



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Delayed Application to Reopen an Appeal 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 Ohio Appellate Rule 26(B) if you can demonstrate that your appellate attorney provided ineffective assistance of counsel. To prevail on an application to reopen an appeal, you must 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. In order to establish a claim of ineffective assistance of appellate counsel, you must demonstrate that appellate counsel's performance was deficient and that, but for the deficient performance, there is a reasonable probability that the result of your appeal would have been different, as set forth under *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 to file a timely application to reopen your appeal arguing issues that were not raised in your first 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. Appellate Rule 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 to him. One copy of your trial transcript was provided to counsel for your earlier appeal. A criminal appellant is not entitled to a second copy of his or her 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 were a convicted felon, and he 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. The applicant must prove that his counsel was deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. It is even more 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. If you did not file within 90 days, be as specific as possible when you are preparing that part of the application explaining why you did not file on time.
3. **When you are finished preparing the application, sign the document (you need to sign a total of 3 times). See sample form.**
4. See your unit staff for notary service. 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, : CA Case No. YOUR APPELLATE COURT
CASE NUMBER

vs. : CP Case No. YOUR TRIAL COURT
CASE NUMBER

YOUR NAME, :

Defendant-Appellant. :

APPELLANT’S DELAYED APPLICATION FOR REOPENING

Appellant respectfully moves this Court to reopen his direct appeal. App.R. 26(B); *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). More than 90 days have passed since this court’s decision and judgment entry were journalized. As described in this Application, appellate counsel’s inadequate performance compromised the appeal. YOUR NAME has suffered severe prejudice as a direct result of his appellate counsel’s inadequate representation and this Court should reopen his 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. Showing of Good Cause for Untimely Filing

YOU NEED TO EXPLAIN WHY YOU DID NOT FILE WITHIN THE 90-DAY TIME LIMIT. BE AS SPECIFIC AS POSSIBLE. FOR EXAMPLE, IF YOU DID NOT FIND OUT THAT

YOUR APPEAL WAS DENIED UNTIL AFTER THE 90 DAYS HAD PASSED, TELL THE COURT THE DATE THAT YOU LEARNED YOUR APPEAL WAS DENIED.

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. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore, the applicant must prove that his counsel was deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696. To justify reopening his appeal, the applicant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, 810 N.E.2d 436, ¶ 9; *State v. McGowan*, 7th Dist. Jefferson No. 14 JE 37, 2016-Ohio-48, ¶ 2.

IV. 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

SECOND ASSIGNMENT OF ERROR

THIRD ASSIGNMENT OF ERROR

V. Conclusion

Appellant has demonstrated that counsel was deficient for failing to raise the issues he now presents, and that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696. For all the foregoing reasons and because there is good cause for the untimely filing of this application, YOUR NAME respectfully requests this Court to grant the Delayed Application for Reopening.

Respectfully submitted,

YOUR NAME AND PRISON NUMBER

NAME AND NUMBER

NAME OF THE INSTITUTION WHERE YOU ARE INCARCERATED

INSTITUTION

ADDRESS OF THE INSTITUTION WHERE YOU ARE INCARCERATED

ADDRESS

CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Delayed Application for Reopening was forwarded by regular U.S. Mail to the office of the _____ County Prosecutor _____, at _____, on this ___ day of _____ 20__.

YOUR NAME AND PRISON NUMBER

NAME AND NUMBER

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 motion to reopen, my appellate counsel’s deficient performance prejudiced me.
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. Appellate counsel was ineffective because s/he failed to raise a winning issue. I was prejudiced because my conviction would have been reversed by this Court if appellate counsel had raised the issue.

Have this signed by a notary public

YOUR NAME AND PRISON NUMBER
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

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, : CA Case No. _____
 : CP Case No. _____
 vs. :
 _____, :
 Defendant-Appellant. :

APPELLANT’S DELAYED APPLICATION FOR REOPENING

Appellant respectfully moves this Court to reopen his direct appeal. App.R. 26(B); *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). More than 90 days have passed since this Court’s decision and judgment entry were journalized. As described in this Application, appellate counsel’s inadequate performance compromised the appeal. _____ has suffered severe prejudice as a direct result of his appellate counsel’s inadequate representation and this Court should reopen his direct appeal.

I. Statement of the Case and Facts

II. Showing of Good Cause for Untimely Filing

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. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore, the applicant must prove that his counsel was deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a "reasonable probability" that he would have been successful. *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696. To justify reopening his appeal, the applicant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, 810 N.E.2d 436, ¶ 9; *State v. McGowan*, 7th Dist. Jefferson No. 14 JE 37, 2016-Ohio-48, ¶ 2.

Appellant demonstrates below, thru the following assignments of error not previously considered on appeal, a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal.

V. Conclusion

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

Respectfully submitted,

SIGNATURE

NAME AND NUMBER

INSTITUTION

ADDRESS

CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Delayed Application for Reopening was forwarded by regular U.S. Mail to the office of the _____ County Prosecutor _____, at _____, on this ___ day of _____ 20__.

SIGNATURE

NAME AND NUMBER

DEFENDANT-PETITIONER, 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 counsel was deficient for failing to raise the issues 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 prejudiced.

SIGNATURE

NAME AND NUMBER

DEFENDANT-PETITIONER, PRO SE

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

NOTARY PUBLIC