ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Miguel E. Neil,

Relator, : Case No. 17-1221

:

vs : On Appeal from the Franklin County Court of Appeals, Tenth Appellate District.

:

Judge Jenifer French, :

Respondent. :

MERIT BRIEF OF APPELLANT MIGUEL NEIL

Miguel E. Neil #710531 *pro se*
Noble Correctional
15708 McConnelsville Road
Caldwell, Ohio 43724

and

Franklin County Prosecutor
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INTRODUCTION

This is a case where the appellant filed a postconviction petition and the trial court did not, and has not, served judgment entry. The appellant filed a *pro se* writ of procedendo, which is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment, and the inferior court's refusal or failure to timely dispose of a pending action is the ill, a writ of procedendo is designed to remedy. The procedendo is an order from the court of superior jurisdiction to proceed to judgment: it does not attempt to control the inferior court as to what the judgment should be. Such delay affects an appellant ability to proceed to a superior court.

However, once assigned to a magistrate to resolve the issue, and the magistrate *sua sponte* dismisses the procedendo for failing to satisfy the filing requirement set forth in R.C. 2969. 25(C)(1), a single technicality, it in effect denies an appellants right to due process of law to appeal to a superior court due to not having a final judgment from the inferior court.

There is also a conflict between the Ohio district court's on the issue that some hold that *pro se* litigants should be held to the same standards as lawyers, while others hold that they should not be held to the same standards as lawyers and give greater latitude towards errors in *pro se* litigant's pleadings. This means that, depending on which district a *pro se* litigant is in, they may benefit from one appellate court who recognizes that *pro se* litigants are inexperienced in such proceedings due to their lack of many years of law school, passing the bar, and not having the financial means to retain lawyers to to perfect such actions, motions, and briefs in accordance with rule requirements, while others will not benefit because that district holds *pro se* litigants to the same standards as lawyers and give no latitude, even where there is some semblance of compliance with most of the rules, and dismisses the action based on that single technicality without addressing the merits. This conflict should be resolved in favor of the Ohio appellate court's giving *pro se* litigants greater latitude.

STATEMENT OF THE CASE AND FACTS

The appellant herein, is self-taught, or more like, crash-course-learned, and does not have the vast legal knowledge that lawyers, prosecutors, and judges possess, and does not have the financial means for representation. Moreover, if counsel is appointed for appellate purposes, counsel may or may not appeal on an appellants behalf any further than the district court once denied, leaving the appellant on their own to trial-and-error through the appellate process, as appellant is doing now due to his inexperience.

In the present case, a magistrate for the Tenth District, *sua sponte* dismissed his proceeding for failure to satisfy a single rule. On January 29, 2016 the appellant sent by U.S. mail a postconviction which was filed on February 3, 2016. On March 15, 2015 the state responded in opposition, and on October 31, 2016 the trial court rendered a decision but the appellant was never served notice of the judgment entry preventing him from appealing to a superior court.

Under such circumstances, "[a] writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." *State ex rel. R.W. Sidley, Inc.* v. *Crawford*, 100 Ohio St. 3d 113, 2003 Ohio 5101, 796 N.E.2d 929, ¶32, quoting *State ex rel. Weiss* v. *Hoover* (1999), 84 Ohio St.3d 530, 532. "Consequently, a writ of procedendo will issue to require a court to proceed to final judgment if the court has erroneously stayed the proceeding." *State ex rel. Watkins* v. *Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535.

After never receiving a judgment entry, on April 6, 2017 the appellant filed a writ of procedendo requesting respondent Judge Jenifer French of the Franklin County Court of Common Pleas, to rule on the petition. On April 27, 2017, a magistrate for the Tenth District recommended that writ be *sua sponta* dismissed for appellants failure to comply with a single filing requirement, R.C. 2969. 25(C)(1). On July 25, 2017, the Tenth District so ordered such dismissal.

The appellant now realizes that Proposition of Law One and Three are essentially one in the same, and therefore, will respectfully combine the two.

ARGUMENT IN SUPPORT OF THE PROPOSITION'S OF LAW

Appellant's Proposition of Law Number One: The trial court erred in failing to serve notice of judgment entry on the appellant. Such failure denied the defendant due process of law and equal protection under the Fourteenth Amendment to timely appeal. When a prisoner *pro se* litigant technically violates a single rule, dismissal of the action also denies an appellant due process of law and equal protection under the Fourteenth Amendment.

The evidence is uncontroverted here by the clerks very own record, that the clerk of the court failed to serve notice of the October 31, 2016 judgment entry on the prisoner *pro se* appellant pursuant to Civ.R. 58(B). **(Attachment A)** The trial court erroneously ordered the clerk to send some sort of notice electronically. However, the appellant is not an e-filing account holder with an e-mail address registered in the e-filing system. Therefore, the appellant can only be served notice by mail.

The Tenth District Court of Appeals is well aware, as in *Leonard* v. *Delphia Consulting, LLC*, 2007 Ohio 1846, (Ohio Ct. App., Franklin County Apr. 19, 2007), that:

> It is well-established that every injured party 'shall have remedy by due course of law, and shall have justice administered without denial or delay.' The opportunity to file a timely appeal pursuant to App.R. 4(A) is rendered meaningless when reasonable notice of an appealable order is not given." *Moldovan* v. *Cuyahoga Cty. Welfare Dept.* (1986), 25 Ohio St.3d 293, 295, 25 Ohio B. 343, 496 N.E.2d 466, quoting Section 16, Article I, Ohio Constitution. Moreover, for due process purposes, litigants are entitled to reasonable notice of the trial court's appealable orders. *Atkinson* v. *Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 84-85, 523 N.E.2d 851.

See also *City Of Whitehall ex rel. Fennessy* v. *Bambi Motel*, 131 Ohio App. 3d 734, (Ohio Ct. App., Franklin County Dec. 29, 1998); this honorable Court in *State ex rel. Sautter* v. *Grey*, 117 Ohio St. 3d 465, 2008 Ohio 1444, at ¶9; *Rothman* v. *Rothman*, 124 Ohio St.3d 109, 2009 Ohio 6410, at ¶4.

After filing a postconviction petition, and never served notice of the judgment entry, the appellant filed a writ of procedendo. A magistrate recommended that the Tenth District *sua sponte* dismiss the procedendo based on a single technicality, failure to comply with the filing requirement

R.C. 2969. 25(C)(1), even though the writ met all other requirements. This dismissal, for a single rule violation, permits the trial courts initial violation of Crim.R. 35(C), which also violates the prisoner *pro se* litigants right to due process of law even though the writ had "some semblance of compliance." *Coleman* v. *Davis*, 2011 Ohio 506, at ¶14.

It is unconstitutional to deny one party judgment due to a *single* technicality, which in turn, permits the other parties initial violation to stand with no recourse. This, in effect, is what happens every time a prisoner *pro se* litigants pleadings are dismissed even though the rest of the action is in complete compliance.

The appellate court, based on record, can verify that the appellant is indigent due to the assigning of counsel from the Franklin County Public Defenders Office. It is also very unlikely that a prisoner *pro se* litigant, and the appellant did not, would obtain a windfall of financial resources upon incarceration to retain counsel. It is a miscarriage of justice when court's deny prisoner *pro se* litigants pleadings based on a single technicality, which in the present case, unconstitutionally prevents appeal to a superior court in violation of the Fourteenth Amendment.

The appellant was never served notice of the trial courts judgment entry pursuant to Crim.R. 35(C) which requires courts to rule on petitions for postconviction relief within 180 days of filing.

"App.R. 22(B) expressly requires the clerk of the court to give notice by mail to counsel of record of the court's decision. App.R. 30 provides that, immediately upon the entry of an order or judgment, the clerk shall serve by mail a notice of entry upon each party to the proceedings and shall make a note in the docket of the mailing." *Spangler on behalf of Kingsmill Recording Studio, Inc.* v. *Redick*, 1990 Ohio App. LEXIS 5533 (Ohio Ct. App., Franklin County Dec. 13, 1990).

Additionally, both Civ.R. 58(B) and App.R. 4(A) are applicable, if service of the notice of judgment and its entry is made within the three-day period of Civ.R. 58(B), the appeal period begins to run on the date of judgment, but if appellants are not served with timely notice, the appeal period is

tolled until the appellants have been served. "Pursuant to App.R. 4(A)(3), '[i]n a civil case, if the clerk has not completed service of the order within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) and 4(A)(2) begin to run on the date when the clerk actually completes service.'" *Clermont Cty. Transp. Improvement Dist.* v. *Gator Milford, L.L.C.*, 141 Ohio St. 3d 542, 2015-Ohio-241, 26 N.E.3d 806. The trial court did not adhered to these rules, nor did the court of appeals enforce them.

This same magistrate, Kenneth W. Macke for the Tenth District, has a long history, and at least hundreds of denials of a thousand cases, of *sua sponte* dismissing *pro so* litigants procedendo's for the single violation of R.C. 2969. 25(C)(1), disregarding merit that the trial judge is in violation of Crim.R. 35(C), and knowing that without service of a judgment entry an appellant cannot proceed to appeal an adverse decision to a superior court in violation of due process of law. **(Attachment B)**

It should not be the position of any court, or state representative, to argue in favor of denying any parties right to due process of law where as in the present case, the initial injury was caused by the other party, i.e., the trial court or clerk of the court.

Thus, to permit the appellant to exercise his right to due process of law to effect an appeal from an adverse decision, this honorable Court should reverse the *sua sponte* dismissal of the procedendo, which was based on a single technicality, due to there being more than "some semblance of compliance" in all other aspects where the appellant did provide an affidavit of indigency pursuant to R.C. 2969. 25(C)(2), except for the cashiers affidavit of indigency pursuant to R.C. 2969. 25 (C)(1).

Appellant's Proposition of Law Number Two: There is a genuine conflict between the Ohio Appellate Court's on the issue of granting prisoner *pro se* litigants greater latitude for technically violating a rule. Some districts hold that *pro se* litigants should not be held to the same standards as lawyers, while others hold that they should be held to the same standards as lawyers.

The below cases support that there is indeed a conflict between the appellate courts of Ohio on

this issue. It is unconstitutional to grant one appellant greater latitude in one court, but deny another appellant in another court for making the same technical violation of a rule when they know they are not knowledgeable in such matters, except for the fact that the appellant knows something is unjust.

Such dismissals appear to be a courts most effective way of denying prisoner *pro se* litigants without even getting to the merits, in turn, denying them access to appeal adverse decisions to a superior court. See *Hillyer* v. *Roth*, 74 Ohio Misc. 2d 127, noting that:

> **There appears to be a split of authority in the state of Ohio on this issue**. In *Meyers* v. *First Natl. Bank* (1981), 3 Ohio App. 3d 209, 3 Ohio B. Rep. 238, 444 N.E.2d 412 the court stated in its syllabus as follows:
>
> "*Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Id.* at syllabus.
>
> The Fourth Appellate District adopted a more liberal rule in *Karmasu* v. *Tate* (Sept. 15, 1994), 1994 Ohio App. LEXIS 4259, Scioto App. No. 94 CA 2217, unreported, 1994 WL 521235, appeal dismissed (1995), 71 Ohio St. 3d 1464, 644 N.E.2d 1386. It held that *pro se* litigants should not be held to the same standard as attorneys, and that it is preferable that cases should be decided on their merits rather than dismissed on minor technicalities.
>
> The Eighth Appellate District appears to have taken an intermediate position. In *Delaney* v. *Cuyahoga Metro. Hous. Auth.* (July 7, 1994), 1994 Ohio App. LEXIS 2980, Cuyahoga App. No. 65714, unreported, 1994 WL 326097, the court quoted the syllabus of the *Meyers* case for the proposition that *pro se* litigants are bound by the same rules as those litigants who are represented by an attorney. However, it then stated, "Nevertheless, this appellate court will ordinarily indulge a *pro se* litigant when there is some semblance of compliance with the appellate rules."
>
> In the absence of controlling precedent in this district, I find that the rule as stated in *Karmasu*, *supra*, affording greater latitude to *pro se* litigants should be followed.

Id., at 131.

Listed below are a few of Ohio's district court's who are against affording greater latitude, for, and where judges on the same panel are split amongst each other on the issue.

<u>Against Greater Latitude</u>:

The Tenth District: *Hardy* v. *Belmont Corr. Inst.*, 2006-Ohio-3316, at ¶9, ¶11 ("While the law permits a litigant to act as his or her own attorney, those who do are generally "held to the same

standard as litigants who are represented by counsel. . . . appellant's brief is basically unintelligible. It consists of jumbled, unclear, and incoherent babblings[.]").

The Fifth District: *State* v. *Long*, 2017-Ohio-2848, at ¶10 ("*like members of the bar*, *pro se* litigants are required to comply with rules of practice and procedure.").

The First District: *Meyers* v. *First Natl. Bank* (1981), 3 Ohio App. 3d 209, at 210 ("*Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors.").

It just seems unthinkable to treat prisoner *pro se* litigants "like members of the bar" *Long*, *supra*, knowing prisoner *pro se* litigants have not attended the many years of law school, nor passed the bar.

For Greater Latitude:

The Eight District: *Delaney* v. *Cuyahoga Metro. Hous. Auth.*, 1994 Ohio App. LEXIS 2980, at 4 ("[*Pro se*] are not to be accorded greater rights and must accept the results of their own mistakes and errors. *Nevertheless*, an appellate court will ordinarily indulge a *pro se* litigant when there is *some semblance of compliance* with the appellate rules.").

The Fourth District: *Karmasu* v. *Tate*, 1994 Ohio App. LEXIS 4259, at 7 ("this court has firmly rejected all notions that *pro se* litigants be held to the same standard as attorneys during trial court proceedings.").

The Eleventh District: *State* v. *Hall*, 2008-Ohio-2128, at ¶11 ("Nonetheless, ***in the interest of justice***, we will attempt to address each argument presented in Hall's brief.").

These district court's have been liberal, in the best interest of justice, by getting to the merits over the errors of prisoner *pro se* litigants in recognition of our inexperience and/or lack of financial means to retain counsel. Moreover, when even appointed and retained experienced attorney's violate rules in pleadings when they should know them, causing the represented party to suffer where

ineffective assistance of counsel is rarely granted in such situations.

Internal Conflict on Greater Latitude: There is also internal conflict between judges who are on the same panel, and panels of judges who go against the usual holdings of other panels of judges in the same district.

The Eighth District in *State* v. *Hubbard*, 2016-Ohio-918, at ¶18, where Hubbard's 26(B) was dismissed based on a technical rule violation the dissenting judge said, ("Notably, 'this court has previously overlooked App.R. 26(B) procedural deficiencies to reach the merits of an application for reopening.' *State* v. *Hiu Hing Chu*, 8th Dist. Cuyahoga Nos. 75583 and 75689, 2002-Ohio-4422, P 64 (here this court granted defendant's untimely application for reopening when the trial court committed a sentencing error). See also *State* v. *Manos*, 8th Dist. Cuyahoga No. 64616, 1998 Ohio App. LEXIS 128 (Jan. 15, 1998), and *State* v. *Smiley*, 8th Dist. Cuyahoga No. 72026, 1998 Ohio App. LEXIS 1886 (Apr. 28, 1998) (where we found that an application that presents a genuine issue as to the effectiveness of counsel on appeal should supersede any procedural deficiency of the application).").

The Tenth District in *Lias* v. *Beekman*, 2007-Ohio-5737, at ¶8, where the district usually holds *pro se* litigant's to the same standards of lawyers. However, this panel held that ("An appellate court, however, may indulge a *pro se* litigant when there is some semblance of compliance with appellate rules. See *Delaney*, *supra*. Here, because respondent has shown some semblance of compliance with rules of appellate procedure, we shall address those issues that are comprehensible.").

Clearly, even judges on the same panel, and judges on different panels within the same district, seem to disagree on when and whether or not to grant greater latitude. It seems established that when there is "some semblance of compliance," a court should indulge a prisoner *pro se* litigant. However, there is no clear meaning of what constitutes "some semblance of compliance" where in the present case, the appellant satisfied R.C. 2969.25(C)(2), providing an affidavit of indigency, but singly failed to satisfy R.C. 2969.25(C)(1), the balance in the inmate account for each of the preceding six months,

thus, having more than "some semblance of compliance" in all other aspects of the procedendo.

The Supreme Court of the United States has instructed the federal courts to liberally construe the "inartful pleadings" of *pro se* litigants. *Boag* v. *MacDougall*, 454 U.S. 364, 365, 70 L. Ed. 2d 551, 102 S. Ct. 700 (1982)(per curiam). "It is settled law that the allegations of [a *pro se* litigant's complaint] 'however inartfully pleaded' are held to 'less stringent standards than formal pleadings drafted by lawyers . . . .'" *Hughes* v. *Rowe*, 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)): see also *Noll*, 809 F.2d at 1448 ("Presumably unskilled in the law, **the *pro se* litigant is far more prone to making errors in pleadings** than the person who benefits from the representation of counsel."); *Ashelman* v. *Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986)("we hold [plaintiff's] *pro se* pleadings to a less stringent standard than formal pleadings prepared by lawyers."); *Balistreri* v. *Pacific Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990) ("This court recognizes that it has **a duty to ensure that *pro se* litigants do not lose their right to a hearing on the *merits* of their claims due to ignorance of technical procedural requirements**."); *Draper* v. *Coombs*, 792 F.2d 915, 924 ("**When a *pro se* litigant technically violates a rule, the court should act with leniency with him**.").

Moreover, an incarcerated *pro se* defendant has a constitutional right of access to the courts. See *Bounds* v. *Smith*, 430 U.S. 817, 821, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977): *King*, 814 F.2d at 568 ("Indigent inmates have a constitutional right to meaningful access to the courts.) (quoting *Bounds*); see also *Toussaint* v. *McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986). This right requires prison authorities to assist inmates in the preparation of legal papers by providing access to law libraries or assistance from trained legal personnel. *Bounds*, 430 U.S. at 828; *Lindguist* v. *Idaho State Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985); 28 C.F.R. § 543.11(a).

Here at Noble Correctional, we do have access to a law library, although the time is limited, but we do not have assistance from the prison authorities here in the preparation of legal papers from

trained legal personnel. There are simply no trained personnel here, nor do any of the inmate law library clerks have any training from any trained legal personnel. We are essentially self-taught, or more like, crash-course-learned, as in the present case, and are prone to make more errors in pleadings than an experienced lawyer whom make them as well.

The appellant is not asking the Court to give prisoner *pro se* litigants greater rights, only to unilaterally hold that prisoner *pro se* litigants should not be dismissed for technical violations of rules where there is "some semblance of compliance," and "to less stringent standards than formal pleadings drafted by lawyers" in the Ohio court system. The only other issue that may arise from granting greater latitude is, what the court's will deem to be "some semblance of compliance."

Finally, and the appellant apologizes for straying into other issues, although they are involved in this case, but feels he may have no other opportunity due to select granting of cases to this Court.

It seems to no longer be coincidence in the present case with the clerk of the court and the court's failing and refusing to send the appellant judgment entries. See also the appellants notice of appeal with this honorable Court, **Case No. 2017-1343**, received and filed on September 25, 2017, where the Tenth District denied appellants request for vacation and reissuance of its February 2, 2017 decision on his application for reopening 26(B) due to notice of the judgment entry, again, never being served where the appellant provided a copy of the clerks very own docket as proof. In this case, even if the 60(B) Motion to Vacate and Reissue was not a "proper proceeding" to get reissuance of the judgment entry, the court still should not have denied the request when it knew it was the clerks error and would deny the appellant due process of law as an appeal of right pursuant to S.Ct.Prac.R. 5.01.

In addition to the hindrance by not serving notice on the issues presented in both pleadings, the trial and appellate court, simply to uphold the convictions, have provided conflicting decisions concerning where the issues should have been raised, the appellant believes, in hope that the appellant gives up so that the facts of the issues are not revealed nor publicized.

The appellant believes this based on present experience, and on an inmates appellate attorneys letter whom was very candid stating that he has "argued before the 4th and 12th Ohio Appellate Districts, the Ohio Supreme Court, as well as the Sixth and Second U.S. Courts of Appeals . . . I must caution you that they rarely overturn a jury conviction. Appellate courts, by their very nature, are set up *to look for ways* to affirm the decision below. Frankly, I have lost cases that I thought I had the better argument." **(Attachment C)** This gives little hope to prisoner *pro se* litigant's.

For both pleadings, the appellant had to ask a friend to search his case docket to find out if any decisions were rendered due to the many months that passed without receiving one. In both cases, she discovered that notice was never served to the appellant. The appellant knew that if he proceeded in filing a notice of appeal to the Tenth District concerning the postconviction petition, and with this Court on the 26(B), they would justly be ruled as untimely, although at no fault of the appellant.

The appellant was also given conflicting information from appellate counsel concerning which issues could or couldn't be raised on direct appeal or postconviction. Thus, in an attempt to preserve the issues, the appellant raised them in both his postconviction and application for reopening 26(B).

The appellant now has knowledge of both decisions, which were denials, due to his friend sending copies. The appellant notes that there is no "actual knowledge" exception. See this Court in *Clermont County Transp. Improvement Dist.* v. *Gator Milford, L.L.C.*, 141 Ohio St. 3d 542, 2015-Ohio-241, at ¶2 ("We agree with the decision reached by the Tenth District in *Whitehall ex rel. Fennessy* v. *Bambi Motel, Inc.*, 131 Ohio App.3d 734, 723 N.E.2d 633 (10th Dist.1998). Actual knowledge of a judgment is not a sufficient substitute for service of notice of the judgment by the clerk of court's office.").

The issues raised in both pleadings were raised under ineffective assistance of counsel where the appellant was denied his "right to present exculpatory evidence." *Taylor* v. *Illinois*, 484 U.S. 400, at 410-411. (1). Photograph's of the appellant's tattoo on his left ankle/leg area from 2007-08 where a

picture of the suspect in one of the 2011 exhibited photograph's revealed that the suspect did not have a tattoo there. There are many cases where the accused was found guilty due to the presence of an identifying tattoo. In the present case, the appellant had a tattoo that the suspect did not, thus, he should have been exonerated. However, when counsel presented states exhibit 4-I, and asked the witness if he sees any tattoo's, in which he replied no, counsel failed to present the photograph's given to him prior to trial of the appellant's ankle/leg area to prove it was not him. Why engage in the line of questioning if not to present the evidence in support that it was not the appellant. How then, could this not be ineffective assistance of counsel; (2). self-authenticating "newspaper" articles under Evid.R. 902, *Stumpff* v. *Harris*, 2015-Ohio-1329, at ¶30, of a 2013 robbery suspect whom committed a series of robberies while the appellant was incarcerated with the same description, and in a "similar manner" as the robberies that the appellant was charged with nine months after his arrest.

This information was presented at the suppression hearing by retained counsel whom had a heart attack and had to withdraw. Appointed new trial counsel refused to use it at trial in defense of "similar characteristics" *Id.*, *Neil*, ¶67, by either *untruthfully* telling the court that he had "no way to authenticate it" (T. 39-40) when they were self-authenticating, or because trial counsel just *ineffectively* did not know Evidence Rule 902. Counsel also *untruthfully* stated that "It will open the door to the state then asking the detective about his past record" (T. 32-34) when such could not happen for the mere presentation of robberies that were committed with "similar acts" as the ones later charged, but upon a states granted motion, or the appellant taking the stand. This evidence would have shown that if "the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise." *United States* v. *Mota*, 2015 U.S. Dist. LEXIS 16893, at *4, quoting *United States* v. *Luna*, 21 F.3d 874, 878-79 (9th Cir. 1994). See also *Sawyer* v. *Stovall*, 2001 U.S. Dist. LEXIS 256, at *2 ("*modus operandi* evidence suggesting a common or "signature" perpetrator requires very peculiar similarities

and idiosyncracies."). "The robber[ies] at issue did not involve any 'peculiar, unique, or bizarre' conduct so as to constitute a personal signature; rather it was similar to most . . . robberies." *Mota*, at *14, quoting *United States* v. *Perkins*, 937 F.2d 1397, 1400-01 (9th Cir. 1991).

The trial court also abused its discretion by not even looking at the news paper articles to determine if trial counsel was correct or not. The judge stated "I'm not going to get into the evidence in this matter. I don't think it's appropriate." (T. 39) However, written or oral requests for the admission or exclusion of evidence is submitted regularly before and during trial. This Court holds that "the trial court has broad discretion in the admission or exclusion of evidence." *State* v. *Jenks*, 61 Ohio St. 3d 259, at 281. Therefore, it *was* "appropriate," and the judges duty, "to get into the evidence in this matter" and at least view the evidence for himself, then make an informed decision to, or not to, admit it pursuant to the rules of evidence; and (3). a Detective Kevin McDonnell's time slotted Narrative Supplement Report of the events that took place from the May 8, 2011 robbery, with a note at the bottom stating that, "While viewing the surveillance video it appears the suspect is a **white male**," along with a mug shot of *one of two Caucasian males* they were presumably investigating, all of which was handed to new trial counsel from discovery, discovered by previous counsel.

To bolster this fact and argument, the appellant pointed out (1). in the November 8, 2012 robbery of Wendy's, the court *untruthfully* and *unconscionably* stated that the witness described the suspect as "African American" *State* v. *Neil*, 2016-Ohio-4762, at ¶68. However, the states only witness for the robbery, a female black, provided a statement to detectives, and testified, "I actually thought that he was **white**" (T. 512), testimony that was *unconscionably disregarded* to make the descriptions uniform to justify upholding the convictions; (2). during the suppression hearing, Columbus Police Officer Ralph Guglielmi testified that "a **white male** was described" (M. 231); and (3). other disregarded testimony probative that it was not the appellant, was the states only witness for the September 13, 2011 robbery whom testified that the suspect was "very light-skinned." Trial

counsel even stopped the video on what could be seen of the suspects face and the witness confirmed, "that's the likeness I got to see." (T. 329-330) The only witness for the April 18, 2011 robbery testified that the suspect had "acne bumps underneath the eyes" with "very thin eyebrows." (T. 168: 2-10)

Columbus Detective Gregg Franken admitted that he had at least "a dozen" other suspects, (T. 832) he also agreed with trial counsel that when you watch a video a lot of what you see depends on "the angle of the video" and "if the video is at the back of somebody . . . they are not going to be able to see the eye area, if the eye area is exposed, . . . [b]ut that eyewitness is up close to the individual and has the opportunity to see and make observations, . . . [s]o there are examples when the video can't see what a witness can," (T. 875-876) and that "in just that limited space and short amount of time, you can tell if someone is white or black," and "you could tell if someone had light-skin black or very dark-skin black." (T. 894-895)

The appellant *cannot* pass for Caucasian, and is not very light skinned, he is of a medium brown complexion, and has *never* had any acne bumps on his face, nor has thin eyebrows, which can be confirmed by previous mug shots. None of the above descriptions remotely matched the appellant.

Therefore, what makes detective Kevin McDonnell's viewing of the surveillance video, and belief that it was not the appellant, less credible than detective Gregg Franken's belief that it was? The appellant was denied his right to present McDonnell, and his testimony to his report, in his defense.

When the appellant asked new trial counsel to subpoena detective McDonnell and present the report, because previous counsel was definitely going to, new counsel, with balled fists and clinched teeth, stood over top of the appellant and told him that he doesn't tell him what to do, and that he is going to try the case the way he wants to. When the appellant asked him to remove himself from his case, counsel told the appellant that he is not going anywhere and a deputy sheriff had to tell counsel to step away from the appellant and made counsel leave. Upon taking the appellant back to his cell, two sheriff deputies advised the appellant to get new counsel. Offended by counsels actions, the

deputies offered to tell new counsel that the appellant wanted new counsel. Apparently the deputies did so because counsel informed the judge. (T. 41)

Additionally, the Tenth District, in its decision denying the appellant's 26(B), stated that it has not found any precedent that a criminal defendant has a right to be present at a joinder hearing, although Crim.R. 43(A)(1) states not only that "the defendant **must** be physically present at every stage of . . . the trial," but also "the criminal proceeding." However, the appellant found a case. See *State* v. *Hackney*, 1993 Ohio App. LEXIS 4200, at 9 holding that:

> Crim.R. 43(A) requires that 'the defendant shall be present at the arraignment and *every stage* of the trial * * *.' The record shows that a hearing on *the state's motion for joinder was conducted in appellant's absence* and that appellant had not personally waived his right to be present. Therefore, we conclude that the trial court erred.

and the appellant did not waive his right to be present.

It is a basic premise of our justice system that "in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105-106. See also *Faretta* v. *California*, 422 U.S. 806, 819, n.15. So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.

Had the appellant had the hearing on joinder, which was set for October 1, 2013, instead of the judge ruling on the states motion for joinder in his chambers on August 19, 2013 without the appellant present in violation of Crim.R. 43, and no recording in violation of Crim.R. 22, the appellant would have been able to present the above exculpatory facts, in particular, the identifying characteristic of the tattoo not on the suspect, the detectives narrative report believing the suspect was white, the mug shot of the Caucasian suspect being investigated, and the robberies that were committed in a similar manner in 2013 as those later charged, to prevent joinder under Crim.R. 14. **(Attachment D)**

Such absence cannot be harmless error due to the above facts that were possessed by counsel, but ineffectively never presented. It is well-established that when there is a Rule 404(b) hearing, a balancing analysis under Rule 403 is necessary. See *United States* v. *Parrish*, 103 Fed. R. Evid. Serv. (Callaghan) 250, at 4-5 ("if the evidence is probative of a material issue other than character, the court **must** engage in a Rule 403 analysis and decide whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect.") citing *United States* v. *Haywood*, 280 F.3d 715, 720 (6th Cir. 2002) quoting *United States* v. *Johnson*, 27 F.3d 1186, 1190 (6th Cir. 1994) (quoting *Huddleston* v. *United States*, 485 U.S. 681, 686, 99 L. Ed. 2d 771, 108 S. Ct. 1496 (1988)).

The present case was one of identity, and neither a Rule 404 or 403 hearing took place with the appellant present, to defend in person with counsel, in violation of the appellant's right to due process of law, a fair hearing, and trial. See also this Court in *State* v. *Lowe*, 69 Ohio St.3d 527, at 530, holding that "***identity*** is the ***least precise*** of the enumerated purposes of Evid.R. 404(B)."

The appellant was also denied his "right to compulsory process to procure the attendance of witnesses in his favor." *Washington* v. *Texas* (1967), 388 U.S. 14, at 19.

For reasons unexplained, and after an explosive argument with new trial counsel as discussed above, counsel unconscionably refused to subpoena Detective Kevin McDonnell to testify to his viewing and narration report of the May 8, 2011 surveillance video in belief that the suspect appeared to be "a male white," and to the mug shot of one of the two Caucasian males that was presumably being investigated, all of which was in the appellant's discovery and attached in both the postconviction and 26(B). **(Attachment E)**

The appellant and retained counsel viewed this video together, in conjunction with the detectives narrative report. Retained counsel concluded as the detective did, that the suspect appeared to be a male white. However, the state deceptively did not show this portion of the video during trial, and new trial counsel *refused* to hear the pleas of the appellant's enlightenment to this.

Representation of a criminal defendant entails certain basic duties. Counsels function is to assist the defendant, and hence "attorneys owe their clients a duty of loyalty, including the duty to **avoid conflicts of interest**. *Strickland* v. *Washington*, 466 U.S. 668, 688, (1984) (citing to *Cuyler* v. *Sullivan*, 446 U.S. 335, 346, (1980)). "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Roe* v. *Flores-Ortega*, 528 U.S. 470, at 478.

Both trial and appellate counsel in the present case refused all the appellant's express instructions where previous counsel advised the appellant that the above evidence would be presented.

To further support the appellant's belief that the trial and district court's wish not to have these issues revealed nor publicized as stated above, is the fact that the Tenth District, in its decision denying direct appeal, see *State* v. *Neil*, 2016-Ohio-4762, at ¶68, never truthfully states that the only witness for the November 8, 2012 robbery testified that she thought the suspect was white. (T. 512)

In the decision denying the postconviction petition, the trial court *never* addresses the issue of the detectives narration report describing the suspect as a male white, nor the identifying characteristic of a tattoo that was on the appellant's lower ankle/leg area that was not present on the suspect in the states exhibited photograph for the June 28, 2011 robbery where trial counsel questioned the witness about the tattoo (T. 209-211) but failed to present the photograph's given to him to prove that the appellant had the tattoo before the 2011 robberies.

The trial court also held that the petition was untimely by erroneously alleging that the petition was due December 1, 2015. However, a **full record** of the "transcript of proceedings" **(Attachment F)** was not filed with the court of appeals, pursuant to R.C. 2953.21(A)(2), until April 27, 2015.

R.C. 2953.21(A)(2) states in part that a petition for post-conviction relief shall be filed "no

later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication." There must be a presumption that there must be a full record filed before the 365 day time for filing a postconviction petition begins to run, not merely part of the record.

New appellate counsel was assigned to the appellant and filed a motion for delayed appeal and the trial court, concerning postconviction, held:

> Here, Defendant filed a delayed appeal in Case No. 13CR-4174. However, the filing of a delayed appeal does not toll the time for filing a postconviction petition. *State ex rel. Hilliard* v. *Russo*, 2016-Ohio-594, P8, 2016 Ohio App. LEXIS 513, *4-5 (Ohio Ct. App., Cuyahoga County Feb. 17, 2016). Therefore, the Court finds that Defendant's petition should have been filed no later than three hundred sixty-five days after the expiration of his time for filing his appeal, which is December 1, 2015.

Hilliard is distinguishable from the present case. In the present case, for the purpose of direct appeal, an incomplete record of the "transcript of proceedings" was filed on January 30, 2015 giving the defendant 365 days to file post-conviction relief, which would be January 30, 2016, not December 1, 2015. Because January 30, 2015 fell on a Saturday, under the operation of Civ.R. 6(A), the next court day after the Saturday deadline became the deadline to file a timely postconviction, which would be in this case, Monday February 1, 2016. The defendants post-conviction petition for relief was filed on February 3, 2016, a mere two days later with issues that should greatly concern the court, despite that the motion was notarized on January 27, 2016, but sent out on January 29, 2016 by the prison, which still should have arrived to be filed on Monday February 1, 2016. *Cf State* v. *Davenport*, 2015-Ohio-5120, (Ohio Ct. App., Franklin County Dec. 10, 2015), at ¶7 holding:

> In this case, the **full record** was filed in the court of appeals in Davenport's direct appeal of his criminal case on March 26, 2012. One hundred eighty (180) days after that fell on Sunday, September 23, 2012. Because of the operation of **Civ.R. 6(A)**, the next court day after the Sunday deadline became the deadline to file a timely postconviction petition in this case.

The appellant is aware that, although the "mail box rule" exists in most other states, and in all federal courts, it does not exist in the state of Ohio. However, see this Court in *Oak Hills Local Sch.*

Dist. Bd. of Educ. v. *Hamilton County...*, 134 Ohio St. 3d 539, at ¶11-14 holding that ("this potentially raises a legal issue whether the time that a notice of appeal is delivered to the post office is material to determining who won the "race to the courthouse." . . . The school board failed to present the "sender's receipt,"). In the present case, the appellant has his receipt. **(Attachment G)**

Hilliard "filed his postconviction relief petition over *four years after* his conviction and sentence." *Hilliard*, at ¶8. In the best interest of justice, and in light of the trial courts dates being wrong, the trial court could have ruled otherwise despite a mere two days.

However, at no fault of the appellant, either new appellate counsel, the state, or the clerk of the court, discovered that the transcripts of proceedings were not fully filed with the court of appeals as required by 2953.21(A)(2). The missing transcript of proceedings were fully filed on April 27, 2015, thus, equitably tolling the 365 day postconviction deadline to April 27, 2016. (See Attachment F)

Appellant's appellate counsels only reason for not filing his postconviction petition on his behalf was due to his lack of spare time. **(Attachment H)** The appellant was diligently attempting to learn what, and how to timely file the postconviction petition. See *State* v. *Carter*, 2008 Ohio 6594, (Ohio Ct. App., Jefferson County Dec. 15, 2008), at ¶69-72, holding that:

> Appellants argue that due process requires that Appellants be allowed to rely on the notice sent to them by the clerk of courts on September 26, 2005, in order to calculate by when they had to timely file their petitions for post-conviction relief. In making this argument, Appellants rely on federal case law which uses the doctrine of equitable tolling.
>
> R.C. 2953.21(A)(2) is a statute of limitations for obtaining post-conviction relief. *State* v. *Culberson*, 142 Ohio App.3d 656, 662, 2001 Ohio 3261, 756 N.E.2d 734. The doctrine of equitable tolling can be used to prohibit the inequitable use of statutes of limitations. *Sharp* v. *Ohio Civ. Rights Com'n*, 7th Dist. No. 04 MA 116, 2005 Ohio 1119, at P10. For example, the Ohio Supreme Court has used equitable principles to incorporate the discovery rule into the statute of limitations governing wrongful death lawsuits. See *Collins* v. *Sotka* (1998), 81 Ohio St.3d 506, 1998 Ohio 331, 692 N.E.2d 581. However, "[e]quitable tolling is only available in compelling cases which justify a departure from established procedure." *Sharp* at P11. Thus, Ohio law "requires a showing of actual or constructive fraud by a party in the form of representations that the statute of limitations was larger than it actually was, promises of a better settlement if the lawsuit was not filed, or other similar representations or conduct" before a party can get relief through the doctrine of equitable tolling. *Sabouri* v. *Ohio Dept. of Job & Family Serv.* (2001), 145

> Ohio App. 3d 651, 655, 763 N.E.2d 1238. This closely resembles federal law, where the United States Supreme Court has said that the doctrine should be used "sparingly" and only in "situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin* v. *Dept. of Veterans Affairs* (1990), 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435.
>
> Appellants argue that they **were misled by the clerk of courts into believing that the transcripts were filed** on September 26th and cite a case where a federal court applied **equitable tolling** because of the actions of a clerk of courts. See *Knight* v. *Schofield* (C.A.11, 2002), 292 F.3d 709. The appellant in that case was pursuing an **appeal** in the Georgia Supreme Court and the clerk of court assured him that he would be informed when the court issued a decision. The court denied appellant's application for a writ of certiorari, but **the clerk inadvertently sent notice of that decision to the wrong person** and the appellant was not informed. Appellant later contacted the court and found out his application had been denied. However, the **time** for filing a federal habeas action had passed by the **time** the appellant was informed of this fact.
>
> The appellate court found that the appellant **was entitled to equitable tolling since he was a *pro se imprisoned defendant* who had exercised diligence in inquiring about the court's decision**. The fact that he was not notified of that decision was beyond his control.

See also *Nasouluck* v. *Haas*, 2017 U.S. App. LEXIS 13239 (6th Cir. May 10, 2017), at 4, holding that:

> A petitioner who otherwise fails to file an action within the statute of limitations period may still file an action, under the doctrine of equitable tolling, **when the petitioner's failure to meet a deadline arose from circumstances beyond the petitioner's control**. *Robertson* v. *Simpson*, 624 F.3d 781, 783 (6th Cir. 2010). A petitioner is entitled to equitable tolling where "he shows '**(1)** that he has been pursuing his rights diligently, and **(2)** that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)).

At no fault of the appellant's, due to the appellant's belief that the record of the transcript proceedings was not fully filed until April 27, 2015, instead of January 30, 2015, the appellant respectfully request such greater latitude due to his inexperience, and to conserve judicial economy and appellate time, to rule that the appellant's February 3, 2016 filing of his postconviction petition was equitably tolled and timely filed, which was not due until April 27, 2016.

As stated above, in an attempt to preserve the issues, the appellant also timely filed the above issues in his application for reopening 26(B) where he also did not receive notice of service. See **Case No. 2017-1343**, received and filed on September 25, 2017 with this Court. The decision denying the application for reopening is also proof that the Tenth District seemingly does not want the above facts revealed or disclosed. The court mentions the testimony about the tattoo but not why the photographs should have been introduced, and the Crim.R. 43 violation, but *merely* refer to the detectives narration report, Columbus police officer and witness testimony describing the suspect as a Caucasian male, and the mug shot of whom law enforcement deemed a suspect, as "certain materials" so not to disclose the ethnic issue. (See Feb. 2, 2017 decision at ¶8) The appellant believes, because the above issues undeniably disputes and discredits the states theory during trial that one individual committed all the robberies, and that individual was the appellant.

Surely, if there was a robbery detectives narrative report describing the appellant, the detective would have definitely been subpoenaed. The above type of exculpatory identifying information, in particular, the suspect being described as a male white by a seasoned robbery detective, and an unrelated acknowledgment of this by a Columbus Police Officer in a different proceeding, would be a *God-send* for any defense attorney in effective defense of his client. For any court, as the Tenth District did, to say there would not be a "reasonable probability" of a different outcome had the above evidence been presented to the jury requested, which would be evidence for a jury to decide upon so that the appellant could have a fair trial and verdict of confidence, then there is just no justice at all.

It seems that the *Strickland* standard of "reasonable probability" has been heightened and altered by the inferior court's in a manner in which no appellant can reach.

For this very reason, the United States Supreme Court in *Kyles* v. *Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995), clarified the "reasonable probability" standard explaining that, "Although the constitutional duty is triggered by the potential impact of favorable but undisclosed

evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id.*, at 682 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland* v. *Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)); *Bagley*, *supra*, at 685 (White, J., concurring in part and concurring in judgment) (same); see id., at 680 (opinion of Blackmun, J.) (*Agurs* "**rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal**"); cf. *Strickland*, *supra*, at 693 ("**We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case**"); *Nix* v. *Whiteside*, 475 U.S. 157, 175, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986) ("**[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland***"). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and *the adjective is important*. The question *is not* whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, at 434.

See also the Supreme Court of the United States in *Turner* v. *United States*, 137 S. Ct. 1885, at 1887 (U.S. June 22, 2017) holding that "A 'reasonable probability' of a different result" is one in which the suppressed evidence "'undermines confidence in the outcome of the trial.'" *Kyles* v. *Whitley*, 514 U. S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490."

Representation of a criminal defendant entails certain basic duties. Counsels function is to assist the defendant, and hence "attorneys owe their clients a duty of loyalty, including the duty to avoid conflicts of interest. *Strickland* v. *Washington*, 466 U.S. 668, 688, (1984) (citing to *Cuyler* v. *Sullivan*, 446 U.S. 335, 346, (1980)). "If counsel has consulted with the defendant, the question of

deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Roe* v. *Flores-Ortega*, 528 U.S. 470, at 478.

The defendant did consult with both trial and appellate counsel about presenting the evidence above, and both unconscionably refused.

Most conflicting is that the trial court held that "the Court finds that the documents attached to support his Petition were all available to Defendant at the time of his trial." (See the trial courts October 31, 2016 decision, at 6). Meaning, that the documents attached to the postconviction petition should have been filed on direct appeal, or if counsel failed to, in a application for reopening 26(B).

However, the Tenth District, concerning the same arguments and documents, ruled that "Because these materials were not introduced into evidence, they were not part of the record on appeal. The Supreme Court of Ohio has held that allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the *postconviction* remedies of R.C. 2953.21 rather than through direct appeal. *State* v. *Coleman*, 85 Ohio St.3d 129, 134 (1999)." (See the February 2, 2017 decision of the 26(B), at ¶8).

One court is saying that the same issues should have been raised on direct appeal, or through a 26(B) if appellate counsel failed to do so, while the other court says the same issues should have been raised through postconviction. One of the courts have to be wrong.

The appellant believes it is the Tenth District that is wrong in its decision that the issues should have been raised through postconviction, based on its own case law. See *State* v. *Bates*, 2008 Ohio 1422, (Ohio Ct. App., Franklin County Mar. 27, 2008), at ¶15, *identical* to the appellant's case where the appellant admitted that the photographs were not only in existence well before trial, but appellant and his trial counsel also discovered and knew about the evidence prior to trial, thus, barring the issue on postconviction because the matters complained of were clearly known before trial:

> In his post-conviction motion, appellant claimed his son Robert Jones took photographs of the bullet hole in the van, and his trial counsel was ineffective for failing to present the photographs to the jury. However, *appellant admitted in his petition for post-conviction relief that* **the photographs were given to his trial attorney prior to trial** and "were dated January 31, 2003[,] way before defendant's trial was well underway, which was June 16, 2003." Accordingly, **it is apparent that the photographs were not only in existence well before trial, but appellant and his trial counsel also discovered and knew about the evidence prior to trial.** Thus, appellant was not unavoidably prevented from discovering the evidence in a timely manner. See *State* v. *Rutan*, Franklin App. No. 07AP-626, 2007 Ohio 6507, at P11 (the record reflects defendant's attorney would have known about evidence at the time of trial; thus, **because the matters complained of were clearly known at the time of trial**, defendant did not demonstrate he was unavoidably prevented from discovering the facts on his claims). Further, as found by the trial court, **because the evidence was known to appellant and his counsel prior to trial, appellant's claims could have been raised on direct appeal**, and they are barred under the doctrine of res judicata. See id., citing *State* v. *Scudder* (1998), 131 Ohio App.3d 470, 475, 722 N.E.2d 1054 (because appellant's claims could have been raised on direct appeal, appellant's petition for post-conviction relief was also barred under the doctrine of res judicata).

This case, and the cases below, conclude that the Tenth District would also deny these same issues raised on postconviction as it did in *Bates*, because the appellant in the present case, also "admitted in his petition for post-conviction relief that the photographs were given to his trial attorney prior to trial . . . appellant's claims could have been raised on direct appeal, and they are barred under the doctrine of res judicata." *Bates*, *supra*.

See also *State* v. *Hessler*, 2002 Ohio 3321, (Ohio Ct. App., Franklin County June 27, 2002),at ¶27 ("Res judicata also implicitly bars a petitioner from "re-packaging" evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal. *Murphy*, *supra*; *Lawson*, *supra*, at 315; *State* v. *Reynolds* (1997), 79 Ohio St. 3d 158, 161, 679 N.E.2d 1131. **In other words, the evidence relied upon must not be evidence which was in existence or available for use at the time of trial or direct appeal**. *Murphy*, *supra*."); *State* v. *Anderson*, 2011 Ohio 6667, (Ohio Ct. App., Franklin County Dec. 22, 2011), at ¶16 quoting this Court in *State* v. *Cole* (1982), 2 Ohio St.3d 112, at 113 (same); *State* v. *Braden*, 10th Dist. No. 02AP-954, 2003-Ohio-2949, at ¶27 (same); *State* v. *Jones*, 2017-Ohio-5529, 2017 Ohio,(Ohio Ct. App., Franklin County June 27, 2017),

at ¶8 citing *Cole* (same); *State* v. *Holnapy*, 11th Dist. Lake No. 2013-L-002, 2013-Ohio-4307, at ¶24 ("the evidence dehors the record must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the defendant wished to use it.").

It is unsavory that the Tenth District refuses to adhere to its own case law, which was precedented and controlling by this Court. This Court has said that when "we ignore the words of the United States Supreme Court at our peril [it is] just as the "lesser" courts of Ohio ignore our words at their peril as to questions of state law." *State* v. *Storch*, 66 Ohio St. 3d 280, at 291.

Thus, the Tenth District should have granted the appellant's 26(B) because all the evidential documents and issues raised in the 26(B) were undeniably in the possession of trial counsel before trial, and appellate counsel before appeal.

In the best interest of justice, it would only seem just that the jury should have been permitted to hear testimony from law enforcement whom was aware of, and believed, the suspect to be of a different ethnicity than the appellant. This should cause this Honorable Court *great concern* to give greater latitude in acceptance of any proceeding in violation of any rule to avoid a miscarriage of justice in violation of guarantied constitutional rights.

The appellant voiced his concern and fear that the above evidence would not be presented by counsel at trial. (T. 38-39, 957) And as the appellant feared, it was not against his express request.

Where as in the present case there is evidence of the magnitude in which there was an identifying tattoo that was not on the suspect that was on the appellant, moreover, law enforcement, in conjunction with witnesses, whom believed that the suspect was Caucasian and not the appellant, this honorable Court has held, as in *State* v. *Murnahan*, 63 Ohio St.3d 60, at 66, that "claims of ineffective assistance of counsel may be barred by res judicata unless the circumstances render application of the doctrine unjust." *Id.* See also *State* v. *Davis*, 119 Ohio St. 3d 422, at ¶6, reaffirming *Murnahan*.

The Supreme Court of the United States in *Kyles* held, and the appellant echoes its sentiment, "A review of the suppressed statements of eyewitnesses -- whose testimony identifying Kyles as the killer was the essence of the State's case -- reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses." *See* syllabus.

In the present case, it was counsels ineffectiveness that resulted in the suppressed evidence prejudicing the appellant, and would undeniably be unjust for any court to say that had the jury heard this evidence, there would be no "reasonable probability" that the outcome would have been different at trial, where the Supreme Court of the United States holds that "the question *is not* whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, *supra*. The appellant clearly has a "right to present exculpatory evidence" *Taylor*, *supra*, and "right to compulsory process to procure the attendance of witnesses in his favor." *Washington*, *supra*, in which he was denied.

It is just very difficult for the appellant to understand why the courts are willing to delay, deprive, and disregard the above evidence where there is a reasonable probability, if presented, would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.

"As a result, the jury was given no theory--other than the State's--to consider in evaluating the strong circumstantial evidence implicating [the appellant]." *DeLuca* v. *Lord*, 858 F. Supp. 1330, at 1346. Thus, prejudicing and depriving the defendant of a fair trial where such exculpatory identification evidence could never be novel due to the case being one of identity where this Court

has said that "***identity*** is the ***least precise*** of the enumerated purposes of Evid.R. 404(B)." *Lowe*, *supra*.

CONCLUSION

Fore the foregoing reasons above, the appellant respectfully requests that this Court reverse the Tenth District Court of Appeals denial of the procedendo, grant the appellant's propositions of law, to rule that the postconviction petition was not untimely due to the full record being filed on April 27, 2015, equitably tolling the deadline for the petition until April 27, 2016 which was filed on February 3, 2016, and accept jurisdiction as an appeal of right pursuant to S.Ct.Prac.R. 5.01 in **Case No. 2017-1343**, received and filed on September 25, 2017, as it did in the case herein.

Respectfully submitted,

Miguel E. Neil

Miguel E. Neil #710531 *pro se*

CERTIFICATE OF SERVICE

A copy of the foregoing memorandum in Support of Jurisdiction was sent by regular U.S. Mail to: The Franklin County Prosecutor 373 South High Street, 13th Floor Columbus, Ohio 43215, on this 27 day of October 2017.

Miguel E. Neil

Miguel E. Neil #710531 *pro se*
Noble Correctional
15708 McConnelsville Road
Caldwell, Ohio 43724

(Attachment A)

Theresa W. Jones
5259 Aurora Dr.
Hilliard, OH 43026
Phone: 614-323-1059

RE: Miguel E. Neil – A710531
15708 McConnelsville Rd.
Caldwell, OH 43724

October 4, 2017

To the Ohio Supreme Court:

This is in regard to the post conviction motion that Miguel Neil filed on 2/3/16. The decision for this was entered on 10/31/16. While researching some things for him I discovered that the decision was never sent to Mr. Neil, thus rendering him unable to appeal the decision.

I have enclosed a copy (screenshots from the Franklin County Clerk of Courts website) of his case docket as proof that a copy of the decision was never sent to him. There is no "Proof of Service" that this was ever mailed to him.

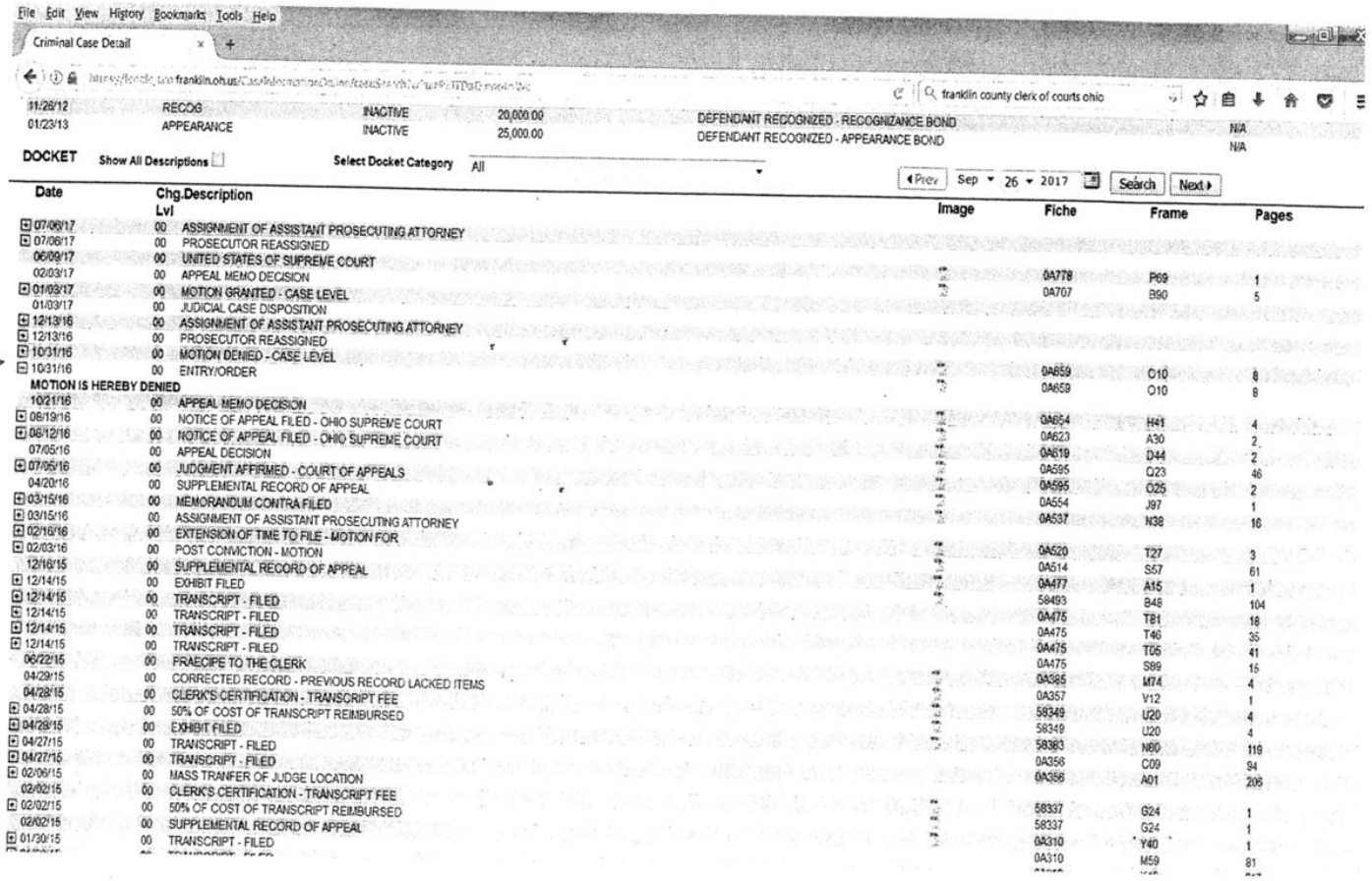
Respectfully,

Theresa W. Jones 10/4/17

NOTARY PUBLIC STATE OF OHIO

RYAN STOCKE
Notary Public, State of Ohio
My Commission Expires
March 16, 2022

10/4/17



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Criminal Case Detail

franklin county clerk of courts ohio

11/26/12	RECOG	INACTIVE	20,000.00	DEFENDANT RECOGNIZED - RECOGNIZANCE BOND		N/A
01/23/13	APPEARANCE	INACTIVE	25,000.00	DEFENDANT RECOGNIZED - APPEARANCE BOND		N/A

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Date	Lvl	Chg.Description	Image	Fiche	Frame	Pages
07/06/17	00	ASSIGNMENT OF ASSISTANT PROSECUTING ATTORNEY				
07/06/17	00	PROSECUTOR REASSIGNED				
06/09/17	00	UNITED STATES OF SUPREME COURT				
02/03/17	00	APPEAL MEMO DECISION		0A778	P69	1
01/03/17	00	MOTION GRANTED - CASE LEVEL		0A707	B90	5
01/03/17	00	JUDICIAL CASE DISPOSITION				
12/13/16	00	ASSIGNMENT OF ASSISTANT PROSECUTING ATTORNEY				
12/13/16	00	PROSECUTOR REASSIGNED				
10/31/16	00	MOTION DENIED - CASE LEVEL				
10/31/16	00	ENTRY/ORDER		0A659	C10	8
MOTION IS HEREBY DENIED				0A659	C10	8
10/21/16	00	APPEAL MEMO DECISION				
08/19/16	00	NOTICE OF APPEAL FILED - OHIO SUPREME COURT		0A654	H41	4
08/12/16	00	NOTICE OF APPEAL FILED - OHIO SUPREME COURT		0A623	A30	2
07/05/16	00	APPEAL DECISION		0A619	D44	2
07/05/16	00	JUDGMENT AFFIRMED - COURT OF APPEALS		0A595	Q23	46
04/20/16	00	SUPPLEMENTAL RECORD OF APPEAL		0A595	Q25	2
03/15/16	00	MEMORANDUM CONTRA FILED		0A554	J97	1
03/15/16	00	ASSIGNMENT OF ASSISTANT PROSECUTING ATTORNEY		0A537	N38	16
02/16/16	00	EXTENSION OF TIME TO FILE - MOTION FOR				
02/03/16	00	POST CONVICTION - MOTION		0A520	T27	3
12/16/15	00	SUPPLEMENTAL RECORD OF APPEAL		0A514	S57	61
12/14/15	00	EXHIBIT FILED		0A477	A15	1
12/14/15	00	TRANSCRIPT - FILED		58493	B48	104
12/14/15	00	TRANSCRIPT - FILED		0A475	T81	18
12/14/15	00	TRANSCRIPT - FILED		0A475	T46	35
12/14/15	00	TRANSCRIPT - FILED		0A475	T05	41
06/22/15	00	PRAECIPE TO THE CLERK		0A475	S89	15
04/29/15	00	CORRECTED RECORD - PREVIOUS RECORD LACKED ITEMS		0A385	M74	4
04/28/15	00	CLERK'S CERTIFICATION - TRANSCRIPT FEE		0A357	V12	1
04/28/15	00	50% OF COST OF TRANSCRIPT REIMBURSED		58349	U20	4
04/28/15	00	EXHIBIT FILED		58349	U20	4
04/27/15	00	TRANSCRIPT - FILED		58383	N60	119
04/27/15	00	TRANSCRIPT - FILED		0A358	C09	94
02/06/15	00	MASS TRANFER OF JUDGE LOCATION		0A356	A01	206
02/02/15	00	CLERK'S CERTIFICATION - TRANSCRIPT FEE				
02/02/15	00	50% OF COST OF TRANSCRIPT REIMBURSED		58337	G24	1
02/02/15	00	SUPPLEMENTAL RECORD OF APPEAL		58337	G24	1
01/30/15	00	TRANSCRIPT - FILED		0A310	Y40	1
				0A310	M59	81

NOTARY PUBLIC STATE OF OHIO

RYAN STOCKE
Notary Public, State of Ohio
My Commission Expires
March 16, 2022

10/4/17

(Attachment B)

31 - 38 of **1000**

Sort By
Date Relevance
What's this?

Show Hits

31. State ex rel. Sevilla v. State, No. 14AP-479, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2015-Ohio-737; 2015 Ohio App. LEXIS 708, March 3, 2015, Rendered

    OVERVIEW: A magistrate properly concluded that an inmate's mandamus request to compel a judge to rule on his summary judgment motion should be dismissed because the inmate failed to file the requisite statement with affidavits pursuant to R.C. 2969.25(C)(1) and (A), and his belated attempt to file them did not excuse his initial non-compliance.

    CORE TERMS: inmate, civil action, writ of mandamus, cashier, conclusions of law, indigency, government entity, preceding, mandatory, mandamus ...

32. State ex rel. Fleming v. Ohio Adult Parole Auth., No. 03AP-1279 , COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2006-Ohio-941; 2006 Ohio App. LEXIS 832, March 2, 2006, Rendered

    OVERVIEW: A court dismissed an inmate's action seeking a writ enjoining the parole authority and parole board from placing him on post-release control after the expiration of his sentence because the inmate had not provided an affidavit listing each civil action or appeal he had filed in the past five years as required by Ohio Rev. Code Ann. § 2969.25(A).

    CORE TERMS: inmate, civil action, mandatory, conclusions of law, sua sponte, listing, original action, writ of prohibition, failed to comply, failed to file ...

33. State ex rel. Draper v. State, No. 07AP-357, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2007-Ohio-5581; 2007 Ohio App. LEXIS 4861, October 16, 2007, Rendered

    OVERVIEW: Inmate's request for a writ of procedendo was dismissed as he failed to comply with R.C. 2969.25(A) and (C). He did not file a statement setting forth the balance of his inmate account for the preceding six months, or file an affidavit with a description of each civil action or appeal of a civil action filed in the previous five years.

    CORE TERMS: procedendo, inmate, leave to file, summary judgment, common pleas, civil action, prosecuting attorney, conclusions of law, sua sponte, issue a writ ...

34. State ex rel. Simpson v. Jackson, No. 08AP-241, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2008-Ohio-4357; 2008 Ohio App. LEXIS 3679, August 26, 2008, Rendered

    OVERVIEW: Inmate's mandamus action was dismissed because the court lacked territorial jurisdiction over the action, in that the prison and the office of its warden, respondent, were

Commented [1]: Hidded field for Dedupe Indication

located beyond boundaries of the court's jurisdiction. Moreover, inmate's failure to comply with the provisions of R.C. 2969.25(A) and (C) were additional grounds for dismissal.

CORE TERMS: warden, sua sponte, inmate, conclusions of law, mandamus, legal conclusion, territorial jurisdiction, deposited, monetary, notice ...

35. State ex rel. Evans v. McGrath, No. 16AP-238, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2016-Ohio-8348; 2016 Ohio App. LEXIS 5390, December 22, 2016, Rendered

CORE TERMS: inmate, cashier, filing requirement, notice, conclusions of law, failed to state, forma pauperis, writ of prohibition, summary judgment, leave to proceed ...

36. State ex rel. Spurlock v. Sevrey, No. 06AP-1291, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2007-Ohio-3550; 2007 Ohio App. LEXIS 3242, July 12, 2007, Rendered

OVERVIEW: A court adopted a magistrate's decision to dismiss an inmate's mandamus action, seeking to compel medical treatment, as he did not file an affidavit of indigency, a description of past civil actions, a statement of his inmate account, or a statement regarding the filing of a grievance, as required by R.C. 2969.25(C), (A), and 2969.26.

CORE TERMS: inmate, grievance, civil actions, conclusions of law, statement setting forth, original action, correctional, indigency, mandamus, failed to file ...

37. State ex rel. Thompson v. Lynch, No. 16AP-251, COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2016-Ohio-5426; 2016 Ohio App. LEXIS 3304, August 18, 2016, Rendered

CORE TERMS: inmate, procedendo, civil action, conclusions of law, filing fees, prepayment, indigency, preceding, cashier, jail-time ...

38. State ex rel. Ely v. Wilkinson, No. 05AP-322 , COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, 2005-Ohio-4574; 2005 Ohio App. LEXIS 4133, September 1, 2005, Rendered

OVERVIEW: Inmate's petition for writ of prohibition was dismissed because he failed to pay the filing fees, failed to submit a notarized affidavit of indigency, and failed to file an affidavit regarding any prior civil actions filed in the past five years and statement of amount in his inmate account as required by Ohio Rev. Code Ann. § 2969.25(A) and (C).

CORE TERMS: civil actions, inmate, mandatory, notarized, original action, failure to comply, indigency, cashier, writ of prohibition, conclusions of law ...

(Attachment C)

Bryan Scott Hicks
Attorney at Law

Office/Appointments:
22 ½ N. Broadway
Lebanon, Ohio 45069

Mail/Correspondence:
P.O. Box 359
Lebanon, Ohio 45036

Telephone (513) **228-1111** Fax (513) **297-0849**
hickslawoffice@gmail.com

September 4, 2014

[redacted]
Noble Correctional Institute
15708 McConnelsville Road
Caldwell, Ohio 43724

Re: Court of Appeals Case

Dear [redacted]:

I received you're your letter. I had not communicated with you earlier as I had really just started on the case. I enclose a copy of the Court Docket for your records. I have ordered the transcripts, but it might be some time before I receive them. The original due date is about 9/23, but when I spoke to the Court Reporter yesterday, she indicated that she was going to need more time.

I really can not advise you as to what issues there may be or the arguments I can make as I was not the trial counsel and I will not really have the ability to understand the case until I have reviewed the transcripts. I have noted your concerns.

Feel free to continue to write me with matters you want me to consider. I will take them into consideration, however, please understand that simply because you think there might be an issue does not mean that it is in fact one. (Judge Harcha told me just yesterday that there may well be a merger issue for me to look at, so that will definitely be carefully looked at).

In my appellate experience, and I have argued before the 4th and 12th Ohio Appellate Districts, the Ohio Supreme Court, as well as the Sixth and Second U.S. Courts of Appeal, it is very damaging to raise and argue weak issues. The credibility of a case is severely damaged by simply throwing everything at the wall and hoping something sticks. You have mentioned several issues that I will carefully consider, but at the end of the day I will make the arguments that I feel are best.

I am well known in the Fourth as I do quite a bit of appellate work there and so I understand that court fairly well. In my experience, the Fourth District

will give your case fair consideration. However, I must caution you that they rarely overturn a jury conviction. Appellate courts, by their very nature, are set up to look for ways to affirm the decision below. Frankly, I have lost cases that I thought I had the better argument. This does not mean that I will not advocate vigorously for you, I simply want you to be realistic in your expectations and understand that you are fighting an uphill battle.

Thank you for writing me with your concerns. I will keep you informed as we go forward.

Sincerely,

Bryan Scott Hicks
Attorney at Law

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	
vs.	:	Case No. 12 CR 5963
	:	13 CR 4174
Miguel Ezra Neil,	:	
Defendant.	:	Judge Fais

MOTION FOR JOINDER OF CASES

Now comes the State of Ohio, pursuant to Rule 7(D), 8(A) and 13 of the Ohio Rules of Criminal Procedure and respectfully requests the Court to join the above captioned matters into a single action for the purposes of trial, in that the matters are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are a part of a course of criminal conduct.

Respectfully Submitted,

RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO

William R. Walton 0073745
Assistant Prosecuting Attorney
373 S. High Street, 14th Floor
Columbus, OH 43215
Attorney for State of Ohio

MEMORANDUM IN SUPPORT

It is within the discretion of the court to amend an original indictment under Rule 7(D) of the Ohio Rules of Criminal Procedure by consolidating an offense charged in a subsequently returned indictment where the offenses charged and consolidated are a part of a course of criminal conduct. State v. Cooper, 52 Ohio St. 2d 163 at 174. This applies as well where the offenses are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. (Rule 8(A) of the Ohio Rules of Criminal Procedure.) Where the joinder of counts eliminates the need to show substantially the same evidence twice over, the kind of economy envisaged by Rule 8(A) of the Ohio Rules of Criminal Procedure is realized, particularly where the joinder of offenses adds little or no prejudice affecting substantial rights of the defendant. United States v. Leonard, (1971), 445 f2d 234 at 236.

Respectfully Submitted,

RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO

William R. Walton 0073745
Assistant Prosecuting Attorney
373 S. High Street, 14th Floor
Columbus, OH 43215
Attorney for State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been forwarded via regular U.S. Mail, postage pre-paid, to Samuel B. Weiner at 743 South Front Street, Columbus, Ohio 43206-1905, on this 19th day of August, 2013.

William R. Walton 0073745
Assistant Prosecuting Attorney

NOTICE OF HEARING

Please take notice that the hearing set out above will come on for hearing on the 1st day of October, 2013, at 9AM before the Honorable FAIS, Courtroom 6B, Franklin County Common Pleas Court, 345 South High Street, Columbus, Ohio 43215.

William R. Walton 0073745
Assistant Prosecuting Attorney
Attorney for State of Ohio

Maryellen O'Shaughnessy
Clerk of the Court of Common Pleas
345 South High Street 1st Fl
Columbus OH 43215-4576

13 CR 1308
NEIL - HEARING NOTICE

SAMUEL B. WEINER
SAMUEL B WEINER CO LPA
743 SOUTH FRONT STREET
COLUMBUS OH 43206-1991

3970

GIAFA5B 43206

CLERK OF THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

AUGUST 09, 2013

STATE OF OHIO - VS - MIGUEL E. NEIL

CASE NUM: 13 CR 1308

PURSUANT TO THE RULES OF COMMON PLEAS COURT THE CASE LISTED ABOVE HAS BEEN RESCHEDULED FOR CONT. TRIAL FROM TUESDAY AUGUST 06, 2013 AT 09:00 AM TO TUESDAY OCTOBER 01, 2013 AT 09:00 AM BEFORE THE HONORABLE JUDGE: DAVID W. FAIS IN COURT ROOM NUMBER 6F.

CALL THE PROSECUTING ATTORNEY'S SCHEDULING CLERK (525-3555): (1) TO OBTAIN THE NAME OF ASSISTANT PROSECUTING ATTORNEY ASSIGNED TO THIS CASE; AND (2) TO ARRANGE FOR THE APPEARANCE OF YOUR CLIENT IF HE IS INCARCERATED.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	
vs.	:	Case No. 12 CR 5963 13 CR 4174
Miguel Ezra Neil,	:	
Defendant.	:	Judge Fais

ENTRY

On this ___ day of August, 2013, William R. Walton, Assistant Prosecuting Attorney of Franklin County, Ohio appeared on behalf of the State of Ohio, and Samuel B. Weiner appeared on behalf of defendant, Miguel Ezra Neil, on the State of Ohio's Motion to join the above-captioned matters for purposes of trial.

For good cause shown, the Court does join the above-captioned matters into a single action for purposes of trial, the matters being of the same or similar character, or based on the same act or transaction, or based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

It is further ORDERED that the Assignment Commissioner insure that the above matters will be set for trial together at the same time and place.

Signature page attached
Judge Fais

NARRATIVE SUPPLEMENT

INCIDENT NUMBER 1-11-003624
INCIDENT DATE / TIME 05/08/2011 2112

Narrative Type: NARRATIVE SUPPLEMENT
Narrative Officer: MCDONNELL, K
Reporting Officer: RILEY, N
Topic: Follow Up
Narrative Date/Time: 05/10/2011 1035

On 05/09/11 I went to Tim Horton's and I took photos. I later burned the photos to disk and I placed the disk in the property room under tag number **42355-1**.

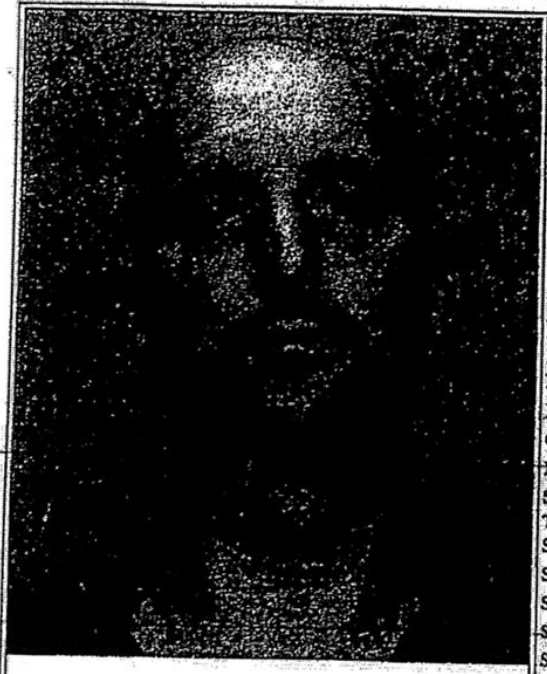
I also received the surveillance video on disk. The disk was placed in the property room under tag number **42355-2**.
The video time is approximately 13 minutes slower from the actual time.
The following events can be seen on the video:
video time (Not actual time)
20:42:30 Toby Akers is in the back room collecting empty boxes near the rear door.
20:42:43 Daber places a fire extinguisher to prop open the rear door.
20:43:12 Toby Akers takes the boxes out the rear door and Nicholas Bakers follows him out the door with a trash can.
20:57:51 Daber walks from behind the counter towards the dining room.
21:00:04 Nicholas Baker removes the fire extinguisher from the rear door and the door closes.
21:00:44 Nicholas Baker takes 2 cash tills out of the safe in the office.
21:00:57 Nicholas Baker puts the 2 cash tills by the drive thru window.
21:01:03 Nicholas Baker is on the cash register at the drive thru.
21:01:23 the suspect is walking behind Daber behind the counter from the east to the west.
21:01:28 the suspect is holding the back of Daber's shirt with his right hand, and pointing a gun at Nicholas Baker with his left hand who is still at the drive thru cash register.
21:01:32 the suspect grabs Nicholas baker by the back of his neck with his right hand, and Daber backed out of view of the camera and the suspect points the gun with his left hand to the direction of Daber.
21:01:34 Nicholas Baker lies on the floor out of the view of the camera, and the suspect takes the money out of the drive thru cash register with his right hand and continued holding the gun in his left hand.
21:01:48 The suspect puts the money in his front right pants pocket.
21:01:53 Nicholas Baker stands up and goes to the cash register at the counter (west cash register) and opens the cash drawer.
21:01:57 the suspect takes the cash out of the cash drawer with his right hand while he is still holding the gun in his left hand.
21:02:17 suspect touches the safe in the office.
21:02:26 suspect goes out the rear door.
21:02:38 A male walks into the east door of Tim Horton's holding a plastic drink container (The individual was later identified as Willie Pippen III)

Note: the 2 cash tills on the drive thru window was not touched by the suspect. While viewing the surveillance video it appears the suspect is a white male. The suspect was also wearing gloves.

On 05/09/11 I received a subpoena for Daber Ghebermeskel's cell phone records for 05/08/11. I faxed the subpoena to Sprint Nextel Corporation.

Willie Pippen III-walked into the east door of Tim Horton's approximately 12 seconds after the suspect went out the rear door (north door).
On 05/10/11 at approximately 1145 hrs Detective Doersam and I went to Tim Horton's and I asked

Columbus Ohio - Division of Police



CITY ID:	49535B
SS No:	297-76-5851
FBI No.:	
BCI No.:	[redacted]
NAME:	JAMES EARL GARRISON IV
SEX:	MALE
RACE:	WHITE
DOB:	05-20-1980
HEIGHT:	6'03"
WEIGHT:	210
BUILD	
HAIR COLOR	BROWN
EYE COLOR:	HAZEL
GLASSES:	NO
FACIAL HAIR:	B&M
SPEECH:	
TEETH:	
S/M/T 1:	HEART LEFT SHOULDER
S/M/T Desc 1:	W/ BANNER
S/M/T 2:	TRIBAL RIGHT UPPER ARM
S/M/T Desc 2:	OF TRIBAL SYMBOLS
S/M/T 3:	WORDS LEFT UPPER ARM
S/M/T Desc 3:	NORTH

DATE OF PHOTO: 09-07-2012

County ID: 193887
Nationality: UNITED STATES
Drugs:
L.K.A.: 2840 PONTIAC ST COLUMBUS OHIO 43211
Offense: OTHER AGENCY
Offense: ROBBERY
Offense:

Felony Registrant:
Weapons:

FOR LAW ENFORCEMENT USE ONLY

CITY ID: 49535B
JAMES EARL GARRISON
COLUMBUS POLICE DEPARTMENT

(Attachment F)

#	FILE DATE	CHG	SUB#	ACTN	DESCRIPTION	FIELD VALUES
617	121114	01	0001	9198	ATTY FEES-MOTION FOR D	
						FICHE: 58331 FRAME: E65
618	121114	01	0002	1701	ATTORNEY FEES ORDER	61207 D
						FICHE: 58331 FRAME: E65
619	010515	01	0001	9280	NOTICE RETURNED	C16 22 3
						FICHE: 58334 FRAME: D01
620	013015	01	0001	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: A70
					TRANSCRIPT OF PROCEEDINGS VOL I	
621	013015	01	0002	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: B20
					TRANSCRIPT OF PROCEEDINGS VOL II	
622	013015	01	0003	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: D55
					TRANSCRIPT OF PROCEEDINGS VOL III	
623	013015	01	0004	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: F22
					TRANSCRIPT OF PROCEEDINGS VOL IV	
624	013015	01	0005	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: H65
					TRANSCRIPT OF PROCEEDINGS VOL V	
625	013015	01	0006	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: K40
					TRANSCRIPT OF PROCEEDINGS VOL VI	
626	013015	01	0007	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A310 FRAME: M59
					TRANSCRIPT OF PROCEEDINGS VOL VII	
627	020215	01	0001	8015	SUPPML REC OF APPEAL	
						FICHE: 0A310 FRAME: Y40
628	020215	01	0002	1591	50% TRANS COST RMBRS SERW	0.0 1622.82
						FICHE: 58337 FRAME: G24
629	020215	01	0003	7963	CLERK CERT-TRANS FEE	
						FICHE: 58337 FRAME: G24
630	042715	01	0001	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A356 FRAME: A01
					TRANSCRIPT OF PROCEEDINGS VOL I	
631	042715	01	0002	7960	TRANSCRIPT - FILED	D 14AP981
						FICHE: 0A356 FRAME: C09
					TRANSCRIPT OF PROCEEDINGS VOL II	
632	042815	01	0001	8950	EXHIBIT FILED	D 14AP981
						FICHE: 58383 FRAME: N80
					1 ENVEL OF EXHIBITS	
633	042815	01	0002	1591	50% TRANS COST RMBRS SERW	0.0 774.00
						FICHE: 58349 FRAME: U20
634	042815	01	0003	7963	CLERK CERT-TRANS FEE	
						FICHE: 58349 FRAME: U20
635	042915	01	0001	9277	CORRECTED RECORD	
						FICHE: 0A357 FRAME: V12
636	062215	01	0001	6825	PRAECIPE TO CLERK	
						FICHE: 0A385 FRAME: M74

You need to hang on to your copies! I have enclosed copies of the postage check out slips for 1-26 + 1-29.

Cashier

JTE

After speaking to the case manager, she informed me that this entity would be able to provide me with a copy of receipts for mail that I sent out on, or about, January 27, 28, or the 29 of 2016. One was addressed to the Franklin County Court of Common Pleas and the othe to the Franklin County prosecutors office in Columbus, Ohio. I need those as soon as possible for appellate purposes.

Thank You.

(Attachment G)

Personal A/C Withdrawal Check Out-Slip

Dollars:	Cents:
3	18

Institution:	Date:
NCF	1-27-16

Name: Franklin County Common Pleas Clerk of Court

Address: 345 South High ST

City:	State:	Zip Code:
Columbus OH	Ohio	43215

☒ Postage ☐ Copies ☐ ID ☐ Misc. _____ ☐ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature:	Number:	Block & Cell Number:
M. Neil	710-531	A2 E6

Approved By:	Witnessed:
[signature]	

Ship VIA:	Date Processed:
	1-29-16

DRC 1004 (Rev. 3/01) DISTRIBUTION: WHITE - Cashier CANARY- Inmate Pink- _____ ACA 4046

Personal A/C Withdrawal Check Out-Slip

Dollars:	Cents:
3	18

Institution:	Date:
NCI	1-27-16

Name: Franklin County Prosecutors Office

Address: 373 South High St

City:	State:	Zip Code:
Columbus	Ohio	43215

☒ Postage ☐ Copies ☐ ID ☐ Misc. _____ ☐ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature:	Number:	Block & Cell Number:
M. Neil	710-531	A2 E6

Approved By:	Witnessed:
[signature]	

Ship VIA:	Date Processed:
	1-29-16

DRC 1004 (Rev. 3/01) DISTRIBUTION: WHITE - Cashier CANARY- Inmate Pink- _____ ACA 4046

CERTIFICATE OF SERVICE

This is hereby to verify that a true exact photo copy of the forgoing Petition for Post Conviction Relief, has hereby been served upon the Franklin County Prosecuting Attorney, at: 373 South High Street, Columbus, Ohio 43215, sent on the 27th day of January, 2016, by prepaid 1st Class Mail Delivery, with sufficient postage affixed.

Miguel E. Neil

Miguel E. Neil
Inmate No. 710-531
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

AFFIDAVIT MADE UNDER SWORN OATH

Now comes the Affiant, Miguel E. Neil., who hereby declares, states, and says, under Sworn Oath and Affirmation, after having been first duly cautioned and sworn, states that the facts and legal issues as stated, is true and correct. Affiant further declares under Sworn Oath that he does have "personal knowledge of the facts" as stated within the petition for Post-Conviction Relief. Affiant further declares under Sworn Oath that he is "*competent*" to give sworn testimony in a court of law.

SO SWORN AND SUBSCRIBED TO IN MY PRESENCE ON THIS 27th DAY OF JANUARY, 2016.

Cheryl A. Evans
NOTARY OF THE STATE OF OHIO

NOTARIAL SEAL
STATE OF OHIO

CHERYL A. EVANS
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES 07-23-2020

Miguel E. Neil
MIGUEL E. NEIL / AFFIANT
INMATE NO. A710-531
NOBLE CORRECTIONAL INSTITUTION
15708 McCONNELSVILLE ROAD
CALDWELL, OHIO 43724

(Attachment H)

JOHN W. KEELING, ATTORNEY AT LAW
OFFICE OF THE FRANKLIN COUNTY PUBLIC DEFENDER
373 S. HIGH ST. / 12th FLOOR, COLUMBUS, OHIO 43215-6302
(614) 525-8783 or (614) 525-8855 (for collect calls)
FAX (614) 461-6470
November 4, 2015

Mr. Miguel Neil
A 710 531
Noble Correctional Institution
15708 McConnelsville Rd.
Caldwell, OH 43724

Dear Mr. Neil:

Enclosed is an entry indicating the state's brief is due December 11, 2015. I will forward a copy to you when I receive it.

I had to wait to see if I would be able to assist you on the post-conviction relief petition. My schedule is now such that I cannot fit in any volunteer activity. Since I currently have no obligation to represent on the petition, I cannot volunteer to do so because of time constraints caused by a very oppressive case load.

With best wishes, I am

Sincerely yours,

John W. Keeling
Attorney at Law

Enclosure: entry

IN THE SUPREME COURT OF OHIO

17-1221

State of Ohio

Plaintiff-Appellee, :

: On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

vs :

Miguel Neil, :

Defendant-Appellant. : Case No. 17AP-241

:

NOTICE OF APPEAL

Miguel Neil #710-531 *Pro Se*
Noble Correctional
15708 McConnelsville Road
Caldwell, Ohio 43724

and

Franklin County Prosecutor
373 South High Street, 12th Floor
Columbus, OH 43215

Appellant Miguel Neil hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 17AP-241 on July 25, 2017.

This case raises a substantial constitutional questions and is one of great general interest.

Respectfully Submitted,

Miguel Neil

Miguel Neil #710-531 *Pro Se*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent by regular mail to the Franklin County Prosecutor at 373 South High Street, 12th, Floor, Columbus, Ohio 43215 on this 29 day of August 2017.

Miguel Neil

Miguel Neil #710-531 *Pro Se*

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Miguel E. Neil,	:	
Relator,	:	
v.	:	No. 17AP-241
Judge Jenifer French,	:	(REGULAR CALENDAR)
Respondent.	:	

MEMORANDUM DECISION

Rendered on July 25, 2017

Miguel E. Neil, pro se.

IN PROCEDENDO
ON SUA SPONTE DISMISSAL

SADLER, J.

{¶ 1} Relator, Miguel E. Neil, a pro se inmate, commenced this original action requesting this court issue a writ of procedendo ordering respondent, the Honorable Jenifer French, a judge of the Franklin County Court of Common Pleas, to rule on a petition for postconviction relief that relator filed February 3, 2016 in the common pleas court.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate recommended that this court sua sponte dismiss this action for relator's failure to comply with the mandatory filing requirements of R.C. 2969.25(C)(1).

{¶ 3} No objections have been filed to the magistrate's decision.

{¶ 4} Having conducted an independent review of the record in this matter and finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law, and its recommendation to sua sponte dismiss this action for failure to comply with R.C. 2969.25(C)(1). Accordingly, the requested writ of procedendo is dismissed.

Action dismissed.

KLATT and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Miguel E. Neil,	:	
Relator,	:	
v.	:	No. 17AP-241
Judge Jenifer French,	:	(REGULAR CALENDAR)
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on April 27, 2017

Miguel E. Neil, pro se.

IN PROCEDENDO
ON SUA SPONTE DISMISSAL

{¶ 5} In this original action, relator, Miguel E. Neil, an inmate of the Noble Correctional Institution ("NCI") requests a writ of procedendo ordering respondent, the Honorable Jenifer French, a judge of the Franklin County Court of Common Pleas, to rule on a petition for postconviction relief that relator filed on February 3, 2016 in the common pleas court.

Findings of Fact:

{¶ 6} 1. On April 6, 2017, relator, an NCI inmate, filed this procedendo action against respondent. Relator alleges that respondent has failed to timely rule on a petition for postconviction relief that relator filed in the common pleas court.

{¶ 7} 2. Relator has not deposited with the clerk of this court the monetary sum required as security for payment of costs. *See* Loc.R. 13(B) of the Tenth District Court of Appeals.

{¶ 8} 3. With his complaint, relator filed an affidavit of indigency that he executed April 3, 2017. In his affidavit relator states "I am requesting that the filing fee, security deposit, and cost associated with this action be waived."

{¶ 9} 4. Relator has not filed with his complaint a statement that sets forth the balance in his inmate account for each of the preceding six months, as certified by the institutional cashier.

Conclusions of Law:

{¶ 10} It is the magistrate's decision that this court sua sponte dismiss this action for relator's failure to satisfy the mandatory filing requirements set forth at R.C. 2969.25(C)(1).

{¶ 11} R.C. 2969.25(C) provides:

> If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. The affidavit of waiver and the affidavit of indigency shall contain all of the following:
>
> (1) A statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier;
>
> (2) A statement that sets forth all other cash and things of value owned by the inmate at that time.

{¶ 12} As earlier noted, relator failed to file with his complaint a statement that sets forth the balance in his inmate account for each of the preceding six months, as certified by the institutional cashier pursuant to R.C. 2969.25(C)(1).

{¶ 13} The magistrate concludes that relator has failed to satisfy the mandatory filing requirements set forth at R.C. 2969.25(C)(1). Thus, this court must sua sponte

dismiss this action. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533; *Hawkins v. S. Ohio Corr. Facility*, 102 Ohio St.3d 299, 2004-Ohio-2893.

{¶ 14} Accordingly, for all the above reasons, it is the magistrate's decision that this court sua sponte dismiss this action.

/S/ MAGISTRATE
KENNETH W. MACKE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Miguel E. Neil,	:	
Relator,	:	
v.	:	No. 17AP-241
Judge Jenifer French,	:	(REGULAR CALENDAR)
Respondent.	:	

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on July 25, 2017, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that this original action is hereby dismissed. Costs shall be assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

SADLER, KLATT, and DORRIAN, JJ.

/S/ JUDGE

Tenth District Court of Appeals

Date:	07-26-2017
Case Title:	STATE OF OHIO, EX REL MIGUEL E NEIL -VS- JUDGE JENIFER FRENCH
Case Number:	17AP000241
Type:	JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Lisa L. Sadler