

IN THE OHIO SUPREME COURT

State of Ohio, :
 : Case No. 2013-0332
Plaintiff-Appellee, :
 :
v. : On appeal from the Butler
 : County Court of Appeals
Donald Lee Johnson, : Twelfth Appellate District
 : Case No. CA2011-11-212
Defendant-Appellant. :

REPLY BRIEF OF DEFENDANT-APPELLANT DONALD JOHNSON

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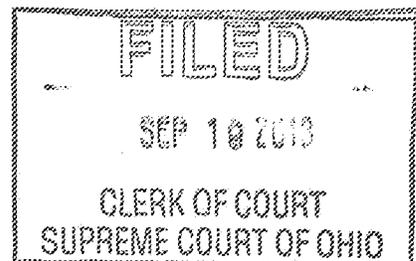


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Certified Conflict Question:

Whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.

- I. The State ignores the express language of R.C. 2951.03 to advance its arguments.
 - A. *The express language of R.C. 2951.03 allows defendant's appellate counsel to review the presentence investigation report for purposes of identifying issues for appeal.*

Revised Code 2951.03(D)(1) expressly permits a defendant's appellate counsel to review the presentence investigation report for appeal:

[D]efendant's counsel [and] the prosecutor * * * may inspect, receive copies of, retain copies of, and use a presentence investigation report * * * for the **purposes of** or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section **2953.08**, section 2947.06, or **another section of the Revised Code**.

(Emphasis added). R.C. 2951.03(D)(1).

Revised Code 2953.08 sets forth the grounds upon which a defendant may appeal his or her sentence as a matter of right. To be effective or meaningful, a defendant's appellate attorney has a duty to investigate possible issues for appeal. *See Bounds v. Smith*, 430 U.S. 817, 823, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1976) (stating that a defendant is entitled to counsel on appeal so that his or her appeal is meaningful). *Douglas v. California*, 372 U.S. 353, 354-55, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (noting that a defendant is deprived of a meaningful appeal if the appellate court is allowed to make an ex parte preliminary examination of the merits). And it is well settled that an

attorney does not act competently if that attorney files a brief without examining the record. *Bounds* at 825. And that record includes the presentence investigation report: “[o]n the appeal of a sentence under this section the record to be reviewed shall include * * * any * * * presentence investigation report.” R.C. 2953.08(F)(1). Consequently, “[d]efendant’s counsel * * * may inspect * * * the presentence investigate report * * * for the purposes of” identifying grounds upon which a defendant may appeal his or her sentence. R.C. 2951.03(D)(1). Any reading that does not allow defendant’s appellate counsel to review the report renders words in the statute meaningless. *See State ex rel. City of Dublin v. Delaware County Bd. of Comm’rs*, 62 Ohio St.3d 55, 59, 577 N.E.2d 1088 (1991) (noting principle that statutes cannot be construed in a way as to render words contained in the statute meaningless).

Despite the plain language of R.C. 2951.03(D)(1), the State advances a number of arguments opposing defendant’s appellate counsel’s request to review the report, but each lacks merit. Consequently, Mr. Johnson’s attorney should be allowed to review the report while preparing his appellate brief.

B. Counsel’s access to the presentence investigation report is not limited, and the report may be reviewed during the defendant’s appeal.

The State argues that when reading R.C. 2951.03 as a whole, counsel can only review the report prior to sentencing. To reach this conclusion, it quotes the following language:

(B) (1) If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report.

* * *

(2) Prior to sentencing, the court shall permit the defendant and the defendant's counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report.

R.C. 2951.03(B).

It is true that R.C. 2951.03(B) requires trial courts to provide defense counsel with access to the report before sentencing. But crucially, R.C. 2951.03 is not exclusive: it does not state that counsel shall only have access to the report before sentencing. In fact, the State's argument is directly contradicted by R.C. 2903.51(D)(1), which provides: "defendant's counsel * * * may inspect, receive copies of, retain copies of, and use a presentence investigation report * * * for the purposes of * * * R.C. 2953.08 * * * or another section of the Revised Code."

Finally, this Court has already implicitly rejected the State's claim that defendant's appellate counsel cannot review a presentence investigation report on appeal, because this Court has allowed defense attorneys to review presentence investigation reports for cases pending before it. *See, e.g., State v. Belew*, — Ohio St.3d —, 2013-Ohio-3837 (procedural order granting counsel access to the presentence

investigation report); *State v. Long*, 134 Ohio St.3d 1474, 2013-Ohio-659, 983 N.E.2d 372 (same).

C. *Defense counsel is defense counsel, and a defendant is a defendant – even on appeal.*

The State's argument that defense counsel cannot review the presentence investigation report because R.C. 2951.03(D)(1) does not list "appellant's" or "appellee's" counsel as persons who may review the report should be rejected. It ignores the common usage of the term "defendant's counsel" and imputes an unreasonable limitation on that term.

The words "defendant's counsel" and "prosecutor" should be interpreted consistent with their common usage and to avoid absurd, inefficient, and fundamentally unfair results. *See State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20 (stating that statutes "should not be given an artificially narrow interpretation that would defeat the legislative intent."); *In re M.W.*, 133 Ohio St.3d 303, 2012-Ohio-4538, 978 N.E.2d 164, ¶ 17 (stating that courts should interpret words consistent with their common usage). The common usage of the word "defendant" is a title that attaches to the accused at the trial court level, and that label follows him or her throughout the appellate process, just as the phrase prosecutor attaches to the attorneys for the State. *See, e.g., State v. Noling*, --- Ohio St.3d ---, 2013-Ohio-1764, ¶ 1 (referring to Tyrone Noling as "the defendant-appellant"); *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 13 (discussing what the "defendant-appellee" argued in

State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988)); *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 5 (discussing the charges brought against “defendants-appellees”). In fact, in the sole document the State filed in the court of appeals, it referred to Mr. Johnson as “Defendant-Appellant.” (Dec. 4, 2012 Memo. in Opp’n to Request to View PSI.) Thus, these terms are used interchangeably during an appeal. Because R.C. 2951.03 expressly provides that a report may be reviewed by defense counsel while appealing a sentence, the legislature exhibited its intent that the term “defendant’s counsel” should include defendant’s appellate counsel and that interpretation is consistent with its common usage.

D. Even if an attorney looks at a presentence investigation report, the report remains confidential.

Allowing defense counsel to review the presentence investigation report does not alter its confidential nature.¹ But the State expends considerable energy arguing that counsel – who is an officer of the court – should not have access to the report, claiming it alters its confidential nature. (State’s Brief, pp. 7-9.) As explained in Mr. Johnson’s Merit Brief, this argument lacks merit, and the State fails to explain how allowing counsel to review the report makes the report a public document. Indeed, the report may still be kept under seal.

¹ Counsel is not seeking permission or advocating to review those items prohibited from disclosure under R.C. 2951.03(B)(1).

II. A narrow construction of “defense counsel” results in fundamentally unfair and inefficient appellate proceedings.

The State argues that a defendant’s attorney need not have access to the presentence investigation report on appeal because the appellate court can identify and address all of the meritorious issues. (State’s Brief, p. 11.) This argument was rejected by the United States Supreme Court fifty years ago in *Douglas*. 372 U.S. at 355-56 (stating that a defendant is deprived of his rights when a court decides the merits of his or her appeal in an ex parte examination of the record conducted without the benefit of counsel’s briefing). Furthermore, it is counsel’s duty to make sure the record on appeal is complete, a task which is impossible without being able to review the entire appellate record. *See* App.R. 9(B).

It is well-established that due process prohibits an appellate court from conducting an ex parte review of the trial court record and determining which appellate issues, if any, exists. *Douglas* at 356. The presentence investigation report is part of the trial court record. R.C. 2953.08(F)(1). And just as the appellate court must allow counsel access to the trial court record so that counsel may advance his or her client’s arguments, due process demands that counsel have access to the presentence investigation report for that same reason.

Moreover, if appellate courts were tasked with identifying and advancing every appellate issue that should be raised on the defendant’s behalf, there would be no reason to have counsel appointed to represent a defendant, and there would be no

reason for Appellate Rule 26(B). But this is not the case. In fact, in our tripartite justice system only a defendant's attorney has a duty to protect and advocate for the defendant. ABA Crim. Justice Standards, Standards 4 - 1.2 and 3.6. http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#1.1 (accessed Sept. 17, 2012). A duty that the neutral reviewing courts do not have.

The State also argues that defense counsel need not review the presentence investigation report because the transcripts provide all of the necessary citations to the legal issues that should be reviewed, and counsel may rely on those citations in crafting the appellate brief. Not only is this argument in conflict with *Douglas*, but it assumes that trial counsel performed effectively and that the presentence investigation report was read into the record. These assumptions cannot be made. *See Douglas* at 357 (stating that "[w]hen an indigent is forced to run the gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.>").

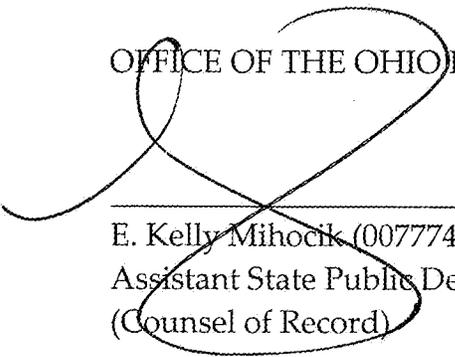
III. Conclusion.

Presentence investigation reports contain indispensable information that trial courts rely on when crafting a defendant's sentence, imposing fines, and ordering restitution. 2951.03(A)(1); R.C. 2929.19(B)(1). A defendant is entitled to a meaningful appeal of his or her sentence, and a meaningful appeal is impossible without access to the trial court record, including access to the presentence investigation report. Because

the plain, express language of the statute, as well as constitutional considerations, support granting Mr. Johnson's counsel access to the report, he asks that this Court rule that a defendant's appellate counsel has the right to obtain or review the presentence investigation report when preparing a defendant's appellate brief.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



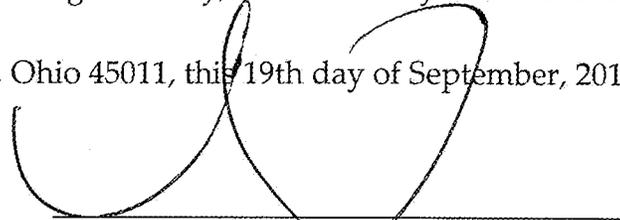
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular U.S. Mail, to the Office
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315 High Street, 11th Floor, Hamilton, Ohio 45011, this 19th day of September, 2013.



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IN THE OHIO SUPREME COURT

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APPENDIX TO
REPLY BRIEF DEFENDANT-APPELLANT DONALD JOHNSON

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*** Rules current through rule amendments received through July 10, 2013 ***
** Annotations current through May 24, 2013 ****

Ohio Rules Of Appellate Procedure
Title II. Appeals from judgments and orders of court of record

Ohio App. Rule 9 (2013)

Review Court Orders which may amend this Rule.

Rule 9. The record on appeal

(A) Composition of the record on appeal; recording of proceedings.

(1) The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases.

(2) The trial court shall ensure that all proceedings of record are recorded by a reliable method, which may include a stenographic/shorthand reporter, audio-recording device, and/or video-recording device. The selection of the method in each case is in the sound discretion of the trial court, except that in all capital cases the proceedings shall be recorded by a stenographic/shorthand reporter in addition to any other recording device the trial court wishes to employ.

(B) The transcript of proceedings; discretion of trial court to select transcriber; duty of appellant to order; notice to appellee if partial transcript is ordered.

(1) It is the obligation of the appellant to ensure that the proceedings the appellant considers necessary for inclusion in the record, however those proceedings were recorded, are transcribed in a form that meets the specifications of *App. R. 9(B)(6)*.

(2) Any stenographic/shorthand reporter selected by the trial court to record the proceedings may also serve as the official transcriber of those proceedings without prior trial court approval. Otherwise, the transcriber of the proceedings must be approved by the trial court. A party may move to appoint a particular transcriber or the trial court may appoint a transcriber sua sponte; in either case, the selection of the transcriber is within the sound discretion of the trial court, so long as the trial court has a reasonable basis for determining that the transcriber has the necessary qualifications and training to produce a reliable transcript that conforms to the requirements of *App. R. 9(B)(6)*.

(3) The appellant shall order the transcript in writing and shall file a copy of the transcript order with the clerk of the trial court.

(4) If no recording was made, or when a recording was made but is no longer available for transcription, *App. R. 9(C)* or *9(D)* may be utilized. If the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion.

(5) Unless the entire transcript of proceedings is to be included in the record, the appellant shall file with the notice of appeal a statement, as follows:

(a) If the proceedings were recorded by a stenographic/shorthand reporter, the statement shall list the assignments of error the appellant intends to present on the appeal and shall either describe the parts of the transcript that the appellant intends to include in the record or shall indicate that the appellant believes that no transcript is necessary.

(b) If the proceedings were not recorded by any means, or if the proceedings were recorded by non-stenographic means but the recording is no longer available for transcription, or if the stenographic record has become unavailable, then the statement shall list the assignments of error the appellant intends to present on appeal and shall indicate that a statement under *App. R. 9(C)* or *9(D)* will be submitted.

The appellant shall file this statement with the clerk of the trial court and serve the statement on the appellee.

If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order transcription of the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript of proceedings shall arrange for the payment to the transcriber of the cost of the transcript of proceedings.

(6) A transcript of proceedings under this rule shall be in the following form:

(a) The transcript of proceedings shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;

(b) The transcript of proceedings shall be firmly bound on the left side;

(c) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;

(d) The transcript of proceedings shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;

(e) An index of witnesses shall be included in the front of the transcript of proceedings and shall contain page and line references to direct, cross, re-direct, and re-cross examination;

(f) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;

(g) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;

(h) No volume of a transcript of proceedings shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length;

(i) An electronic copy of the written transcript of proceedings should be included if it is available;

(j) The transcriber shall certify the transcript of proceedings as correct and shall state whether it is a complete or partial transcript of proceedings, and, if partial, indicate the parts included and the parts excluded.

(7) The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court under *App. R. 10(A)*.

(C) Statement of the evidence or proceedings when no recording was made, when the transcript of proceedings is unavailable, or when a recording was made but is no longer available for transcription.

(1) If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to *App.R. 10* and the appellee may serve on the appellant objections or propose amendments to the statement within ten days after service of the appellant's statement;

these time periods may be extended by the court of appeals for good cause. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to *App.R. 10*, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(2) In cases initially heard in the trial court by a magistrate, a party may use a statement under this division in lieu of a transcript if the error assigned on appeal relates solely to a legal conclusion. If any part of the error assigned on appeal relates to a factual finding, the record on appeal shall include a transcript or affidavit previously filed with the trial court as set forth in *Civ.R. 53(D)(3)(b)(iii)*, *Juv.R. 40(D)(3)(b)(iii)*, and *Crim.R. 19(D)(3)(b)(iii)*.

(D) Agreed statement as the record on appeal.

(1) In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record under *App.R. 10*, may prepare and sign a statement of the case showing how the issues raised in the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised in the appeal, shall be approved by the trial court prior to the time for transmission of the record under *App.R. 10* and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by *App.R. 10*.

(2) In cases initially heard in the trial court by a magistrate, a party may use a statement under this division in lieu of a transcript if the error assigned on appeal relates to a legal conclusion. If the error assigned on appeal relates to a factual finding, the record on appeal shall include a transcript or affidavit previously filed with the trial court as set forth in *Civ.R. 53(D)(3)(b)(iii)*, *Juv.R. 40(D)(3)(b)(iii)*, and *Crim.R. 19(D)(3)(b)(iii)*.

(E) Correction or modification of the record.

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified, filed, and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

HISTORY: Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92; 7-1-11; 7-1-13.

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*** Rules current through rule amendments received through July 10, 2013 ***
** Annotations current through May 24, 2013 ****

Ohio Rules Of Appellate Procedure
Title III. General provisions

Ohio App. Rule 26 (2013)

Review Court Orders which may amend this Rule.

Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A) Application for reconsideration and en banc consideration.

(1) Reconsideration.

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by *App.R. 30(A)*.

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2) En banc consideration.

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by *App.R. 30(A)*. In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by *App.R. 30(A)*. A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under *App.R. 26(A)(2)(c)* and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B) Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to *App.R. 9* and *10* shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

HISTORY: Amended, eff 7-1-75; 7-1-93; 7-1-94; 7-1-97; 7-1-10; 7-1-11; 7-1-12.