of right to fair trial and jury. Of these claims, appellate counsel did assign as error in his appeal that his sentence was contrary to law, that he received ineffective assistance of counsel, that his convictions were not supported by sufficient evidence, and that he was denied his right to a fair trial and jury. This court considered and rejected each of those claims. Defendant has not shown that appellate counsel was ineffective in regard to these claims.

{¶6} To the extent defendant argues that appellate counsel failed to raise issues concerning jury improprieties, we assume he refers to his allegation that a juror attempted to bribe him in return for a not guilty verdict. *Morris* at ¶12. Defendant's trial counsel raised this issue in a motion for new trial filed the day of sentencing. Although the trial court proceeded with sentencing, the trial court delayed its decision on the motion for new trial to allow time for the appropriate agencies to investigate the matter. Three months later, the trial court denied defendant's motion for new trial.

{¶7} Appellate counsel was not deficient for failing to raise this issue on appeal. The only evidence in the record that would support defendant's claim was double hearsay testimony from a witness who never talked to the juror that allegedly attempted to bribe defendant. Given the weakness of this evidence, appellate counsel could have

legitimately decided not to raise this issue on appeal. This was well within the discretion of appellate counsel and was not deficient. *Lowe*.

{¶8} Lastly, even if defendant had shown that appellate counsel was somehow deficient for not raising this issue, defendant provides nothing to show that his appeal on this issue had a reasonable probability of success. As we noted in our previous decision, defendant never provided any firsthand evidence to support his allegations of jury impropriety. Accordingly, defendant has not demonstrated a colorable claim of ineffective assistance of appellate counsel.

{¶9} For these reasons, defendant's application to reopen his appeal is denied.

*Application denied.*

FRENCH, P.J., and BRYANT, J., concur.

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