

ORIGINAL

IN THE SUPREME COURT
FOR THE STATE OF OHIO

2007-2027
CR 06-3581

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	:
	:
vs.	:
	:
WAYNE S. POWELL,	:
	:
Petitioner-Appellant	:

APPLICATION FOR REOPENING APPEAL

COUNSEL FOR APPELLEE

JULIA BATES
Lucas County Prosecutor
Lucas County Courthouse
Toledo, Ohio 43624

WAYNE S. POWELL, Pro se
1580A ST. RT. 104 NORTH
Chillicothe, Ohio 45601

FILED

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CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT
FOR THE STATE OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

WAYNE S. POWELL

Petitioner-Appellant

CASE NO. 2007-2027
CR 06-3581

MOTION FOR REOPENING
OF DIRECT APPEAL THROUGH
MURNAHAN BRIEF

Now comes the petitioner-appellant, Wayne S. Powell, and respectfully requests that this Honorable Court grant his Motion for Reopening of Direct Appeal Through Murnahan Brief pursuant to App. R. 26(B), Rule 11.6 of the Supreme Court, and STATE v. MURNAHAN, 63 Ohio St.3d 60 (1992). Petitioner makes this request due to the denial of effective assistance of counsel during Mr. Powell's direct appeal to this Court. The reasons in support of this Motion are more fully set within Memorandum in support attached herein.

Respectfully submitted,

Wayne S. Powell

WAYNE S. POWELL-Pro se

CLAIM NO. I:

PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS AND HIS HIS RIGHT TO COUNSEL WHEN HE WAS SUBJECT TO DETENTION, INTERROGATION AND ARREST BY POLICE IN SPITE OF PETITIONER'S REPEATED REQUESTS FOR COUNSEL TO BE PRESENT.....16

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INTENTIONALLY SABOTAGE PETITIONER'S DIRECT APPEAL. 281

MEMORANDUM IN SUPPORT

Petitioner is appealing a death penalty case involving an offense committed well after January 1, 1995. Pursuant to Rule XI, Section 6, an application for reopening shall be filed within 90 days from entry of the judgment of the Supreme Court. This Application and petitioner's Murnahan both conform to the Rules Of Practice Of The Supreme Court with annotations current through April 1, 2009.

Both the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution guarantee all criminal defendants the right to effective assistance of counsel. GIDEON v. WAINWRIGHT, 373, U.S. 335 (1963). The right to counsel means much more than an attorney will stand next to the defendant during the trial and do ~~nothing~~ to affect the outcome of the case. The right to assistance of counsel assumes out of necessity that said assistance will be effective, for if the assistance is not effective, ~~for if the assistance is not effective~~, then the right is of no value. POWELL v. ALABAMA, 287 U.S. 45, 53 (1932).

The federal test for whether said assistance is effective, as articulated in STRICKLAND v. WASHINGTON, 466 U.S. 668, 686 (1984), is "whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result. As noted by the Eighth District Court of Appeals:

"The test in Ohio is "whether the accused under all circumstances ... had a fair trial and substantial justice was done." In applying this test the court must determine whether an essential duty owed by defense counsel has been substantially violated and whether such violation prejudiced the defense.

STATE v. BLAGAJEVIC, 21 Ohio App.3d 297, 299 (1985).

Petitioner Powell's Murnahan Brief is a grievous example of such ineffective assistance of appellate counsel. The meritorious issues not raised by counsel on Mr. Powell's behalf cause one to wonder if appellate counsel even perused the trial transcript.

Petitioner Powell was substantially prejudiced by appellate counsel's deficient performance and representation. There is a reasonable probability, albeit a rather strong one that, but for the ineffectiveness of appellate counsel during petitioner's direct appeal, Mr. Powell's murder convictions and all related charges would have been reversed and a new trial ordered by this Honorable Court.

The Due Process Clause of the Fourteenth Amendment guaranteed effective assistance of counsel in any appeal of right. EVITTS v. LUCEY, 469 U.S. 587 (1985). This effective assistance means that counsel not cause valid issues to be waived by procedural default because they were not raised on appeal. STATE v. GREER, 39 Ohio St.3d 236, 244 (1988). See also TEAGUE v. LANE, 489 U.S. 288 (1989). Whether present counsel argues those issues already raised vigorously or not is irrelevant as those issues are deemed frivolous as will be clearly shown by the contents of the Murnahan Brief of petitioner. The need to avoid procedural default and the state exhaustion requirements mandate that all issues be raised. Federal courts have held that appellate counsel can be ineffective if they fail to raise issues on direct appeal that state court may well reject but which would be found meritorious by federal courts in habeas corpus reviews. FREEMAN v.

LANE, 962 F.Ed. 1252, 1259 (C.A. 7, 1992).

In the case at bar, appellate counsel for petitioner failed or more likely refused to raise important and extremely meritorious claims, thereby attempting to hide them from the reviewing courts, thereby waiving them, which, had these claims not been waived, would have required reversal of Mr. Powell's conviction and death sentence in the interests of justice.

CONCLUSION

Appellate counsel was derelict in their duty to petitioner. The rendering of such ineffective assistance was serious as the claims spell out concisely in the Murnahan Brief of this petitioner. Wherefore, for the foregoing reasons, Wayne S. Powell prays this Honorable Court grant his MOTION FOR REOPENING OF DIRECT APPEAL THROUGH MURNAHAN BRIEF on the grounds that his appellate counsel for his direct appeal was ineffective and clearly denied petitioner his constitutional right to an attorney for his Appeal of Right.

Respectfully submitted,

Wayne S. Powell

WAYNE S. POWELL - Pro se

CERTIFICATE OF SERVICE

The petitioner, WAYNE S. POWELL, does hereby certify that the original and required number of copies to his Pro se MOTION FOR REOPENING OF DIRECT APPEAL THROUGH MURNAHAN BRIEF were forwarded by regular U.S. Mail to the Supreme Court of Ohio. A true copy of the foregoing petition has been sent by U.S. Mail to Julia Bates, Prosecuting Attorney, Lucas County Courthouse, Toledo, Ohio 43624 on this 20 day of June, 2012.

Respectfully submitted,

Wayne S. Powell

WAYNE S. POWELL - Pro se
15802 ST. RT. 104 NORTH
Chillicothe, Ohio 45601

IN THE OHIO SUPREME COURT

STATE OF OHIO	:	Case No. 2007-2027
	:	
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	:	
vs.	:	Common Pleas Case No.
	:	CR 06-3581
WAYNE S. POWELL	:	
	:	
Defendant-Petitioner	:	This is a Death Penalty Case

AFFIDAVIT OF WAYNE S. POWELL

STATE OF OHIO)
) ss:
 COUNTY OF ROSS)

I, Wayne S. Powell, hereinafter, Appellant, after being duly sworn, hereby state as follows:

1. I am a pro-se litigant presently incarcerated in Ohio's death row.
2. After being convicted and sentenced to death by the Lucas County Court of Common Pleas, Attorneys Spiro Cocovas and Gary Crim was assigned as appellate counsels in the case.
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. Appellate counsel has a professional responsibility of advising, conferring with, and informing his or her client of the necessary steps to be taken in the appellate process. This responsibility begins upon assignment of representation throughout the appellate process at the level of judicial

review. It includes informing the client of any and all potential errors and/or issues to be presented to the Court. As well as taking into consideration and surely investigating all errors and issues brought to the attorneys' attention by the represented client.

5. 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 the Federal District Court. Appellate counsel must preserve all errors/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.
6. 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 States Supreme Court, Cullen v. Pinholster, 131 S.Ct. 1388 (2011). To exhaust an issue, the issue must be preserved 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.
7. Appellant contacted appellate attorney Spiros Cocovas and Gary Crim numerous times prior to their filing the appellant's brief and argument before this Honorable Court. The attorneys was informed that appellant wanted to be involved in all of the issues and arguments drafted which were to be submitted in the appellate brief.
8. Neither of the assigned appellate attorney conferred with the appellant on any of the errors or issues that was drafted by them and submitted in appellant's direct appeal brief. Appellate counsel ignored the appellant and the issues he wanted to be submitted in the brief. Based on the review of the record in Wayne Powell's case, appellant has identified the following listed issues as; I thru XXXXII that should have been evaluated by appellate counsel and fully presented to this Honorable Court.

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- 9. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors and/or issues amounts to ineffective assistance of appellate counsel in this case.
- 10. Appellate counsel failed to raise any of the aforementioned issues in appellant Wayne Powell's direct appeal to this Honorable Court. Based on the evaluation of the record and understanding of the law, petitioner believe the issues raised in the Application to Re-open are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal court review.
- 11. Therefore, Appellant Wayne S. Powell was detrimentally affected by the deficient performance of his former appellate counsel.

Further, affiant sayeth naught.

Mr. Wayne S. Powell

 WAYNE S. POWELL
 Petitioner, Pro se

Sworn and subscribed before me on this 20th day of June,
 2012.



KYLE A. HAUSWIRTH
 Notary Public
 In and for the State of Ohio
 My Commission Expires
1-2-13

Kyle A. Hauswirth

 Notary Public