



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Application to Reopen Appeal – Appellate Rule 26(B) Pro Se Packet

*What should I do if I lost my appeal and I think my appellate attorney
should have raised different issues?*

What is an application to reopen an appeal?

You may file an application to reopen an appeal (sometimes called a “Murnahan”) under Appellate Rule 26(B) if you can demonstrate that your appellate attorney provided ineffective assistance of counsel by not raising an issue (or issues). The court may reopen your appeal if you establish “a colorable claim” of ineffective assistance of appellate counsel. Ineffective assistance of appellate counsel means more than failing to communicate with you or failing to raise the issues that you wanted to raise. To establish ineffective assistance of appellate counsel, you must demonstrate two things: (1) that appellate counsel’s performance was deficient, and (2) that, if not for the deficient performance, there is a reasonable probability that the result of your appeal would have been different. This test comes from the United States Supreme Court case *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

When should I file?

You have 90 days from the date the court of appeals filed its judgment entry (the decision in your case) to file an application to reopen your appeal. After that period, you will need to file a delayed application requiring you to show “good cause” for the delay. It is very difficult to establish “good cause.” Difficulty in conducting legal research or limited access to legal materials does not establish “good cause” for the untimely filing of an application for reopening. If you would like a delayed application packet, contact the Public Defender at reception or at the main office in Columbus.

Please note that your application is not considered filed until the clerk of courts for the court of appeals in the county where you were convicted *actually receives* it. It is not enough to send it out within 90 days. So make sure to leave plenty of time for your document to be processed through the mail and received by the clerk of courts.

App.R. 26(B)(2)(e) requires you to attach or provide the relevant portions of the record that are available to you. One copy of your trial transcript was provided to counsel for your earlier appeal. You are not entitled to a second copy of the transcript at the state’s expense. If you do not have a copy of your transcripts, try obtaining a copy from counsel or the *trial court clerk’s office*. After your appeal was decided, the record was returned to the trial court clerk’s office. App.R. 30(B).

You must point to places in your transcript where the errors took place. For example, on page 100 of the transcript, the prosecutor told the jury that you have been convicted of a felony, but the prosecutor wasn't allowed to tell them that. You need to write that on page 100 the prosecutor did that, and then you need to attach a copy of all of the pages that you refer to, to your application. Cite the law and other cases to support your claim.

You may raise one or more assignments of error. You can add more pages to this pro se application. However, the application can only be 10 pages long, not including affidavits and parts of the record. You will need to prepare an affidavit explaining the basis for your claim that your appellate counsel was deficient and how you were prejudiced. This affidavit is mandatory and typically just summarizes the claims written in your application.

Where should I file?

You need to file your application with the clerk of the court of appeals in the county where you were convicted.

What are my chances of success?

It is very difficult to convince the court of appeals to reopen your appeal. You must prove that your counsel was deficient for failing to raise the issues you now present, as well as showing that had your counsel presented those claims on appeal, there was a "reasonable probability" that they would have been successful.

When will the court of appeals decide my application?

The court of appeals usually decides within 4-5 months, but it can take longer. The court will send you a notice as soon as it decides the application.

Appellate Rule 26(B)

(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.

INSTRUCTIONS

Following this page is a sample copy of the form application, explaining what needs to be included. After that are blank forms for you to fill out using the sample as a guide.

1. To prepare the cover page of your application, you need certain information. Most of the information can be found on your appeal brief or the court of appeals' opinion. When the form asks for "case number," it is referring to the case number of your appeal and your trial court case number.
2. **When you are finished preparing the application, sign the application at the end and again after the certificate of service.** See sample form.
3. See your unit staff for notary service. **You will need to sign the affidavit and have it notarized.** Do not sign the affidavit until you see the notary; it must be signed in the notary's presence.
4. Make three (3) copies of the application. Some courts require additional copies, so make sure to check the court's local rules to verify how many copies you need to send.

Mail the forms as follows (if the local rules are different than these instructions, follow the local rules):

TO THE CLERK OF COURTS:

- Mail the original application, plus two (2) copies to the clerk of courts for the court of appeals.
- Mark one copy of each document "time-stamp and return." **Do not** mark the original form.
- **Do not** mail anything directly to the judge.
- If you do not know the mailing address of the clerk of courts, you can find it in your prison orientation packet.

TO THE PROSECUTOR:

- Mail one (1) copy of the application to the prosecutor.
- If you do not know the prosecutor's mailing address, you can find it in your prison orientation packet.
- If you have lost your orientation packet, you can mail the application to the prosecutor by addressing it to the prosecutor at the same address of the clerk of courts for the court of appeals.

IN THE COURT OF APPEALS
FIRST, SECOND, ETC. APPELLATE DISTRICT
COUNTY WHERE YOU WERE CONVICTED COUNTY, OHIO

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. Your appellate court case number

vs. : C.P. Case No. Your trial court case number

YOUR NAME, :

Defendant-Appellant. :

APPELLANT’S APPLICATION FOR REOPENING

Appellant respectfully moves this court to reopen their direct appeal. App.R. 26(B); *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). As described in this Application, prior appellate counsel’s inadequate performance compromised the appeal. Because YOUR NAME _____ has suffered severe prejudice because of prior appellate counsel’s inadequate representation, this court should reopen the direct appeal.

I. Statement of the Case and Facts

THE STATEMENT OF THE FACTS IS BASICALLY A SUMMARY OF THE FACTS THAT ARE RELEVANT TO YOUR LEGAL ISSUES. THE STATEMENT OF THE CASE IS THE PROCEDURAL HISTORY OF THE PROCEEDINGS IN THE TRIAL COURT AND THE APPELLATE COURT. THESE SECTIONS CAN BE COMBINED.

II. Applicable Standard of Review

An application for reopening must be granted “if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App.R. 26(B)(5). The appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel is the two-pronged analysis found in *Strickland*. *State v. Simpson*, Slip Opinion No. 2020-Ohio-6719, ¶ 1, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, Applicants who wish to reopen their direct appeal must show “a genuine issue as to whether [they have] a colorable claim that [their] appellate counsel’s performance was deficient and that the deficient performance caused [them] prejudice.” *Simpson* at ¶ 1.

III. Assignments of Error Not Considered on Appeal Due to Counsel's Ineffectiveness

FIRST ASSIGNMENT OF ERROR

EXAMPLE: The trial court erred when it denied the Motion to Suppress the evidence obtained during the search of the house. Fourth Amendment to the United States Constitution.

PRESENT YOUR ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

SAMPLE

Blank lined paper with horizontal ruling lines.

SECOND ASSIGNMENT OF ERROR

EXAMPLE: The trial court erred when it denied the Motion to Suppress the evidence obtained during the search of the house. Fourth Amendment to the United States Constitution.

PRESENT YOUR ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

Handwriting practice lines for the assignment. The page contains 20 horizontal lines. A large, light gray diagonal watermark reading "SAMPLE" is overlaid across the page.

IV. Conclusion

Appellant has demonstrated that counsel was deficient for failing to raise the issues now presented, and that had those claims been presented on appeal, there was a “reasonable probability” that they would have been successful. *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696 (1998). For all the foregoing reasons YOUR NAME respectfully requests this court to grant the Application for Reopening.

Respectfully submitted,

Sign your name

DEFENDANT-APPELLANT, PRO SE

Your name and inmate number

Inmate Number/Institution

Name and address of the institution where you are incarcerated

Address

City, State Zip of the institution where you are incarcerated

City, State, and Zip Code

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANT'S APPLICATION FOR REOPENING** has been sent by regular U.S. mail to the office of the Name of the county where you were convicted County Prosecutor this date day of month, 20year.

Mailed to:

Name: Name of the prosecuting attorney

Street Address: Address of the prosecuting attorney

City: _____ State: _____ Zip Code: _____

Sign your name

DEFENDANT-APPELLANT, PRO SE

AFFIDAVIT

State of Ohio)
) ss:

County of COUNTY WHERE YOU ARE INCARCERATED)

I, YOUR NAME, swear that the following is true:

1. I have reviewed the record. For the reasons explained in my application to reopen, and listed again below, I was deprived of the effective assistance of counsel on appeal.
2. RESTATE THE ASSIGNMENT(S) OF ERROR THAT SHOULD HAVE BEEN RAISED AND WHY YOU THINK IT WOULD HAVE MADE A DIFFERENCE.
TYPICALLY IT HELPS TO LIST A CASE WHERE A COURT AGREED THAT THIS TYPE OF ERROR WAS REVERSIBLE.
3. Appellant's previous counsel was deficient for failing to raise the issue(s) presented in this application. There was no reasonable justification for counsel's ineffective performance and because there is a reasonable probability that but for these errors, the outcome of my appeal would have been different, I suffered prejudice.

*Do not sign this until
you are in a notary's
presence*

Sign your name
DEFENDANT-APPELLANT, PRO SE

*Have this
signed by a
notary
public*

Sworn to and subscribed in my presence this ____ day of _____, 20____.

NOTARY PUBLIC

IN THE COURT OF APPEALS

APPELLATE DISTRICT

COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. _____
vs.	:	C.P. Case No. _____
_____	:	
Defendant-Appellant.	:	

APPELLANT’S APPLICATION FOR REOPENING

Appellant respectfully moves this court to reopen their direct appeal. App.R. 26(B); *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). As described in this Application, prior appellate counsel’s inadequate performance compromised the appeal. Because _____ has suffered severe prejudice because of prior appellate counsel’s inadequate representation, this court should reopen the direct appeal.

I. Statement of the Case and Facts

[illegible]

II. Applicable Standard of Review

An application for reopening must be granted “if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App.R. 26(B)(5). The appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel is the two-pronged analysis found in *Strickland*. *State v. Simpson*, Slip Opinion No. 2020-Ohio-6719, ¶ 1, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, Applicants who wish to reopen their direct appeal must show “a genuine issue as to whether [they have] a colorable claim that [their] appellate counsel’s performance was deficient and that the deficient performance caused [them] prejudice.” *Simpson* at ¶ 1.

III. Assignments of Error Not Considered on Appeal Due to Counsel's Ineffectiveness

FIRST ASSIGNMENT OF ERROR

[illegible]

[illegible]

[illegible]

[illegible]

IV. Conclusion

Appellant has demonstrated that counsel was deficient for failing to raise the issues now presented, and that had those claims been presented on appeal, there was a “reasonable probability” that they would have been successful. *State v. Spivey*, 84 Ohio St.3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696 (1998). For all the foregoing reasons _____ respectfully requests this court to grant the Application for Reopening.

Respectfully submitted,

DEFENDANT-APPELLANT, PRO SE

Inmate Number/Institution

Address

City, State, and Zip Code

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANT'S APPLICATION FOR REOPENING** has been sent by regular U.S. mail to the office of the _____

County Prosecutor this _____ day of _____, 20____.

Mailed to:

Name: _____

Street Address: _____

City: _____ State: _____ Zip Code: _____

DEFENDANT-APPELLANT, PRO SE

AFFIDAVIT

State of Ohio)
) ss:
County of _____)

I, _____, swear that the following is true:

1. I have reviewed the record. For the reasons explained in my motion to reopen and listed again below, I was deprived of the effective assistance of counsel on appeal.
2. _____

3. Appellant's previous counsel was deficient for failing to raise the issue(s) presented in this application. There was no reasonable justification for counsel's ineffective performance and because there is a reasonable probability that but for these errors, the outcome of my appeal would have been different, I suffered prejudice.

DEFENDANT-APPELLANT, PRO SE

Sworn to and subscribed in my presence this _____ day of _____, 20__.

NOTARY PUBLIC