

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : CASE NO. 2007-0755
v. : C.P. Case No. CR475400
CHARLES MAXWELL, :
Appellant. : **This is a death penalty case.**

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF COMMON PLEAS,
CASE NO. CR475400

APPELLANT CHARLES MAXWELL'S APPLICATION FOR REOPENING
PURSUANT TO S.Ct. Prac. R. 11.06

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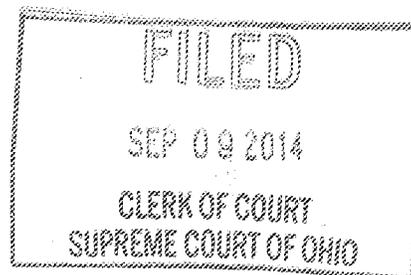
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Supreme Court Case No. 2007-0755
-vs.- :
CHARLES MAXWELL, : **This is a capital case.**
Appellant. :

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF COMMON PLEAS,
CASE NO. CR475400

APPELLANT CHARLES MAXWELL'S APPLICATION FOR REOPENING
PURSUANT TO S.Ct. Prac. R. 11.06

Appellant Charles Maxwell asks this Court to grant his Application for Reopening based upon the ineffective assistance of counsel during Maxwell's direct appeal. S.Ct. Prac. R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

I. Maxwell's direct appeal counsel were constitutionally ineffective.

The Due Process Clause of the Fourteenth Amendment 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). Maxwell's appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial. *See* Propositions of Law I-XV, *infra*. Because appellate counsel were prejudicially ineffective in this case, this Court must re-open Maxwell's appeal. *State v. Murnahan*, 63 Ohio St.3d 60 (1992) and S.Ct. Prac. 11.06.

II. Propositions of Law¹

¹ Due to the page limitation of S.Ct. Prac. R. 11.06, Maxwell is unable to fully brief the issues. The inability to fully brief every issue should not be the basis of a waiver of that issue.

Had Appellant Maxwell's direct appeal counsel presented the following propositions of law, the outcome of this appeal would have been different.

Proposition of Law I: The evidence against Maxwell is insufficient to support a conviction for 2929.03(A)(3), because Maxwell was not convicted of the felonious assault for which he had sought to avoid detection, apprehension, trial, or punishment, and his conviction is unconstitutional.

"[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship*, 397 U.S. 358, 362 (1970). Maxwell currently stands convicted of the R.C. 2929.04(A)(3) death penalty specification—that he killed McCorkle to avoid detection, apprehension, trial, or punishment for a felonious assault—but this was not proven beyond a reasonable doubt. Maxwell was never convicted of that felonious assault. "[P]roof of the defendant's commission of the prior offense constituted an essential element of the R.C. 2929.04(A)(3) specification." *State v. Conway*, 109 Ohio St. 3d 412, 420 (2006). The State never proved beyond a reasonable doubt that he committed it. Without this felonious assault conviction, Maxwell cannot be guilty of the (A)(3) specification. *Id.* ("[T]he state was required to prove beyond a reasonable doubt that Conway committed the offense of felonious assault for which he had sought to avoid detection, apprehension, trial, or punishment.")

Proposition of Law II: Maxwell's due process rights were violated when direct appeal counsel failed to raise the issue that evidence against Maxwell is insufficient to support a conviction for 2929.03(A)(3).

Direct appeal counsel performed deficiently, to Maxwell's prejudice, when they failed to point out that Maxwell's conviction of the 2929.04(A)(3) specification is unsupported and unconstitutional. "[P]roof of the defendant's commission of the prior offense constituted an essential element of the R.C. 2929.04(A)(3) specification." *State v. Conway*, 109 Ohio St. 3d 412, 420 (2006). There is no question that Maxwell was not convicted of felonious assault.

“There was a reasonable probability of success had he presented those claims on appeal.” *State v. Were*, 120 Ohio St. 3d 85, 88 (Ohio 2008)(internal citations omitted).

Proposition of Law No. III: The State committed misconduct by misrepresenting the evidence against Maxwell.

The State committed misconduct by misrepresenting to the jury that the phone records corroborated the testimony of John Gregg, the key witness against Maxwell. Gregg’s testimony was the sole evidence the State presented to prove that Maxwell murdered Nichole McCorkle in retaliation for her testimony in front of a grand jury. (See Tr. 2292) (According to the trial judge, “The jury found beyond a reasonable doubt that Mr. Maxwell’s purposeful murder was in retaliation for the victim’s testimony. **That finding was based upon the testimony of John Gregg.**”) (emphasis added). But Gregg had little credibility, even according to the trial judge. *See, i.e.*, (T.p. 1022) (The trial judge stated, “There are fewer witnesses that come before Common Pleas Court that have less credibility than one John Gregg.”) The State used Maxwell’s phone records—or, rather, the State’s interpretation of Maxwell’s phone records—to corroborate Gregg’s unbelievable testimony.

For Maxwell to be guilty of the retaliation specification, the State had to prove two things: 1) that Maxwell was aware of McCorkle’s grand jury testimony, and 2) that he killed her in retaliation for it. The State relied on the testimony of John Gregg, specifically, Gregg’s testimony about an alleged phone call from Maxwell to Gregg on the night of November 23, 2005 when Maxwell called Gregg and then connected to McCorkle on a three-way call. (Tr. 1672-7).

If Gregg’s testimony had any truth, there would be a call from Maxwell to Gregg on November 23rd, 2005 in the State’s phone records, Ex. 121, but none exists. (*See attached Ex. A*). The parties agreed that Exhibit 121 “represents that these phone calls took place between all

the individuals listed on here for the times and on the dates in question.” (Tr. 1558). Had it happened the way Gregg testified, the call would be reflected in the records. (Tr. 1674-5).

The State permitted Gregg to testify that, through this phone call, Gregg had firsthand knowledge that Maxwell knew of McCorkle’s grand jury testimony that day, threatened to kill her, and then discussed acquiring a gun during the alleged call. (Tr. 1672-7). Without the phone call, this could not have occurred. The State relied heavily on what Gregg purportedly heard during the phone call. (*See, e.g.*, Tr. 768, 1673-76, 1996.) Despite the nonexistence of the call in the records, the prosecutor pointed to the records and argued that they supported Gregg’s testimony, but then added: “We don’t have Gregg’s records at that point, okay? But you have - - and he’s on that three-way. Okay? There it is right there.” (Tr. 1996-7).

In actuality, the records only showed a call between Maxwell and McCorkle. And the State did indeed have Gregg’s phone records, as evidenced by other calls on Exhibit 121. Moreover, Gregg claimed Maxwell called **him**. (Tr. 1673).

Gregg’s perjured testimony, knowingly permitted by the State, was the source of Maxwell’s death specification. This is error and violated Maxwell’s rights. It is the prosecutor’s duty to seek justice. *Berger v. United States*, 295 U.S. 78, 88 (1935). “The prosecution deliberately misrepresented the truth,” and “the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.” *Miller v. Pate*, 386 U.S. 1, 6-7 (1967)(citing *Mooney v. Holohan*, 294 U.S. 103 (1935)).

Proposition of Law No. IV: Direct appeal counsel were ineffective under *Strickland v. Washington* for failing to argue the State committed misconduct by misrepresenting the evidence against Maxwell.

Direct appeal counsel performed deficiently by failing to argue that the State misrepresented to the jury that the phone records corroborated the testimony of Gregg. Ex. 121.

Counsel raised other instances of prosecutorial misconduct, and none were as strong an issue as this. Even without this, two justices already determined that a death sentence is not appropriate Maxwell. “There was a reasonable probability of success had he presented those claims on appeal.” *State v. Were*, 120 Ohio St. 3d 85, 88 (Ohio 2008)(internal citations omitted).

At oral argument, this Court questioned the attorneys about the meaning of Maxwell’s alleged statements to Gregg on the 23rd. The questioning should have instead concerned whether there was any evidence that a 3-way call happened. This Court was left with the false impression that Gregg’s testimony was somehow “corroborated” by the phone records.

Proposition of Law V: The evidence against Maxwell is insufficient to support a conviction for aggravated murder, and his conviction is unconstitutional.

There is insufficient evidence to support Maxwell’s conviction for the R.C. 2929.04(A)(3) specification. (*See Prop. of Law I*). There is insufficient evidence supporting Maxwell’s conviction for the 2929.04(A)(8) specification. (*See Prop. of Law III*). There are no other specifications for which he stands convicted. Therefore, his conviction for capital murder is unconstitutional. *See* 2929.04 (A) “Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment.” *See also Gregg v. Georgia*, 428 U.S. 153 (1976).

Proposition of Law VI: Maxwell’s due process rights were violated when direct appeal The evidence against Maxwell is insufficient to support a conviction for aggravated murder, and his conviction is unconstitutional

Direct appeal counsel performed deficiently, to Maxwell’s prejudice, when they failed to point out that there is insufficient evidence supporting Maxwell’s conviction for the capital murder. “There was a reasonable probability of success had he presented those claims on appeal.” *State v. Were*, 120 Ohio St. 3d 85, 88 (2008)(internal citations omitted).

Proposition of Law No. VII: The trial court erred by denying Maxwell's Motions for a New Trial.

The new trial motions identified critical errors from trial. First, the testimony presented to the Grand Jury prosecutor ended up testifying in front of the grand jury, because John Gregg refused. *See* Second New Trial Motion, p. 4-5. He testified about Gregg's statement to police, which was an unsigned statement. It was not authenticated. Also, the trial court, in sentencing Maxwell, considered statements that were not in evidence. It is error for the sentencer to consider facts not in evidence. *See e.g., State v. Rojas*, 64 Ohio St. 3d 131, 142 (1992).

Notably, the evidence in the new trial motion demonstrates that the prosecution violated the rules of discovery and *Brady v. Maryland*, 373 U.S. 83 (1963). According to the motion, the prosecutors did not disclose all of the statements of the co-defendant – John Gregg. Moreover, the State did not disclose the fact that Gregg was given **immunity** in exchange for his testimony. *See* Second New Trial Motion, p.8-9. “That immunity apparently included Conspiracy to Commit Aggravated Murder.” *Id.* at 9. The State had a duty to disclose this. *See Kyles v. Whitley*, 514 U.S. 419, 432(1995). The trial court denied this motion without explanation.

Proposition of Law No. VIII: Direct appeal counsel failed to raise the issue that the trial court erred by denying Maxwell's Motions for a New Trial.

Direct appeal counsel failed to raise numerous meritorious issues enumerated in two separate motions for new trial filed by Maxwell's trial counsel in the court record. (*See Proposition of Law III; see* Exs. B and C.) Even without the errors identified by the new trial motions, two justices already determined that a death sentence is not appropriate Maxwell. “There was a reasonable probability of success had he presented those claims on appeal.” *State v. Were*, 120 Ohio St. 3d 85, 88 (Ohio 2008)(internal citations omitted).

Proposition of Law No. IX: A defendant's Sixth Amendment and Fourteenth Amendment rights are violated when he is denied the effective assistance of counsel.

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).

A. Trial counsel failed to effectively argue State's Ex. 121.

Exhibit 121 undermines further the already shaky testimony of Gregg. Gregg's testimony was the sole evidence the State presented to prove that Maxwell murdered Nichole McCorkle in retaliation for her testimony in front of a grand jury. (See Tr. 2292). But Gregg had little credibility, even according to the trial judge. Defense counsel failed to effectively use Maxwell's phone records to refute Gregg's testimony.

Defense counsel tried a half-hearted attempt to interject the phone records for the first time during closing argument (Tr. 1963), which then gave the State another opportunity to mislead the jury. Closing arguments are not evidence. Furthermore, counsel's timing allowed for the prosecution to explain away defense counsel's argument without any further challenge from the defense. (See Tr. 1996-7).

By stipulating to State's Ex. 121 and allowing the State to avoid calling a phone company custodian, counsel was never able to cross-examine a witness or otherwise present it effectively to the jury. Nor did counsel call a phone records expert to explain their meaning. Because of ineffective assistance, the jury never heard critical exculpatory evidence during the case-in-chief.

B. Trial counsel erred by failing to present the testimony of a witness qualified to testify about the phone records.

Counsel erred by failing to present the testimony of a phone company custodian or phone records expert during the trial phase. *Ake v. Oklahoma*, 470 U.S. 68 (1984); *State v. Johnson*, 24 Ohio St.3d 87 (1986). Had trial counsel obtained the assistance of a such a witness, they would

have had a witness who could have testified that the absence of a phone record means the call did not occur. This would have undermined the State's attempt to argue that a 3-way call does not show up on records. (See Tr. 1996-97.)

C. Trial counsel failed to preserve the record for review.

Early in the trial, the court warned the attorneys that it was “encumbent [sic] upon [them] to request the court reporter if you wish to preserve an objection for the record.” (Tr. 769). In response, trial counsel vowed to “put everything on the record.” (Id). Instead, trial counsel failed to preserve 60 additional sidebar discussions, including several at critical junctures, such as during the contentious testimony of John Gregg or relating to Gregg. (Tr. 1026, 1659, 1683, 1687, 1693, 1719, 1785). Maxwell is now prejudiced by an incomplete record for review.

D. Trial counsel performed deficiently, to Maxwell's prejudice, when they failed to point out that there is insufficient evidence supporting Maxwell's conviction for the capital murder.

Trial counsel erred by failing to argue to the court that there was insufficient evidence of either aggravating circumstance. Maxwell fully incorporates Prop. of Law I and III as if rewritten herein.

Proposition of Law No. X: Direct appeal counsel failed to raise several instances of ineffective assistance of counsel, in violation of Maxwell's due process rights.

Direct appeal counsel failed to raise numerous meritorious issues of the ineffective assistance of counsel. (See *Proposition of Law IX*.) Even without these errors, two justices already determined that a death sentence is not appropriate for Maxwell. “There was a reasonable probability of success had he presented those claims on appeal.” *State v. Were*, 120 Ohio St. 3d 85, 88 (Ohio 2008)(internal citations omitted).

Proposition of Law No. XI: Maxwell's right to the effective assistance of counsel and his due process rights were violated when direct appeal counsel conceded a constitutional violation at argument.

Direct appeal counsel was ineffective for conceding a Sixth Amendment violation during oral argument. Counsel was aware of the particular importance of this issue, as this Court, *sua sponte*, ordered supplemental briefing on the subject. Counsel was ineffective for conceding the issue of whether Chief Deputy Coroner Dr. Felo, who did not conduct the autopsy of McCorkle, testified in violation of Maxwell's Constitutional rights.

Proposition of Law No. XII: The trial court violated its role as gatekeeper of the evidence, and Maxwell's Due Process rights were violated.

The trial court allowed the unreliable testimony of John Gregg before the jury. The court was initially and rightly skeptical of Gregg. In overruling the State's forfeiture by wrongdoing motion, based on Gregg's testimony, the court stated that if "Gregg came in here and told me my name was David Matia I would first have to check my birth certificate and my driver's license to confirm that." (Tr. 1022). Yet, despite defense counsel's objections, the court violated its gatekeeper duty and allowed Gregg to in give unconfirmed and unreliable testimony to the jury in a capital case.

Proposition of Law No. XIII: The trial court erred by not granting Maxwell's Rule 29 Motion, and Maxwell's Due Process rights were violated.

Having allowed Gregg's testimony, the court should have granted defense counsel's Rule 29 motions on the retaliation specification. (Tr. 1860-1, 2029). This would have been consistent with the court's earlier statements about Gregg's lack of credibility. Instead, the court erred again by not granting the R. 29 motion for the retaliation specification or instructing the jury on a directed verdict of not guilty to the specification.

Proposition of Law No. XIV: A trial court violates a capital defendant's rights to a fair trial and due process when it fails to record sidebars to ensure a complete record on appeal.

The trial court failed to record at least 75 sidebars during Charles Maxwell's capital trial.

Maxwell 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); S.Ct. Prac. R. 5.1.

Proposition of Law No. XV: Direct appeal counsel failed to raise several instances of trial court errors, in violation of Maxwell’s due process rights.

Direct appeal counsel failed to raise numerous meritorious issues of trial court errors. (See *Propositions of Law VII, IX, X, XI*.) Even without these errors, two justices already determined that a death sentence is not appropriate for Maxwell. “There was a reasonable probability of success had he presented those claims on appeal.” *State v. Were*, 120 Ohio St. 3d 85, 88 (Ohio 2008)(internal citations omitted). Moreover, appellate counsel was ineffective for failing to remedy the court’s failure to record crucial sidebar conversations regarding jury selection and critical evidentiary rulings. See App. R. 9. Counsel must ensure that the record at every stage is complete.

III. Conclusion.

Appellant Maxwell requests that this Application for Reopening be granted. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

Respectfully submitted,

Office of the Ohio Public Defender



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Certificate of Service

I hereby certify that on September 9th, 2014, I served a copy of the foregoing APPELLANT CHARLES MAXWELL'S APPLICATION FOR REOPENING PURSUANT TO S.Ct. Prac. R. 11.06 and APPENDIX TO APPLICATION by regular United States mail to Timothy McGinty, Prosecutor, Saleh Awadallah and Adam Chaloupka, Assistant Prosecutors, Cuyahoga County Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



RACHEL TROUTMAN (0076741)
Counsel of Record

COUNSEL OF APPELLANT

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No.: 2007-0755
Charles Maxwell,	:	
Appellant.	:	This Is A Capital Case.

AFFIDAVIT OF RACHEL TROUTMAN

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Rachel Troutman, 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 2003. My sole area of practice is capital litigation.
2. I was assigned to work on Charles Maxwell's post-conviction case.
3. I have reviewed the record in *State v. Maxwell*, Cuyahoga County Common Pleas Case No. CR-475400. 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. Because of my specialized practice, I have also taught as faculty at the Ohio Association of Criminal Defense Lawyers annual death penalty seminar as well as the Ohio State Bar Association annual death penalty seminar, both held in Columbus, Ohio.
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 appellate 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. 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. After ensuring that the record is complete, counsel must then review the entirety of the record for purposes of issue identification. This review of the record not only includes the transcript, but also the trial motions, exhibits, and the jury questionnaires.
9. 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.
10. 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 this Supreme Court precedent and developments in the law to raise and preserve all relevant issues for appellate review.
11. 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.
12. 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.
13. 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.

14. Based on the foregoing standards, I reviewed the record in Charles Maxwell's case. I have identified the following issues that should have been evaluated by appellate counsel and fully presented to this Court:

Proposition of Law I: The evidence against Maxwell is insufficient to support a conviction for 2929.03(A)(3), because Maxwell was not convicted of the felonious assault for which he had sought to avoid detection, apprehension, trial, or punishment, and his conviction is unconstitutional.

Proposition of Law II: Maxwell's due process rights were violated when direct appeal counsel failed to raise the issue that evidence against Maxwell is insufficient to support a conviction for 2929.03(A)(3).

Proposition of Law No. III: The State committed misconduct by misrepresenting the evidence against Maxwell

Proposition of Law No. IV: Direct appeal counsel were ineffective under *Strickland v. Washington* for failing to argue the State committed misconduct by misrepresenting the evidence against Maxwell.

Proposition of Law V: The evidence against Maxwell is insufficient to support a conviction for aggravated murder, and his conviction is unconstitutional

Proposition of Law VI: Maxwell's due process rights were violated when direct appeal The evidence against Maxwell is insufficient to support a conviction for aggravated murder, and his conviction is unconstitutional

Proposition of Law No. VII: The trial court erred by denying Maxwell's Motions for a New Trial

Proposition of Law No. VIII: Direct appeal counsel failed to raise the issue that the trial court erred by denying Maxwell's Motions for a New Trial.

Proposition of Law No. IX: A defendant's Sixth Amendment and Fourteenth Amendment rights are violated when he is denied the effective assistance of counsel.

- A. Trial counsel failed to effectively argue State's Ex. 121.
- B. Trial counsel erred by failing to present the testimony of a witness qualified to testify about the phone records.

C. Trial counsel failed to preserve the record for review

D. Trial counsel performed deficiently, to Maxwell's prejudice, when they failed to point out that there is insufficient evidence supporting Maxwell's conviction for the capital murder.

Proposition of Law No. X: Direct appeal counsel failed to raise several instances of ineffective assistance of counsel, in violation of Maxwell's due process rights.

Proposition of Law No. XI: Maxwell's right to the effective assistance of counsel and his due process rights were violated when direct appeal counsel conceded a constitutional violation at argument

Proposition of Law No. XII: The trial court violated its role as gatekeeper of the evidence, and Maxwell's Due Process rights were violated.

Proposition of Law No. XIII: The trial court erred by not granting Maxwell's Rule 29 Motion, and Maxwell's Due Process rights were violated.

Proposition of Law No. XIV: A trial court violates a capital defendant's rights to a fair trial and due process when it fails to record sidebars to ensure a complete record on appeal.

Proposition of Law No. XV: Direct appeal counsel failed to raise several instances of trial court errors, in violation of Maxwell's due process rights.

15. 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.
16. Appellate counsel failed to raise these issues in appellant Charles Maxwell's direct appeal to this Court. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application to Re-open are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.
17. Therefore, Appellant Charles Maxwell was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.



TRACY L. SMITH
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 5-18-16

Rachel Troutman
Counsel for Appellant Maxwell

Sworn to and subscribed before me on this 9 day of September, 2014.