

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

Case No.

13 - 0628

VS.

CORTEZ M. OLIVER,

Defendant-Appellant.

On Discretionary Appeal from the
Portage County Court of Appeals,
Eleventh Appellate District
Case No. 2010-P-0017

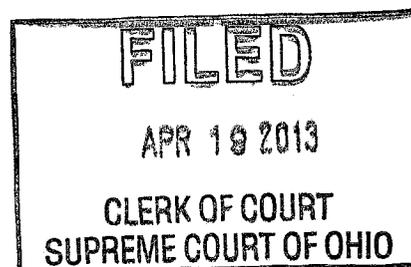
**NOTICE OF APPEAL OF DEFENDANT- APPELLATE
CORTEZ M. OLIVER**

Cortez M. Oliver #581-824
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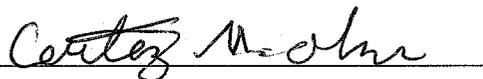


NOTICE OF APPEAL OF DEFENDANT-APPELLANT
CORTEZ M. OLIVER

Defendant-Appellant Cortez M. Oliver gives notice of appeal to the Supreme Court of Ohio from the Portage County Court of Appeals, Eleventh Appellate District, entered in State of Ohio vs. Cortez M. Oliver, case no: 2010-P-0017, March 8, 2013.

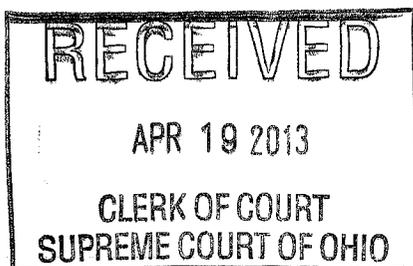
This case raises a substantial constitutional question that involves a felony, and is of a public or great general interest.

Respectfully Submitted,



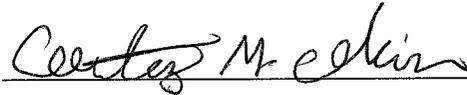
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CERTIFICATE OF SERVICE

I certify that Regular U.S. Mail, Postage Pre-paid upon Victor V. Viglucci, Portage County Prosecutor, 241 South Chestnut Street, Ravenna, Ohio 44266, and this day of April 2013, served a copy of the foregoing Notice of Appeal.

A handwritten signature in cursive script, reading "Cortez M. Oliver", is written over a horizontal line.

Cortez M. Oliver #581-824
Counsel for Defendant- Appellant, Pro-Se

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

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VS.

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**MEMORANDUM IN SUPPORT OF JURISDICTION DEFENDANT
APPELLANT CORTEZ M. OLIVER**

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State of Ohio V. Cortez M. Oliver, Portage County Court of Appeals Case NO. 2010-P-0017
(March 8, 2013.) Opinion and Judgment Entry

THIS COURT SHOULD HEAR THIS CASE

Appellate rule 26 (B) is a procedural right to file with 90 days after an opinion of a court of appeal on ineffective assistance of appellate counsel.

The U.S. Supreme Court determined the right of representation on appeal, and trial, are similar.

Evitts v. Luccy (1985). 469 U.S. 387, 396. Proper appellate review must be had to ensure the criminal conviction has been tainted through a reliable process. Evitts, 469 U.S. at 399-400.

It is understood the right of appellate counsel guarantees a review of the record.

The reviewing counsel must raise reversal issue for appropriate review, Strickland v. Washington (1984), 466 U.S. 668. 687, if not, they are ineffective. In addressing claims of ineffective assistance of counsel, the U.S. Supreme Court has developed a two - part test.

Strickland v. Washington (1984), 466 U.S. 688.

Appellant was accused of being involved in an aggravated Burglary. The homeowner was present when the crime occurred. The homeowner was not assaulted with a peon. The home Owner was transported to the hospital. On July 28. 2009, the homeowner's life was terminated in the hospital. The Fact of this termination was not disclosed to the appellant by his counsel.

Appellant raised these raises in appellate Rule 26(B). In Morgan. Eads, 104 Ohio st. 3d14, 2004 Ohio 6110, 818 NE2d 1157, the Supreme Court held, "First the application process under App.R.26 (B) required that an applicant submit additional matter not in the record of the trial to support claims the appellate counsel was effective. See App.R.26 (B) (2) (d). ("Sworn statement of the basis for the claim"); 26(b) (2) (e) ("supplemental affidavits upon which the applicant relies"). See, also, App.R.26 (B) (8) (if necessary, an "evidentiary Learning maybe conducted by

the court or referred to and to a magistrate." This procedure Under App. 26(B) bears a strong resemblance to the process that follows when a post conviction petition is filed in a trial court. See R.C. 2953.21 (A) 4) (a) ("petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief."); 2953.21 (C); 2953.21(B) (unless petition deemed without merit, "court shall proceed to a prompt hearing"); 2953.22 ("testimony may be offered by deposition"). This, in post-conviction proceedings under R.C. 2953.21 ET seq. , trial courts consider addition material outside the record, and appellate court do the same in App. 26 (B) proceeding. The fact that a court of appeals can consider additional material under App.R.26 (B), or order a hearing to do so, represents a fundamental difference between such an application and an original appeal." Morgan, 104 Ohio st 3d at 144.

The decision of Morgan v. Ead. 194 Ohio st. 3d 14, 2004 Ohio 61110, 818 NE2d 1157, reinforces the right to raise the issues outside the record or transcript. The court may hear evidence outside the record for judicial economy and inherent authority to address the merits of a claim. Therefore, this court should accept this case.

STATEMENTS OF THE CASE AND FACTS

On August 17, 2009, a Portage County Grand Jury indicted Defendant-Appellant Cortez M. Oliver, (hereinafter "Oliver"), for the crimes of Murder, in violation of Ohio Revised Code 2903.02(B), Aggravated Burglary, in violation of Ohio Revised Code 2911.11(A)(1)(B), and, Aggravated Robbery, in violation of Ohio Revised Code 2911.01(A)(3), in Portage Criminal Case No. 2009-CR-0488, regarding an incident in which the State of Ohio alleged Oliver caused the death of on Richard Lowther. Oliver thereafter entered a plea of not guilty to the alleged charges, and the matter proceeded to a jury trial on February 2, 2010.

During individual voir dire of prospective jurors, the trial judge repetitively stated that an elderly gentleman was "killed" in a "home invasion." On February 11, 2010, the jury returned verdicts of guilty on all charges. On February 18, 2010, the trial court sentenced Oliver to LIFE in prison with parole eligibility after fifteen (15) years for the murder, and consecutive definite prison terms of ten (10) years each for aggravated burglary and aggravated robbery, ordered to be served consecutively to the murder, for a total aggregate prison sentence of thirty-five (35) years to Life.

The Defendant-Appellant filed a timely Appellate Rule 26(B) to the Eleventh Appellate District Court of Appeals, on ineffective assistance of Counsel. The Court of Appeals denied this reopening on March 8, 2013, and the Defendant-Appellant now appeals to this court for jurisdiction.

Proposition of Law I.

The Appellate court erred to the prejudice of Appellant to have effective assistance of appellate counsel guaranteed in the sixth Amendment.

When the state provides for an appeal of right, as Ohio does ; a convicted criminal defendant. Has the constitutional right to the effective assistance of counsel on the appeal guaranteed by the sixth amendment. Douglas v. California (1963), 372 us, 353 and Evitts v. Lucey (1985), 469 U.S. 387

The Eleventh District Court of appeals opinion claims the issue is outside the record and must be considered in a post conviction setting. This may be done in Morgan v. Fads 104 Ohio St... 3d 142, 2004 Ohio 6110. 818 NE.2d.1157.

In Morgan vs. Fads, 104 Ohio St. 3d 142,, the Ohio Supreme Court held, " We have ourselves explicitly and consistently recognized that the App. 26 (B) process represents a

collateral post conviction remedy .See, State vs. Robinson (1996), 74 Ohio St. 3d 1518, 660 NE.2d 472, (Describing the App. R. 26 (B) process as a "civil Post Conviction matter.") Morgan, 104 Ohio St. 3d at 148. The opinion of the Eleventh District Court pf appeals is squarely in opposition to their ruling in Morgan vs. Fads, 104 Ohio st 3d. 142, 2004 Ohio 6110, 818 NE2d 1157. Therefore, this Court should accept, jurisdiction to review this proposition.

Proposition of Law II

The Dependent's right to the effective assistance of counsel guaranteed under article I, section 10 and 16 of the Ohio constitution and the sixth hand fourteenth amendment to the United States, Constitution was violated when trail counsel failed to conduct and meaningful pretrial investigation regarding the victim's self-executed decision to terminate his own life support, which constituted an independent, intervening cause in his own death.

Of all rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects the ability to assert and other rights he or she may have. The Sixth and Fourteenth Amendments to the United States Constitution guarantee the accused the right to effective assistance of counsel. Strickland v. Washington (1984), 466 U.S. 688, 686;

United States v. Cronic (1984), 466 U.S. 648, 654; McMann v. Richardson (1970), 397 U.S. 759, 771.

At the heart of effective assistance of counsel is counsel's independent duty to investigate and prepare. Goodwin V. Blkcom (11th Cir. 1982), 684 F. 2d 794, 805. To represent a client effectively, "counsel has a duty to make reasonable investigations or to make reasonable decision that make particular investigations unnecessary."Kimmelman V. Morrison (1986), 477 U.S. 365, 384, (quoting Strickland v. Washington, 4666 U.S. at 691). Had trail counsel handled his professional responsibility to Oliver with anything approaching the "reasonableness" demanded by the Strickland standard, he would have investigated and discovered that the actual cause of

Richard Lowther's (the victim) death was his self-executed decision to terminate his own life support. Dorothy Dean, M.D., a duty medical examiner with the summit County Medical Examiner Office, performed the autopsy on Richard Lowther. She testified for the State that Mr. Lowther died from complications of a spinal cord injury due to blunt force trauma to the neck, and that his death was proximately caused by the injuries he received on July 2, 2009. The jury, however, was never apprised of the fact that Mr. Lowther's actual cause of death on July 28 2009 was the result of his self-executed decision to terminate his own ventilator support. The jury was never given the opportunity to consider this material fact, because the State failed to disclose this exculpatory evidence to the defense in violation of Brady v. Maryland (1963), 373 U.S. 83, and trial counsel's inept pretrial investigation failed to uncover it. Moreover, the State's Brady violation was compounded by the trial court judge repetitively stating during individual voir dire of the prospective jurors, that an elderly man was "killed" in a "home invasion." This repetitively made comment, in and of itself was fatally prejudicial to Oliver, for which no corrective measure would realistically be able to remove the factual "seed" planted in the minds of a majority of the jurors. In addition, not once did Oliver's trial attorney properly object to the trial judge's prejudicial comments.

It is generally recognized that due process may require a criminal defendant to be provided with expert assistance when it is necessary to provide an adequate defense. State v. Manson (1998), 82 Ohio St. 3d 144, 149, citing Ake v. Oklahoma (1985), 470 U.S. 68, 77. Moreover, due process, as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution, and Section 16, Article I of the Ohio Constitution, requires that an indigent criminal defendant be provided funds to obtain expert assistance at State expense when a reasonable probability exists that an expert would aid in his own defense. Manson, Supra.

Trial Counsel again effectively prejudiced Oliver's defense when he failed to obtain a Forensic Pathologist who was qualified to give medical testimony as to Mr. Lowther actual cause of death, and/or, and expert qualified to give testimony regarding "informed consent" or the clinical treatment of people with spinal injuries, or people on ventilator support.

Because a person in Ohio has the right to die, and because medical personnel are "required by a legal duty to accede to a patient's express refusal of medical treatment," Anderson v. St. George Hospital Hosp., Inc. (1996), 77 Ohio St. 3d 82, 84, Oliver had the right to challenge Mr. Lowt mental competency, and the jury, thus, was never given the opportunity to consider wether Mr. Lowther decision to remove the ventilator was uninformed and/or due to mental in competency. Moreover, because the State failed to disclose that the removal of ventilator support was actual of Mr. Lowther's death, Oliver could not even present a possible defense of "independent, intervening cause of death."

Oliver was deprived of effective assistance of counsel throughout his trial court proceedings. Had Trial counsel handled his professional responsibility to Oliver with anything approaching the reasonableness demanded by the Strickland standard, but for counsel's deficiencies, a reasonable probability exists that the outcome of Oliver's with respect to the charge of murder would have been different.

Proposition of Law III

The Defendant was wrongfully convicted of the crime of murder, thus depriving him of his rights of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and section 16, Article I of the Ohio Constitution because the prosecution withheld exculpatory evidence.

Brady v. Maryland (1963), 373 U.S. 83, at 87, States "suppression by the prosecution of evidence favorable to an accused upon violation of due process where the evidence is material either to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution."

In the instant case, the State failed to disclose that the actual cause of Richard Lowther's (The victim) death, was his self-executed decision to terminate his own ventilator support. The State's failure to disclose the exculpatory evidence clearly undermined confidence in the outcome of Oliver's trial. Oliver was never afforded the opportunity to challenge Mr. Lowther's mental competency with respect to "informed consent", and his self-executed decision to terminate his own life support. Moreover, the State Brady violation was compounded by the trial court judge repetitively stating during individual voir dire of prospective jurors, that an elderly gentleman was "killed" during a "home invasion." The Judge's repetitive comment was factually misleading and fatally prejudicial to Oliver. The jury was never apprised of the fact that Mr. Lowther actually died because he terminated his own ventilator support, but more than likely prejudged his death based on the trial judge's repetitive misrepresentation that Mr. Lowther was "killed" at home.

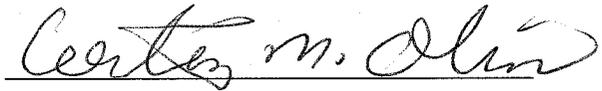
The State's failure to disclose the actual cause of Mr. Lowther's death cannot be considered a harmless error. The Brady violation went to the very heart of the case, permeated the

entire trial, and prevented the jury from considering and defense to the crime of murder. Had the jury been apprised of the fact that Mr. Lowther actually self-executed the decision to remove himself from ventilator support, there is a reasonable probability that the jury would not have found Oliver guilty of murder.

Conclusion

For the forgoing reasons Defendant- Appellant Cortez M. Oliver has presented this Court of Appeals with genuine issues of error and a colorable claim of ineffective assistance of counsel on direct appeal, Oliver respectfully moves the Court for an order reopening his direct appeal in portage App. NO. 2010-P-0017.

Respectfully submitted,

A handwritten signature in cursive script that reads "Cortez M. Oliver". The signature is written in black ink and is positioned above a horizontal line.

Cortez M. Oliver
Defendant- Appellant in pro se...

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STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

CASE NO. 2010-P-0017

CORTEZ M. OLIVER,

FILED
COURT OF APPEALS

Defendant-Appellant.

MAR 08 2013

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

On April 2, 2012, appellant, Cortez M. Oliver, filed a pro se application to reopen his appeal pursuant to App.R. 26(B) based upon a claim of ineffective assistance of appellate counsel. Appellant is attempting to reopen the judgment rendered by this court in *State v. Oliver*, 11th Dist. No. 2010-P-0017, 2012-Ohio-122. In *Oliver*, we affirmed in part the judgment of the trial court sentencing appellant for murder and reversed in part and remanded the matter to the trial court to determine whether aggravated burglary and aggravated robbery were allied offenses of similar import subject to merger under *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

The determination of an App.R. 26(B) motion involves a two-prong test, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). At the first prong, an applicant must make a threshold showing that there is a genuine issue as to whether he was deprived of effective assistance of appellate counsel. App.R. 26(B)(5). If the applicant succeeds in this showing, the matter proceeds to the second prong. At this prong, in order to have the prior appellate judgment

altered, the applicant is required to show that the performance of appellate counsel was deficient and that the deficiency prejudiced the outcome of the appeal. App.R. 26(B)(9).

Applying the *Strickland* standard, the Ohio Supreme Court held that the two-prong analysis "is the appropriate level of review to determine whether an appellant has raised a 'genuine issue' in an application for reopening an appeal." *State v. Reed*, 74 Ohio St.3d 534, 535 (1996). Appellate counsel's failure to raise an issue on appeal is prejudicial if it would have had a "reasonable probability" of success had it been asserted. *Id.* at 535-536.

At the jury trial, the state's witnesses collectively established that appellant devised a deceptive plan in order to gain entry into the victim's residence for the purpose of stealing from him which resulted in his death. *Oliver, supra*, at ¶3. Appellant maintains, however, that he did not cause the victim's death. Rather, appellant now alleges that the victim caused his own death by terminating his own life support. Appellant specifically argues that his appellate counsel was ineffective for failing to raise the following two assignments of error:

"[1.] The defendant's right to the effective assistance of counsel guaranteed under Article I, Sections 10 and 16 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution was violated when trial counsel failed to conduct any meaningful pretrial investigation regarding the victim's self-executed decision to terminate his own life support, which constituted an independent, intervening cause in his own death.

"[2.] The defendant was wrongfully convicted of the crime of murder, thus depriving him of his rights of due process as guaranteed by the Fifth and

Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution because the prosecution withheld exculpatory evidence."

In sum, appellant essentially argues the jury was never apprised that the victim's actual cause of death was the result of his own decision to terminate his ventilator support; that the state failed to disclose this exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and that trial counsel's inept pretrial investigation failed to uncover this evidence. Specifically, appellant maintains that he was never afforded the opportunity to call a forensic pathologist or other expert to challenge the victim's mental competency, and therefore, the jury was never given the opportunity to consider whether the victim's decision to remove the ventilator was uninformed and/or due to mental incompetency. Appellant alleges that had such a challenge been made at trial, his counsel could have presented the defense of an independent, intervening cause of death, and that his appellate counsel erred in failing to raise these issues.

With respect to appellant's first assignment that he claims was not considered or raised on appeal by his appellate counsel, we note that his appellate counsel raised an ineffective assistance of trial counsel claim in his direct appeal, but on separate grounds than those advanced in the assignments of error contained in this application. In *Oliver, supra*, this court held that appellant failed to demonstrate that his trial counsel was deficient, or that such deficiency resulted in prejudice to him with respect to trial counsel's failure to object to the trial judge's statements during individual voir dire that a gentleman

was "killed" during a "home invasion." Because the trial judge was not giving her own views or opinion with respect to whether an elderly gentleman was "killed" during a "home invasion," but rather, was merely portraying the pretrial publicity coverage surrounding the case, we concluded that the alleged failure of defense counsel did not prejudice appellant or deny him a fair trial. *Oliver, supra*, at ¶232-233.

A review of appellant's application reveals that he also argues this same issue again, though does not assign it separately as error. However, to the extent that appellant argues it, we merely point out that appellate counsel raised and this court addressed that issue in *Oliver, supra*.

In his first assignment of error, appellant's underlying supposition is that his trial counsel conducted an "inept" pretrial investigation, which if it had been conducted effectively, would have uncovered potentially exculpatory facts regarding an intervening and independent cause of death; to wit, the victim's mental competency in deciding to remove the ventilator. In his second assignment of error, appellant's underlying premise is that the state actually possessed exculpatory information that the victim made the decision to remove the ventilator, yet did not disclose this fact to defense counsel. Appellant argues that but for appellate counsel's deficiencies in failing to raise these two issues on appeal, the probability exists that the outcome of his case with respect to the charge of murder would have been different.

App.R. 26(B)(2)(e) requires an application for reopening to "contain * * * [a]ny parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies." With respect to appellant's contention that trial

counsel did not conduct a pretrial investigation; presumably, if no pretrial investigation were conducted, then no record or transcript exists upon which appellant could support his argument, nor does appellant cite to any portions of the record or transcript which demonstrate his counsel's efforts to conduct an investigation that may have elicited the purported exculpatory material. Nor does appellant contend that the record actually contained such evidence of efforts by his counsel, but that those portions of the record were not made available to him in accordance with App.R. 26(B)(2)(e). Accordingly, since a determination on this issue is apparently dependant on support from evidence seemingly outside the record before us, it is not a matter that can be considered here, but instead, in a post-conviction setting.

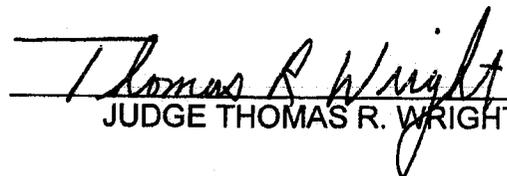
Furthermore, with respect to appellant's claim in his second assignment of error, he essentially maintains that the state withheld exculpatory evidence. Yet, the scope of App.R. 26(B) applies only to prejudicial errors made by appellate counsel, not the state. Additionally, to the extent that appellant maintains his trial counsel should have uncovered exculpatory evidence and that such failure should have been raised on direct appeal, we have addressed those arguments under appellant's first assignment. Simply stated, appellant does not direct us to any portions of the record, nor aver in his affidavit, that his counsel requested but was denied access to exculpatory information regarding the victim's state of mind or decision to terminate his own life support such that the issue could have been raised on direct appeal.

Moreover, in a companion case involving one of appellant's co-defendants, *State v. Dukes*, 11th Dist. No. 2010-P-0027, 2011-Ohio-6849, this court

previously addressed the issue of whether the victim's decision to have the ventilator removed constituted an independent, intervening act that broke the causal connection between the victim's death and the injuries inflicted by defendant. *Id.* at ¶32. We concluded that the circumstances requiring the victim to use a ventilator were the direct effect of the injuries inflicted on him, and that the removal of the ventilator could not constitute the sole and only cause of death. Thus, while the removal of the ventilator may have constituted an intervening cause, it did not constitute an independent, intervening cause so as to relieve the defendant of responsibility for the victim's death. *See Id.* at ¶33-35.

Based on the foregoing, we determine that appellant has failed to set forth a colorable claim of ineffective assistance of appellate counsel pursuant to App.R. 26(B)(5). Having determined that appellant did not make a threshold showing that he was deprived of effective assistance of appellate counsel, we need not address the second prong of *Strickland* as to whether appellant was prejudiced by any such deficiency.

Accordingly, appellant's pro se application for reopening is hereby overruled.



JUDGE THOMAS R. WRIGHT

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.