ORIGINAL

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No.: 2006-1366
Duane A. Short,	:	
Appellant.	:	**This Is A Capital Case.**

On Appeal from the
Montgomery County Court of Common Pleas
Case No. 2004 CR 02635

Appellant Duane Short's Application For Reopening Pursuant To
S.Ct. Prac. R. XI, Section 5

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CLERK OF COURT
SUPREME COURT OF OHIO

In The Supreme Court Of Ohio

State Of Ohio,		
Appellee,	:	
-Vs-	:	
	:	Case No.: 2006-1366
Duane A. Short,	:	
	:	
Appellant.	:	**This Is A Capital Case.**

Appellant Short's Application For Reopening Pursuant To S.Ct. Prac. R. XI, Section 5

Appellant Duane Short asks this Court to grant his Application for Reopening. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

A. Short's direct appeal counsel were constitutionally ineffective.

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. See, e.g., *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). As can be seen from the lack of meritorious issues filed on Appellant Short's behalf (see Section B.2., *infra*)[1] and the oral argument that was presented in this Court on April 5, 2011[2], it is clear that appellate counsel

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[1] As further evidence of Short's direct appeal counsel's ineffectiveness, Short points out what counsel did raise. Instead of raising the multitude of meritorious arguments included herein, counsel attempted to argue that the multiple murder aggravating circumstance deserves only a "comparatively light" weight. This is in direct contravention of this Court's findings in this case as well as in *State v. Hutton*, 100 Ohio St.3d 176, ¶ 91 (2003) (the multiple murder specification carried "great weight in aggravation").

[2] See Oral Argument at 59:08 (direct appeal counsel stated that Short did not have a clear idea of his trial counsel's strategy in waiving mitigation; yet on page 2547 of the transcript, Short stated that their strategy was for him to waive presenting mitigation to his jury because they were going to present it to the Court). Other areas where direct appeal counsel was seemingly unaware of the record in this case during oral argument are at 8:58, 11:00, 13:30, and 20:26.

prejudicially ineffective in this case. Exs. A-D. This Court must reopen his appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); S.Ct. Prac. R. 11.6.

1. Appellate counsel were prejudicially ineffective for failing to know the record of the case and for failing to ensure that a complete record was before this Court.

Under Article I, § 16, of the Ohio Constitution, Short is entitled to a "complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal." *State ex. rel. Spirko v. Court of Appeals, Third Appellate Dist.*, 27 Ohio St. 3d 13, 18 (1986); *Griffin v. Illinois*, 351 U.S. 12 (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review); see also S.Ct. Prac. R. 5.1. Here, appellate counsel failed to ensure that a complete record was before this Court because they failed file a motion to supplement the record with the jury questionnaires, jury pool reports, and special jury questionnaires, even though they filed a motion to have those (and other) portions of the record unsealed. See Motion to unseal, filed 4/11/07; Exs. A, B, and C. Because of that omission, portions of the record in this case were missing when this Court affirmed Short's convictions and sentence on July 28, 2011.

After the direct appeal was concluded, current appellate counsel filed a Motion to Supplement on September 21, 2011, which was granted by this Court on October 17, 2011. In granting that motion, this Court recognized that these missing portions of the record were "necessary to the Supreme Court's consideration of the questions presented on appeal." S.Ct. Prac. R. 5.8. Not until November 3, 2011, when Short's record was officially supplemented, was Short's record finally complete.

Appellate counsel were clearly ineffective for failing to ensure that a full record was before this Court. They were similarly ineffective for failing to have knowledge of the full and complete record, including the jury questionnaires, jury pool reports, and special jury

questionnaires. These failures prejudiced Short as there are meritorious claims that have arisen from the missing portions of the record. (See Section B.2., Propositions of Law II, c, d and f, and Proposition of Law VIII, *infra*). Further, it was a violation of Short's constitutional rights to decide this appeal absent a full and complete record. Article I, § 16, of the Ohio Constitution; *Spirko*, 27 Ohio St. 3d at 18. Therefore, this Court must re-open Short's direct appeal.

2. Appellate counsel were prejudicially ineffective for failing to raise meritorious issues on appellant Short's behalf. [3]

The failure to present a meritorious issue for review constitutes ineffective assistance of appellate counsel. See e.g. *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Had Appellant Short's direct appeal counsel presented the following nine propositions of law, the outcome of this appeal would have been different.

PROPOSITION OF LAW NO. I: A capital defendant is constructively denied counsel when trial counsel advise their client to waive the presentation of mitigation without first investigating the facts or researching the law. U.S. Const. VI and XIV.

Short was "denied counsel at a critical stage of his trial," when his counsel "fail[ed] to subject the prosecution's case in aggravation to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648 (1984). Short's counsel convinced him to waive his right to present mitigating evidence to his jury, and instead, present that evidence to the trial judge. Tr. 2547. Under Ohio law "***all*** mitigating evidence must be presented to the jury, if the offender was tried by a jury" and "a defendant may not wait for an unfavorable jury recommendation before presenting all relevant evidence." *State v. Roe*, 41 Ohio St. 3d 18, 26, (1989) (emphasis added).

The mitigation phase is a critical stage in a capital trial because it "holds significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 695-96 (2002); *Strickland v.*

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

Washington, 466 U.S. 668, 686-87 (1984). As such, there was a "*constructive* denial of counsel" during a critical stage, the mitigation phase, of Short's trial. *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997). Prejudice is therefore presumed. *Cronic*, 466 U.S. at 659.

PROPOSITION OF LAW NO. II: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. VI and XIV.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995). Here, Short's counsel rendered deficient performance to Short's prejudice by failing to:

a) Know the law regarding the presentation of mitigation evidence: Short's trial counsel was ignorant of the law concerning the presentation of mitigation; this lack of knowledge and understanding prejudiced Short, as compelling mitigation evidence was available to be presented. See Proposition of Law 1, *supra*; Tr. 2547, 2588-92. At least one of Short's jurors would have considered this evidence. Ex. D. One juror can preclude imposition of the death penalty in Ohio. O.R.C. § 2929.03; see also *Williams v. Taylor*, 529 U.S. 362, 391(2000).

b) Present mitigation evidence after promising Short's juror during voir dire: Short's trial counsel started his opening statement with the word's "our goal is to save Duane's life." Tr. 1677. This statement reinforced promises made during voir dire. For instance, counsel stated "do you think at that point you might want to know something about that person you're considering the death penalty for?" and "we put on mitigating factors." Tr. 1106, 1110; see also Tr. 877, 987, 988, 989, 1041, 1114. Despite these promises, Short's trial counsel then failed to

present available, compelling mitigation evidence. Ex. D. One juror can preclude imposition of the death penalty in Ohio. O.R.C. § 2929.03; *Williams v. Taylor*, 529 U.S. 362, 391(2000).

c) Attempt to rehabilitate Juror Slaght: Before Ms. Slaght could fully answer a single question the Court interrupted and asked her if her opinions on "this type of case" would prevent her from complying with her oath. Tr. 1034. She answered in the affirmative, but was cut-off again. *Id.* She then said, "I wouldn't know how that person felt when they did something." *Id.* Juror Slaght was then excused. The defense agreed. *Id.* Juror Slaght's questionnaire indicates that she believes that the death penalty is "appropriate in some murder cases" and she "slightly agrees" that "The death penalty should sometimes be used as the punishment in certain murder cases." This is not a juror that was unequivocal that she could not enforce the death penalty in this case. Counsel were ineffective to Short's prejudice when they agreed to excuse Ms. Slaght, particularly without asking her a single question before agreeing to her excusal.

d) Challenge or excuse Jurors Russell, Wick, Hartfelder, Dixie, Ditto, and Bryson: Each of these jurors could not be impartial based upon the answers on their juror questionnaires. See Proposition of law VI, Section (c) and jury questionnaires. E.g. Juror Russell had bad experiences with guns, had seen something about the case, and was inclined to give death if guilt was proven. Guilt was not really at issue. Tr. 1677. Trial counsel were ineffective to Short's prejudice by failing to either challenge for cause or exclude these jurors from service in this case.

e) Object to the Prosecutor's misstatements concerning the aggravating circumstances: See argument in Proposition of Law VII. Trial counsel were ineffective to Short's prejudice when they failed to object to the prosecutor's blatant misstatements of law.

f) Object to automatic death penalty jurors: See Proposition of Law No. VI. Trial counsel were deficient to Short's prejudice when they failed to either object for cause and/or excuse these jurors that sat on Short's jury.

These failures, alone and in the cumulative, prejudiced Short. *Strickland*, 466 U.S. 668.

PROPOSITION OF LAW NO. III: a capital defendant's waiver of the presentation of mitigation evidence is not knowingly made when that waiver is not based upon reasonably competent advice. U.S. Const. Amend. XIV.

Although Short's direct appeal counsel raised the issue that Short's waiver of presenting mitigating evidence was not made knowingly, a key issue was overlooked. Short's trial counsel advised him that he could waive his right to present mitigating evidence to his jury but could still present the mitigating evidence to the Court. Tr. 2547. Short was unaware that his counsel did not know that Ohio statutory and case law prevented him from doing so. Short's waiver of presenting mitigating evidence to his jury was not "based on reasonably competent advice," and therefore was not made knowingly. *McMann v. Richardson*, 397 U.S. 759, 770 (1970).

PROPOSITION OF LAW NO. IV: A capital defendant's rights to a fair trial, impartial jury, due process and freedom from cruel and unusual punishment are violated when the trial court excludes a juror for cause when cause did not exist. Amends. VI, VIII and XIV, Ohio Const. Art. I, §§ 9, 10.

The trial court erred by dismissing Juror Sexton for cause. Ms. Sexton stated she supported the death penalty, but might have some problems imposing a death sentence. Tr. 668. Under further questioning, however, Ms. Sexton agreed that although she would have some reservations, she could follow the rules in the sentencing phase of the trial. Tr. 689-90. The test for excluding prospective jurors, based on their personal views on the death penalty, "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Ms. Sextons answers did not show such an impairment.

PROPOSITION OF LAW NO. V: A capital defendant is denied the right to effective assistance of trial counsel when trial counsel labors under a conflict of interest during his capital trial. U.S. Const. VI and XIV.

Short's trial counsel labored under a conflict, which arose when counsel were retained and paid by his family members, specifically his father, Sam Short. Because Sam Short retained attorney Patrick Mulligan, Mulligan and his co-counsel were completely dependent on Sam Short for compensation for their services as well as for any potential investigators or experts.

The quintessential duty of counsel in the mitigation phase of a capital case is to explain to the jury the reasons why the accused personally developed into the person that led him to commit the homicide for which he is charged. *Williams v. Taylor*, 529 U.S. 362, 393 (2000). To properly and fully identify these factors for the jury, trial counsel would have had to present facts regarding the Short family in an uncomplimentary light. The inherent conflict arose in the present case when trial counsel was required, but failed, to raise the issue that the individuals who paid their fees were the same individuals who negatively impacted Short's development. See *Cuyler v.Sullivan*, 446 U.S. 335 (1980). Courts have recognized the inherent dangers that arise when a criminal defendant is represented by an attorney who is paid by a third party. *Wood v. Georgia*, 450 U.S. 261, 269 (1981); Ohio Rules of Professional Conduct 1.8(f) (2007).

PROPOSITION OF LAW NO. VI: A trial court violates a capital defendant's constitutional rights to a fair trial and due process when commits prejucial errors during the capital defendant's trial. U.S. Const. Amends. VI, XIV.

The trial court violated Short's constitutional rights when it:

a) **Did not allow trial counsel to argue Short was suicidal**: The trial court erred by not allowing defense counsel to argue that Duane Short was suicidal. Officer Mike Rosenbalm was asked what he observed when he arrived at the Short residence on July 16, 2004. Tr. 2286. The state objected to this testimony, and it was excluded. However, this testimony was admissible

under Ohio Evid. Rule 803(1)(3) as a present sense impression or then existing mental, physical or emotional condition. Short had a constitutional right "to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The trial court erred by sustaining the state's objection.

b) **Did not allow trial counsel adequate time to study the juror questionnaires**: The trial court erred when it overruled defense counsel's objection to the lack of time they had to review the completed juror questionnaires, violating Short's right to a meaningful voir dire. U.S. Const. Amend. VI; *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "The scope of voir dire is within the trial court's discretion and varies depending on the circumstances of each case." *State v. Bedford*, 39 Ohio St. 3d 122, 129. Any restrictions placed upon voir dire must be reasonable. *Id.* These were not reasonable. The juror questionnaires consisted of 120 questions. Defense counsel objected. Tr. 473. The trial court's failure to grant adequate time was an unreasonable. See also Section (c) below.

c) **Did not excuse automatic death penalty jurors for cause**: "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). The "obligation to impanel an impartial jury lies in the first instance with the trial judge". *Id.* at 189. Here, in a case where two people were murdered, 9 of the 12 seated jurors checked that the death penalty is "appropriate with very few exceptions where someone has been murdered" on their jury questionnaire. Juror Hartfelder stated "I feel if a person has taken a life, then you need the death penalty." And Juror Russell stated, "the bible does say that God commanded people be put to death for certain crimes." These jurors could not be impartial based upon the answers on their juror questionnaires. The trial court erred in failing to excuse them for cause.

d) **Failed to correct the prosecutor's blatant misstatement of the law:** See Proposition of Law No. VII. The trial court violated Short's constitutional rights when it allowed the prosecutor to misstate the law regarding the aggravating factors and mitigating circumstances. Tr. 2499; *Darden v. Wainwright*, 477 U.S. 168 (1986).

PROPOSITION OF LAW NO. VII: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial .

The prosecutor told Short's jury that "if you find that the state proved beyond a reasonable doubt any one of the aggravating circumstances as to any one of those counts of aggravated murder, your sentence must be death." Tr. 2499. This was a clear misstatement of the law. Under R.C. § 2929.03(D) (2) the trial jury must unanimously find, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, before they can recommend to the court that the sentence of death be imposed on the offender. The prosecutor's comments were improper and misleading, violating Short's due process rights. *Darden v. Wainwright*, 477 U.S. 168 (1986).

PROPOSITION OF LAW NO. VIII: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when the venire systematically excludes distinctive groups in the community.

The individuals who were selected to be in Short's jury venire were pooled exclusively from the county voter registration. *See* jury pool reports. The Report of the Ohio Commission on Racial Fairness concluded that the sources for jury selection should be expanded beyond voter registration lists because voter registration lists exclude minorities and the poor. p. 33. "[V]enires from which juries are drawn must not systematically exclude distinctive groups in the

community and thereby fail to be reasonably representative thereof." *Duren v. Missouri*, 439 U.S. 357, 364-65 (1979).

PROPOSITION OF LAW NO. IX: A capital defendant has the constitutional right to present a defense. U.S. Const. Amend. VIII and XIV.

Besides being a violation of Short's constitutional right to due process, the trial court's decision to forego a hearing on the involvement of the Victim Witness Division of the Prosecutor's Office in the decision to deny Short's counsel access to his children is also a violation of Short's right "to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In addition, it was within the trial court's discretion to order that Short be granted access to his children, absent a hearing. Failing to order that access was a violation of Short's constitutional rights. *Id.* U.S. Const. Amends. VIII, XIV.

C. Conclusion.

Appellant Duane Short has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Short requests that this Application for Reopening be granted. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,

Office of the Ohio Public Defender

By: _____
Kimberly S. Rigby - 0078245
Counsel of Record

By: _____
Gregory A. Hoover - 0083933
Counsel for Appellant

Certificate of Service

I hereby certify that on November 21, 2011, I served a copy of the foregoing by depositing it in the United States mail addressed to:

Carley Ingram
Assistant Prosecuting Attorney
Montgomery County, Ohio
Post Office Box 972
301 West Third Street, Fifth Floor
Dayton, Ohio 45422

By: _____
Kimberly S. Rigby - 0078245

Counsel For Appellant

EXHIBIT A

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No.: 2006-1366
Duane A. Short,	:	
Appellant.	:	**This Is A Capital Case.**

AFFIDAVIT OF KIMBERLY S. RIGBY

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kimberly S. Rigby, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio, and I have been an assistant state public defender since 2004. My sole area of practice is capital litigation.

2. I was assigned to work on Duane Short's post-conviction case.

3. I have reviewed the record in *State v. Short*, Montgomery County Common Pleas Case No. 2004-CR-2635. I have also reviewed the direct appeal briefs and oral argument presented to this Court in this case.

4. I am Rule 20 certified to represent indigent clients in death penalty appeals.

5. Because of the focus of my practice of law, my Rule 20 certification, 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.

6. ~~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).

7. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with the Ohio Supreme Court. Appellate counsel has a fundamental duty in every criminal case, and especially in a capital case, to ensure that the entire record is before the reviewing courts on appeal. Ohio Sup. Ct. Prac. R. XIX, §

4(A); R.C. 2929.05; *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); See also *Griffin v. Illinois*, 351 U.S. 12, (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review).

8. Based upon this foregoing duty, after the Office of the Ohio Public Defender was appointed as counsel for the purpose of preparing and filing an application to re-open pursuant to S. Ct. Prac. R. XI Section 6, I filed a motion to supplement the record before this Court on September 21, 2011. This motion was granted by this Court on October 17, 2011, and the record was officially supplemented on November 3, 2011.

9. Before November 3, 2011, the record before this Court was therefore not complete. A thorough review of the entire record is necessary to give Short a full and fair opportunity to litigate his appeal as of right in this Court. Without a complete record for review, counsel could not provide effective representation to Short. See *State v. Buell*, 70 Ohio St. 3d 1211, 639 N.E.2d 110 (1994); *Evitts v. Lucey*, 469 U.S. 387 (1985).

10. After ensuring that the record 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 trial motions, exhibits, jury questionnaires, jury pool reports, and special jury questionnaires.

11. 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.

12. 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. Many 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 to raise and preserve them for appellate review.

13. 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.

14. 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. This is all the more important in light of a recent case out of the United State Supreme Court, *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). 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 to avoid any exhaustion problems in federal court.

15. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two 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. Thus, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, counsel should prepare the appeal accordingly.

16. Based on the foregoing standards, I reviewed the record in Duane Short's case. I have identified the following issues that should have been evaluated by appellate counsel and fully presented to the Ohio Supreme Court:

- **PROPOSITION OF LAW NO. I: A capital defendant is constructively denied counsel when trial counsel advise their client to waive the presentation of mitigation without first investigating the facts or researching the law. U.S. Const. VI and XIV.**

- **PROPOSITION OF LAW NO. II: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. VI and XIV.**

- **PROPOSITION OF LAW NO. III: a capital defendant's waiver of the presentation of mitigation evidence is not knowingly made when that waiver is not based upon reasonably competent advice. U.S. Const. Amend. XIV.**

- **PROPOSITION OF LAW NO. IV: A capital defendant's rights to a fair trial, impartial jury, due process and freedom from cruel and unusual punishment are violated when the trial court excludes a juror for cause when cause did not exist. Amends. VI, VIII and XIV, Ohio Const. Art. I, §§ 9, 10.**

- **PROPOSITION OF LAW NO. V: A capital defendant is denied the right to effective assistance of trial counsel when trial counsel labors under a conflict of interest during his capital trial. U.S. Const. VI and XIV.**

- **PROPOSITION OF LAW NO. VI: A trial court violates a capital defendant's constitutional rights to a fair trial and due process when commits prejucial errors during the capital defendant's trial. U.S. Const. Amends. VI, XIV.**

- **PROPOSITION OF LAW NO. VII: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.**

- **PROPOSITION OF LAW NO. VIII: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when the venire systematically excludes distinctive groups in the community.**

- **PROPOSITION OF LAW NO. IX: A capital defendant has the constitutional right to present a defense. U.S. Const. Amend. VIII and XIV.**

17. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.

18. Appellate counsel failed to raise these issues in appellant Duane Short's direct appeal. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application for Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

19. Also based upon my review of the record in this case, appellate counsel did not have a full understanding of the record. That is apparent from a review of the oral argument in this case as well as the lack of meritorious issues raised in Short's direct appeal.

20. Further, had counsel filed the requisite motions, the record on Short's appeal of right would have been complete before this Court, and meritorious issues stemming from those missing portions of the record could have raised and preserved for federal-court review.

21. Therefore, Appellant Duane Short was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

KIMBERLY S. RIGBY
Counsel for Appellant Short

Sworn to and subscribed before me on this 21st day of November, 2011.

Notary Public

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

EXHIBIT B

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No.: 2006-1366
Duane A. Short,	:	
Appellant.	:	**This Is A Capital Case.**

AFFIDAVIT OF JUSTIN THOMPSON

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Justin Thompson, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 2005. I was an assistant state public defender at the Office of the Ohio Public Defender from February 2006 to April 2009. Since April of 2009, I have worked in the Capital Habeas Unit at the Federal Public Defender Office in the Southern District of Ohio. My sole area of practice is capital litigation.

2. While I worked at the Ohio Public Defender, I was assigned to work on Duane Short's post-conviction case.

3. As part of my duties as appellate counsel, I attempted to ensure that the entire record was filed with the Ohio Supreme Court.

4. After looking at the trial court docket and checking the record in the Ohio Supreme Court, I learned that portions of the record in this case had been sealed for appellate review. I specifically recall the jury questionnaires were sealed. I then discussed this fact with Short's direct appeal counsel Gary Crim. I recall talking on the phone once, but the majority of our communications was through email. I never spoke with or had any email communications with Crim's direct appeal co-counsel Dennis Adkins.

5. I drafted a motion to unseal and then emailed the motion that I prepared to Gary Crim for his review. After reviewing the draft, he had a few suggested edits

which I made. I then filed that motion in the Ohio Supreme Court with Crim's permission.

6. After the Motion to Unseal was granted, as post-conviction counsel, I went to the Ohio Supreme Court and attempted to locate the jury questionnaires, jury pool reports, and special jury questionnaires, as well as other unsealed portions of the record. At that time, I learned that although everything was now unsealed, these portions of Short's trial court record were never made a part of the Ohio Supreme Court record in Case No. 2006-1366.

7. I then traveled to the Montgomery County Courthouse with Kelly Heiby, an investigator with the Ohio Public Defender who was assigned to Duane Short's post-conviction appeal. Heiby and I went to the clerk of courts office in an attempt to locate the jury questionnaires. An officer of the clerk located the box and we asked permission to go through the contents. I showed the clerk of court's employee the entry from the Ohio Supreme Court which unsealed the jury questionnaires.

8. The clerk of courts employee then called Judge Huffman's chambers. I was then informed that we would not be given permission to view the unsealed documents despite our entry from the Ohio Supreme Court.

9. I then communicated what had happened in Montgomery County with Gary Crim. I informed him that although the Ohio Supreme Court granted the motion to unseal, the documents ordered unsealed were never transferred from Montgomery County with the rest of the record. I recall informing Gary Crim that portions of the trial court record were still in Montgomery County and needed to be supplemented into the direct appeal record at the Ohio Supreme Court.

10. I then drafted and sent a fully written Motion to Supplement the Record to Gary Crim. I did not receive a response and a motion to supplement was never filed.

11. To the best of my knowledge, Duane Short's direct appeal counsel did not file the motion I drafted or any other motion to supplement the record with the documents ordered unsealed. Nor did they inform the Ohio Supreme Court in any other way that the record in Duane Short's direct appeal was incomplete.

Further affiant sayeth naught.

Justin Thompson

Sworn to and subscribed before me on this 16th day of November, 2011.

Notary Public

ALAN J. PFEUFFER
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.

EXHIBIT C

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No.: 2006-1366
Duane A. Short,	:	
Appellant.	:	**This Is A Capital Case.**

AFFIDAVIT OF GARY W. CRIM

STATE OF OHIO)
) ss:
COUNTY OF MONTGOMERY)

I, Gary W. Crim, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 1973. I was appointed by this Court to represent Duane Short in Case No. 2006-1366 in his direct appeal. My co-counsel was Dennis Adkins.

2. Although I filed a Motion to Unseal the Record, I did not file a Motion to Supplement the Record in this case.

3. After reviewing the issues that appellate counsel are now raising as part of their Application to Re-open, it was not a strategic decision to omit these issues. I did not think of them and reject them as frivolous.

Further affiant sayeth naught.

Gary W. Crim

Gary W. Crim

Sworn to and subscribed before me on this 21th day of November, 2011.

Cheryl A. Evans

Notary Public

CHERYL A. EVANS, Notary Public
In and for the State of Ohio
My Commission Expires June 27, 2013

EXHIBIT D

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
Respondent,	:	Case No. 2004-CR-2635
-vs-	:	
DUANE A. SHORT,	:	
Petitioner.	:	JUDGE HUFFMAN

AFFIDAVIT OF CAROL KEMPHUES

State of Ohio)
) ss.:
County of Montgomery)

I, Carol Kemphues, being first duly sworn according to law, state the following:

1) I was on the jury in the death penalty case of State v. Duane Short in 2006.

2) During the mitigation phase of the deliberations I remember saying to the other jurors, "we don't have anything to go on", and the other jurors and I wondered about Duane Short's history and background.

3) Information about Duane Short's background along with testimony from experts would have been helpful to myself and other jurors in deciding on the sentence.

4) If I had heard the mitigation evidence that was available, it could have changed my vote.

Further affiant sayeth naught.

Carol Kemphues

Carol Kemphues

Sworn and subscribed in my presence on this 29th of September, 2011.

Kelly Heiby

Notary Public

KELLY HEIBY
NOTARY PUBLIC STATE OF OHIO
MY COMMISSION EXPIRES 11-5-2013