



# Office of the Ohio Public Defender

Timothy Young, State Public Defender

## **Delayed Application to Reopen an 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 a timely application to reopen your appeal. If you did not file within the time limit, you must ask the court of appeals to permit you to file late. To do that, you must file a delayed application to reopen explaining why you did not file within the 90 days. Use this packet if you must file a delayed application.

You will be required to show “good cause” for the delay. App.R. 26(B)(2)(b). It is very difficult to establish “good cause.” Courts have generally held that 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.

The court may be more willing to grant your motion if you document cause for delay. For example: Your lawyer did not timely advise you of the appellate court’s decision. You could attach your institution’s mail log or letters from counsel. Please note that if you attach any letters from your appellate counsel, they will become public and will no longer be protected by the attorney-client privilege.

App.R. 26(B)(2)(e) requires the applicant to attach or provide the relevant portions of the record that are available. 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, make the effort to get one. 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, and 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 previous counsel was deficient for failing to raise the issues you now present, as well as showing that had counsel presented those claims on appeal, there was a "reasonable probability" that they would have been successful. It is even more difficult when the application is delayed.

### **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. Be as specific as possible when you are preparing the part of the application explaining why you did not file within 90 days.
3. **When you are finished preparing the application, sign the application at the end and again after the certificate of service.** See sample form.
4. 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.
5. 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 DELAYED 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). Although more than 90 days have passed since this court’s decision and judgment entry were journalized, appellant will present good cause for the delay. App.R. 26(B)(2)(b). 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**

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.

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V. **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 DELAYED 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 DELAYED 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). Although more than 90 days have passed since this court’s decision and judgment entry were journalized, appellant will present good cause for the delay. App.R. 26(B)(2)(b). 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**

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**III. 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.

**IV. Assignments of Error Not Considered on Appeal Due to Counsel’s Ineffectiveness**

**FIRST ASSIGNMENT OF ERROR**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **APPELLANT'S DELAYED 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