

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 Appellee, :
 vs. : Case No. 2008-2370
 CALVIN NEYLAND :
 Appellant. : **This is a Capital Case**

**On Appeal from the
 Wood County Court of Common Pleas
 Case No. 07 CR 0359**

**Appellant Calvin Neyland's Application For Reopening Pursuant To
 S.Ct. Prac. R. XI, Section 6**

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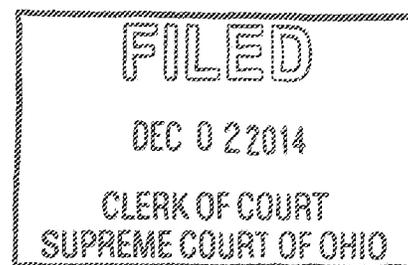
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Appellee, :
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CALVIN NEYLAND :
Appellant. : **This is a Capital Case**

Appellant Neyland's Application for Reopening Pursuant to S.Ct. Prac. R. XI, Section 6

Appellant Calvin Neyland requests that this Court grant his Application for Reopening based upon the ineffective assistance of counsel during Neyland's direct appeal. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

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

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. See, e.g., *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). Appellant counsel failed to raise meritorious claims in Neyland's Direct Appeal proceedings. Based on these errors, it is apparent that appellate counsel were ineffective in the case. See Exhibit A; Propositions of Law I and II, *infra*.

Because appellate counsel were prejudicially ineffective in this case, this Court must reopen Neyland's appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); S.Ct. Prac. R. 11.6.2014

B. Appellate counsel were prejudicially ineffective for failing to raise meritorious issues on appellant Neyland's behalf.¹

¹ If this Court finds that these Propositions of Law were not adequately raised or supported by facts and/or law, current appellate counsel respectfully requests that further briefing of these claims be allowed.

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

PROPOSITION OF LAW NO. I: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails to have his client's competency revisited during his capital trial and sentencing.

The United States Supreme Court has determined that counsel must provide "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). And counsel's decisions must be based on "reasonable professional judgment." *Id.* at 688. When counsel's performance is deemed deficient a defendant must also show counsel's actions were prejudicial; "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Trial counsel were ineffective when they failed to have Neyland's competency revisited at the time of his trial and for sentencing.

To be competent, a defendant must have "sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding -- and a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *State v. Were*, 118 Ohio St.3d 448, 455 (2008) (emphasis added). Ohio's competency statute requires a finding of incompetency where "because of the defendant's *present* mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." O.R.C. § 2945.37(G) (emphasis added.).

Trial counsel initially raised an issue of competency with the trial court. At a July 28, 2009 pretrial hearing, trial counsel testified that Neyland refused to talk to Dr. Graves, and counsel were trying to convince him to get involved in the case. (Tr. 4). At the August 5, 2009 ex parte hearing, defense counsel testified that Neyland “has consistently refused to cooperate” in their efforts to prepare for the mitigation phase. (Tr. 4) During the Pre-trial hearing on August 25, 2008 counsel noted and the judge concurred that Neyland was not cooperating, focused on irrelevant matters, and saw things that were not there. (Tr. 5). The trial judge also stated; “I understand he’s not going to cooperate as to the litigation phase.” (*Id.*). Still, the trial judge determined that Neyland was competent to stand trial (Tr. 113) and before trial commenced denied a motion to reconsider his competency determination.

Throughout Neyland’s trial, Neyland continued to demonstrate signs of incompetency and a deteriorating relationship with trial counsel. There were several indicators that due to Neyland’s mental condition he was unable to assist his attorneys at various points during the time of his trial. (Tr. 1169-73). Competency is fluid. As such, trial counsel should have re-raised the issue of competence and had Neyland re-evaluated to ensure his right to a fair trial and sentencing. Ohio’s statute provides the defendant the right to raise competency both before trial and during the trial. R.C. § 2945.37(B).

Neyland was not assisting them in his defense leading up to his trial. Trial counsel continued to have the same difficulty in getting Neyland to assist in his trial and sentencing phase that they had before his competency hearing. And it had been already determined that Neyland was “suffering from a mental condition (whether it was called Schizophrenia, or a Personality Disorder, or some other name).

While there was a substantial question about Neyland's competency raised well-before the mitigation phase, as O.R.C. 2945.37 and *Drope* make apparent, a defendant must be competent throughout the proceedings. The need to ensure Neyland's competence continued into the mitigation phase of his capital trial.

It was deficient performance for trial counsel to fail to have Neyland re-evaluated to determine if he was competent at the time of his trial or during his mitigation phase. Counsel's decision was not based on "reasonable professional judgment." *Strickland*, 466 U.S. at 691.

Neyland was prejudiced by his trial counsel's deficient performance in not having him reevaluated for competency at the time of his trial. Neyland was suffering from a mental illness and was not able to assist his counsel during the most essential phase of his capital trial, the mitigation phase. Instead of assisting with his trial, Neyland was disruptive and made statements contradicting testimony presented by his attorneys. (Mit. Tr. 82-88). Neyland was clearly incompetent at the time of his trial and sentencing phase. Had trial counsel requested the court to conduct an additional hearing on his competency where they could have presented their continued inability to work with Neyland, the result of his trial and sentencing phase would have been different. *Strickland v. Washington*, 466 U.S. at 694.

PROPOSITION OF LAW NO. II: When the trial court is confronted with indicia that the defendant is incompetent to stand trial, the trial court's failure to order a competency evaluation and conduct a hearing violates the defendant's procedural due process rights.

Where there is sufficient indicia of incompetence the trial court must have a defendant's competency evaluated and conduct a hearing on the issue. Failure to do so deprives a defendant of his procedural due process rights. U.S. Const. Amends. V, XIV; Ohio Const. Art. I, § 16. A defendant is further deprived of his substantive due process rights when the trial court permits him to be tried for a crime while he is incompetent. U.S. Const. Amends. V, XIV; Ohio Const. Art. I, § 16.

Although the trial court granted Neyland a competency hearing before the trial What should have been apparent to the court was that Neyland was not "perceiving accurately, interpreting, and / or responding appropriately to the world around him." *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1991). The trial court discussed with trial counsel Neyland's refusal to assist with mitigation and his lack of cooperation with the case. Tr. 1169-73. Trial counsel also indicated that Neyland was agitated and wanted to represent himself pro se. However, the judge denied the request and ignored indicia that Neyland was incompetent saying that Neyland was "more emotional than he is logical." Tr. 1179. Neyland was suspicious of everyone. Accusations were levied against nearly every participant in the proceedings against him. Many of his claims had no foundation in fact. His suspicions and paranoia were both unfounded and irrational.

It is well settled principle that trying a defendant who is legally incompetent violates that defendant's right to a fair trial. *Drope*, 420 U.S. at 162. In Ohio, the **court**, prosecutor or defendant may raise the issue of the defendant's competence to stand trial. Competence can be raised after the trial commenced. R.C. 2945.37(B). As discussed in Proposition of Law No. I, a

defendant who lacks the mental capacity to understand the “nature and object of the proceedings against him, to consult with counsel, and to assist in the preparing of his defense may not be subjected to trial.” *Drope*, 420 U.S. at 171 (1975). *See also*, *State v. Were*, 94 Ohio St. at 174, 761 N.E.2d 591, 592 (2002) (internal citations omitted). The purpose of the competency requirement is to ensure that the defendant has both the “capacity to understand the proceedings and to assist counsel.” *Godinez v. Moran*, 509 U.S. 389, 402 (1993).

In assessing competency, the court should consider the defendant’s irrational behavior, his trial demeanor, and prior opinions on competency. *Drope*, 420 U.S. at 180. Listing appeals issues, reciting charges, identifying witnesses, and using legal terminology is not sufficient to establish competency, because the defendant must have both a rational and factual understanding of the proceedings. *United States v. Williams*, 113 F.3d 1155, 1160 (10th Cir. 1997) (citing *United States v. Hems*, 901 F.2d 293, 295 (2nd Cir. 1990); *Dusky*, 362 U.S. at 402)).

The trial court must always be alert to circumstances suggesting that the defendant is incompetent. “Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” *Drope*, 420 U.S. at 181. Trying or convicting a defendant who is incompetent deprives the defendant of his due process right to a fair trial. *Id.* at 172 (internal citation omitted).

In the present case, there was sufficient indicia of incompetence presented to the trial court such that an inquiry into Neyland’s competency was necessary to ensure a new trial. The trial court had an obligation to hold a second hearing on Neyland’s competency once it became clear that Neyland could not assist in his defense. The failure to do so violated Neyland’s right

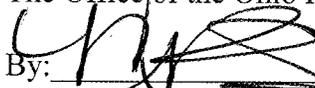
to a fair trial and sentencing proceeding as provided by the Due Process Clause of the United States Constitution.

D. Conclusion

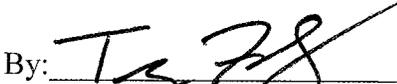
Appellant Neyland requests that this Application for Reopening be granted. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,

The Office of the Ohio Public Defender

By: 

Pamela Prude-Smithers (0062206)
Chief, Death Penalty Division

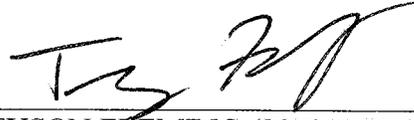
By: 

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Certificate of Service

I hereby certify that on December 2nd, 2014, I served a copy of the foregoing APPELLANT CALVIN NEYLAND'S APPLICATION FOR REOPENING PURSUANT TO S.Ct. Prac. R. XI, Section 6 by regular United States mail to Paul Dobson, Prosecutor, Wood County, One Courthouse Square, Bowling Green, Ohio 43402.



TYSON FLEMING (0073135)
Counsel of Record

COUNSEL OF APPELLANT

EXHIBIT A

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-Vs- : Case No: 2008-2370
Calvin Neyland, :
Appellant. : **This Is A Capital Case.**

AFFIDAVIT OF TYSON FLEMING

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Tyson Fleming, 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 2007. My sole area of practice is capital litigation.
2. I was assigned to work on Calvin Neyland's post-conviction case.
3. I have reviewed the record in *State v. Neyland*, Wood County Common Pleas Case 07-CR-359. I have also reviewed the direct appeal briefs 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 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 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. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.
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.

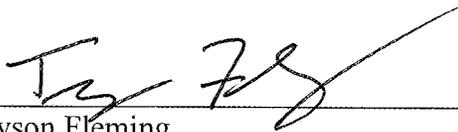
13. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus 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 have identified the following issues that should have been evaluated by appellate counsel and fully presented to this Court:

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

PROPOSITION OF LAW NO. II: When the trial court is confronted with indicia that the defendant is incompetent to stand trial, the trial court's failure to order a competency evaluation and conduct a hearing violates the defendant's procedural 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 Calvin Neyland'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 Calvin Neyland was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.



 Tyson Fleming
 Counsel for Calvin Neyland

Sworn to and subscribed before me on this 2nd day of December, 2014.



TERI SLACK
 NOTARY PUBLIC, STATE OF OHIO
 MY COMMISSION EXPIRES Apr. 9, 2017



 Notary Public