

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

-vs-

RAYMOND A. MILLER,
Defendant-Appellant.

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CASE NO.: 19-0320

On Appeal from Geauga County Court
of Appeals, Eleventh Appellate
District of Ohio

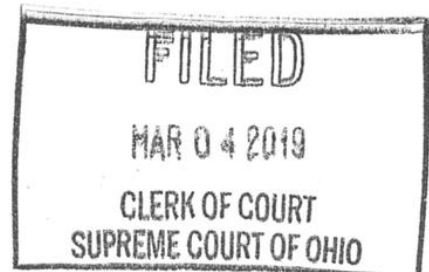
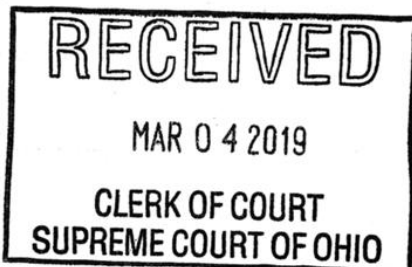
CA.: 17-G-0136

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT, RAYMOND A. MILLER

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DEFENDANT-APPELLANT, PRO SE

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COUNSEL FOR PLAINTIFF-APPELLEE:
STATE OF OHIO



EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a substantial Constitutional question of Right to Effective Assistance of Appellate Counsel and Trial Counsel, Sixth Amendment, U.S. Constitution; Section 10, Article 1, Ohio Constitution. Also, Defendant-Appellant's Fifth and Fourteenth Amendments, U.S. Constitution; Section 16, Article 1, Ohio Constitution; Due Process Rights Violations, which includes Appellant's right to have Appellate Counsel present all errors on Appeal. The Strickland test applies to Appellate Counsel, *Smith v. Robbis* (2000), 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed. 2d 756; *Burger v. Kemp*, (1987), 483, U.S. 776, 107 S.Ct. 3114, 97 L.Ed 2d 638.

A defendant's right to effective assistance of counsel extends to an appellate review process. The law is clear that defense counsel has an affirmative duty under the Sixth Amendment to the United States Constitution to object to a violation of law upon the record and bring that error to the trial court's attention. When trial counsel fails to fulfill his adversarial role to the prosecution's case, *U.S. v. Gronic*, 466 U.S. 648 (1984); *State v. Lythle*, (1976), 48 Ohio St. 2d 391; *Strickland v. Washington*, 466 U.S. 686 (1984), it falls to appellate counsel to assign as error on appeal, dead bang winner issues for appellate review. Appellate counsel's failure to do his duty then makes assistance to the appellant ineffective.

Considering all of the above Federal, State Constitutional and Due Process Rights Violations, it is the shared responsibility of the trial court and defense counsel to insure a fair and just legal proceedings. Trial courts must protect a defendant's due process rights so that the legal proceedings does not violate a defendant's Constitutional Rights. Defense counsel and Appellate Counsel must act as an adversary to any and all of the trial court's abuse of discretion that stops a defendant from obtaining a just and fair legal proceeding, *U.S. v. Gronic, supra*,. The failure to do so would cause them both to be ineffective,

making the trial counsel and appellate counsel to be deficient in their duty owed to the Appellant herein.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant, Raymond A. Miller, (hereinafter referred to as Miller), adopts the statement of case and facts from Appellant's Brief and Assignment of Error filed by his appellate counsel in the above entitled case, and incorporate the same as if fully rewritten herein.

Miller timely filed his Application to reopen his appeal pursuant to App. R. 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E. 2d 1204 (1992), on January 7, 2019. On February 14, 2019 the Eleventh Appellate District Court of Appeals, of Ohio denied his Application. Miller now timely appeals to this Honorable Court to accept jurisdiction of this case and give the issue a *de novo* review.

LAW AND ARGUMENT

Proposition of Law No. I:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR, TRIAL COUNSEL'S INEFFECTIVENESS FOR SUBMITTING AN INVALID WRITTEN PLEA AGREEMENT TO THE COURT WITHOUT APPELLANT'S SIGNATURE, THEREBY VIOLATING THE DEFENDANT'S DUE PROCESS RIGHTS AND CONSTITUTIONAL RIGHTS AS GUARANTEED UNDER BOTH THE OHIO AND UNITED STATES CONSTITUTION.

A criminal defendant is entitled to effective assistance of counsel on appeal as well as trial. Counsel should act as an advocate rather than merely as a friend of the Court, *Evitts v. Lucey*, (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821; *Pension v. Ohio*, (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed 2d 300.

On July 12, 2017, Miller's Geauga County Ohio Public Defender filed a written plea agreement without Miller's signature on it. Miller was never given a opportunity to enter into a binding contract with the state. Miller's counsel took it upon himself to file this agreement without Miller's consent.

Plea agreements are an essential and necessary part of the administration of justice, *State v. Carpenter*, 68 Ohio St. 3d 59, 623 N.E. 2d 66(1993), citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed 2d 427 (1971); *Blackledge v. Allison*, 431 U.S. 63 (1977), also see, *State v. Billingsley*, 133 Ohio St. 3d 277, 2012-Ohio-4307 (2012). This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to ensure the defendant what is reasonably due in the circumstance, *Santobello v. New York*, *supra*,. In felony cases, when a defendant offers a negotiated plea of guilty, the underlying agreement upon which the plea is based shall be stated on the record in open court, pursuant to **Crim. R. 11(F)**. Purdence also dictates that a plea agreement be in writing, *In rel Mullen*, 129 Ohio St. 3d 417, 2011-Ohio3361, 953 N.E. 2d 302; *State v. Billingsley*, *supra*,.

Miller's case involves some serious charges with a significant penalty imposed thereafter, "20 years". In light of the aforementioned facts, defense counsel had a duty to perform an adversarial function to the prosecution's case. With respect to this assignment of error; Appellant counsel render ineffective assistance of counsel when Appellate counsel failed to assign as error trial counsel's ineffectiveness during Miller's plea negotiation proceedings, highlighted by the fact that trial counsel submitted to the trial court, "plea agreement NOT signed by the defendant," see, *Moore v. Naiman*, 2017-Oh-1163, ¶1, ¶14. Thereby violating Miller's Constitutional Right to Due Process at Law and his right to a fair and impartial plea negotiation process.

Plea agreements are most used to resolve felony cases. They are **contractual** in nature and subject to interpretation and enforcement under general **contract-law principles**, *State v. Bethel*, 110 Ohio St. 3d 416, 2006-Ohio-4853, 854 N.E. 2d 150, citing *United States v. Wells*, 211 F. 3d 988, 995 (6th Cir. 2000); *Inrel DS*, 148 Ohio St. 3d 390 (2016), 2016-Ohio-7369. For a plea to exist, there must be a "meeting of the minds" between the State and the criminal defendant as to

the terms of the agreement, E.g., *State v. Smith*, 2d Dist. Greene No. 2009-CA-81, 2010-Ohio-6229, 2010 WL 5276934. Generally *** a plea agreement between the State and the defense is not binding on the court, as the ultimate decision of whether or not the agreement is accepted rest with the trial judge, *State v. Liskany*, 196 Ohio App. 3d 609, 2011-Ohio-4456, 964 N.E. 2d 1073 (2d Dist.), quoting *State v. Burks*, 10th Dist. Franklin No. 04 AP-531, 2005-Ohio-1262, 2005 WL647564.

The state asserted in their "Response to Application for Reopening pursuant to Appellate Rule 26(B), filed on January 29, 2019, that Miller fails to cite any law that states a plea agreement must be signed by the defendant. In *Haley v. Raker*, 1991 Ohio App. LEXIS 5261, Appellees points out that under Ohio law, settlement agreements are contracts, see, *Noroski v. Fallet*, (1982), 2 Ohio St. 3d 77, 79. As with any contract in Ohio, to be binding, a settlement agreement MUST be signed by parties which are competent to enter into the agreement, see *Local Telephone Company v. Cranberry Mutual Telephone Company* (1921), 102 Ohio St. 524, 530.

Ohio Court Rules 23.2, Procedure-Mediation: Where the parties have reached an agreement through mediation, the written agreement MUST be signed by the parties and counsel and submitted to the Court. The court may require the parties to appear in open court to review the written agreement. If the court approves the agreement, it shall be filed with the clerk.

Black's Law Dictionary (10th ed. 2014) pg. 1130, defines Mediation as: A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

Adequate preparation of a defense includes the ability to intelligently weigh one's options that allows the criminal defendant to make the final decision on whether he wants to enter into a plea agreement. The denial of that opportunity therein constitutes prejudice to the defendant, *United State v. Muniz-Jaquez*, 718 F. 3d 1180 (9th Cir. 2013).

The significant of this issue, is that defense trial counsel submitted a written plea agreement that did not include Miller's signature. Therefore, the written plea agreement is void of the acknowledgement and acceptance of the state's plea offer by Miller as the law is clearly defined that defense counsel can not accept a plea offer on behalf of the criminal defendant without his permission and/or consent. This error was amplified during the plea colloquy, when the trial court turned to address Miller's trial counsel when the court questioned was his client (Miller) entering a plea knowingly, voluntarily and intelligently, see plea transcript page 15, lines 17-22.

The record must show that the defendant actually entered his plea. The defendant must expressly and unambiguously admit his guilt. This may be accomplished in a written and signed document that is made part of the record. Anything less cannot provide a basis for a judgment of conviction, *State v. Singleton*, 169 Ohio App. 3d 585, 591, 2006-Ohio-6314 (2006); *Chagrin Falls v. Katelanos*, 54 Ohio App. 3d 157, 561 N.E. 2d 992 (1988).

Considering all of the aforementioned facts of this case, circumstances and case laws pertinent to this issue, herein trial counsel was ineffective when he filed a plea agreement with the trial court absent his client's signature. Appellate counsel was ineffective for failing to assign the aforementioned assignment of error to the Eleventh Appellate District Court of Appeals for review.

Proposition of Law No.II:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN AS ERROR THE DEFENDANT'S PLEA JOURNAL ENTRY AND NUNC PROTUNC JOURNAL ENTRY BEING VOID DUE TO OMISSION OF CONSEQUENCES OF VIOLATING POST RELEASE CONTROL.

Miller faced a 17 count indictment, included were second (2) degree felony Burglaries, R.C. §2911.12(A)(2)(c). R.C. §2967.28(B)(2) provides that felonies of the second (2) degree that are offenses of violence are subject to three (3) years mandatory post release control supervision. Pursuant to R.C. §2901.01(A)(9)(a),

a violation of R.C. §2911.12(A)(2)(c), burglary, a felony of the second (2) degree is an offense of violence and thus subject to **mandatory** three (3) years of PRC. This Honorable Court has addressed this issue in a long line of cases, included but not limited to, *State v. Sarkozy*, 117 Ohio St. 3d 86, 20-08-Ohio-509. 881 N.E. 2d 1224. This Honorable Court, as well as many Appellate District Courts has stressed the importance of advising a criminal defendant of all the potential maximum penalties before accepting a criminal defendant's plea of guilt. *Sarkozy, supra*,. The consequences of violating post release control is apart of a defendant's maximum penalties, *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085; *State v. Fischer*, 128 Ohio St. 3d 92 (2010), 2010-Ohio-6238; *State v. Qualls*, 131 Ohio St. 3d 499 (2012) 2012-Ohio-1111; *State v. Gimes*, 151 Ohio St. 3d 19 (2017) 2017-Ohio-2927.

Under R.C. §2943.032, a court is required to inform a defendant of post release control at the plea hearing. Prior to accepting a guilty plea or a plea of no contest to an indictment, information, or complaint that charges a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony charged or any other felony and if the court imposes a prison term upon the defendant for the felony, all of the following apply:

(E) If the offender violates the conditions of a post release control sanction imposed by the parole board upon the completion of the stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term up to nine months. (**Emphasis added.**)

As the 8th Appellate District Court held in *State v. Delventhal*, Cuyahoga App. No. 81034, 2003-Ohio-1503 ¶4, footnotes omitted: "R.C. §2943.032 *** states that prior to accepting a guilty plea, a judge "shall inform the defendant personally" that he may be subject to an additional prison term if he violates the conditions of post release control." *State v. Pendleton*, 2005-Ohio-3126.

If a defendant does not know the consequences of his plea, it cannot be made knowingly and intelligently. Such a plea violates due process, and is invalid under both the United States Constitution and the Ohio Constitution, *State v. Lamb*, 156 Ohio App. 3d 128, 132, 2004-Ohio-474(citing, *State v. Engle*, 74 Ohio St. 3d 525, 527, 660 N.E. 2d 450 (1996)).

Ordinarily trial courts can use a nunc pro tunc journal entry to correct clerical errors, but the aforementioned error is more than a clerical error, the described error is to such a magnitude that it violated the defendant's due process and Constitutional rights to a fair and impartial plea bargaining process thereby making the plea negotiation process void. Although a court speaks through its journal entries, clerical errors may be corrected at any time in order to reflect to the transcripts of the proceedings, *State v. Steinke*, 8th Dist. Cuyahoga No. 81785, 2003-Ohio-3527, ¶147; Crim. R. 36. Trial courts retain continuing jurisdiction to correct clerical errors in judgments by nunc pro tunc entry to reflect what the court actually [*6] decide. *In re D.P.*, 8th Dist. Cuyahoga No. 100597, 2014-Ohio-3324, ¶10, citing *State v. Zaleske*, 111 Ohio St. 3d 353, 2006-Ohio-5795, 856 N.E. 2d 263, ¶18-19; *State v. Mitchell*, 2015-Ohio-1146.

The trial court held a change of plea hearing on July 12, 2017. Issued an order and filed on July 19, 2017. Forty days later, trial court entered a nunc pro tunc order to correct clerical errors. The trial court failed to include notifications of R.C. §2943.032, consequences of violating post release control in the original plea journal entry and in the nunc pro tunc journal entry. The trial court cannot correct these journal entries to conform with the plea colloquy, for the said plea hearing colloquy is incorrect to inform Miller of all potential maximum penalties of violating post release control, See plea hearing transcripts page 12, lines 1-11. Therefore, the original plea journal entry and the nunc pro tunc journal entry is void.

The state asserted in their "Response to Application for Reopening pursuant to Appellate Rule 26(B), filed on January 29, 2019, that nothing Miller cites requires the entries from a plea hearing contains an explanation of the consequences of violating post release control."

The record demonstrates that the trial court held a plea hearing July 12, 2017. The transcripts of the hearing reveals that during the colloquy. The court advised Miller of post release control and the consequences of violating post release control. The trial court stated:

Plea Hearing Transcripts Page 11, lines 17-22;

THE COURT: Okay, you will also be required to serve a period of post release control as part of a sentence if you are sentenced to prison, that for the second degree felony it would be three years, or it could be up to three years for some of the third degree felonies.

THIS IS INCORRECT: see State v. Lamb, 156 Ohio App. 3d 128 (2004); State v. Perdue, 2004-Ohio-6788; State v. Pitts, 159 Ohio App. 3d 852 (2005); State v. Gulley, 2005-Ohio-4592; State v. Pendleton, 2005-Ohio-3126; State v. Pitts, 2006-Ohio-3182; State v. Holloway, 2006-Ohio-2591; State v. Biondo, 2008-Ohio-6560 and State v. Belden, 2012-Ohio-6240. All these courts ruled on the issue of Would, Will, May, Could receive three years post release control. All these courts vacated their pleas and remanded.

The record will also demonstrate that the trial court advised Miller partially of the consequences of violating postrelease control. The trial court stated:

Plea Hearing Transcripts Page 12, lines 1-11;

THE COURT: If a period of post release control is imposed following release from prison, the parole board may impose a prison term as part of the sentence of up to one half of the stated prison term originally imposed for all violations.

Also, if you are convicted of a new felony while on post release control, that in addition for being punished for the new offense, the judge could add an additional consecutive prison term of one year or that time remains on your post release control term, whichever is great as a maximum.

State v. Whitesell, 12th Dist. Butler No. CA-2005-04-100, 2006-Ohio-1781, 2006 WL 902407 ¶11, as further explained by the General Assembly in R.C. §2943.032; Prior to accepting a guilty plea or a no contest plea to an indictment, information, or complaint that charges a felony, the court shall inform the defendant personally that, if the defendant pleads guilty or no contest to the felony so charged or any other felony, if the court imposes a prison term upon the defendant for the felony, and if the offender violates the conditions of post release control sanction imposed by the parole board upon completion of the stated prison term, the parole board may impose upon the offender a residential sanction of up to nine months.

State v. Parker, 2013-Ohio-2898; State v. Steinke, 2014-Ohio-2059 and see State v. Mitchell, 2015-Ohio-1146. These courts remanded defendant back to correct the plea hearing journal entry to reflect what the court decided during the plea colloquy and issue a nunc pro tunc order. Miller's plea journal entry cannot be corrected to reflect what the court actually decide when the colloquy/transcripts mis-stated imposition of PRC and Consequences of violating PRC. Therefore, Miller's plea journal entry is void. It is well established that "a trial court only speaks through [its] journal entry[.]" State v. Overstreet, 9th Dist. No. 21367, 2003-Ohio-4530, at ¶8.

Proposition of Law No. III:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO ASSIGN AS ERROR, TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILURE TO OBJECT UPON THE RECORD THE TRIAL COURT'S MIS-STATEMENT OF POST RELEASE CONTROL DURING THE PLEA COLLOQUY.

This Honorable Court has addressed the post release control issue all too many times. The long line of cases dealing with post release control has consistently held that sentences that fail to impose a mandatory term of post release control are void. See *Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 11978, 884 N.E. 2d 568, at syllabus; [***5] *State v. Bezak*, 114 Ohio St. 3d 94, 2007 Ohio 3250, 868 N.E. 2d 961, syllabus; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006

Ohio 5795, 856 N.E. 2d 263. P 20, State v. Jordan, 104 Ohio St. 3d 21, 2004 Ohio 6085, State v. Fischer, 128 Ohio St. 3d 92 (2010), State v. Qualls, 131 Ohio St. 3d 499 (2012), State v. Grimes, 151 Ohio St. 3d 19 (2017). The post release control has went further to affect the knowingly, voluntarily and intelligence of a defendants plea. This Honorable Court has addressed that issue in so many cases as well, including, but not limited to State v. Boswell, 121 Ohio St. 3d 575, State v. Sarkozy, 117 Ohio St. 3d 86, 2008-Ohio-509, 881 N.E. 2d 1224. This Honorable Court has made it clear that a defendant has a Constitutional right to be advise of all potential maximum penalties he is facing so the defendant can make a absolute intelligent decision to enter a plea of guilt. State v. Clark, 119 Ohio St. 3d 239 (2008).

Miller was represented by the Chief Public Defender, Mr. R. Robert Umholtz, who's career stem back 30 years. Thats 30 years of standing infront of the courts with his client during plea colloquys and sentencing colloquys. Mr. Umholtz has made clear his defense experience when campaigned for Geauga County Common Pleas Judge. During Miller's change of plea hearing on July 12, 2017, the court mis-adviced Mr. Umholtz client, Miller of post release control. "Please see plea transcript page 11, lines 17-22, the court stated "it would be three years post release control, or could be up to three years post release control." Miller's public defender failed to object to the courts mis-statement. Also the court did not fully advise Miller of the consequenecs of violating post release control of that he could get additional nine months for violating sanctions. Miller's very experienced trial counsel allowed the trial court to violate Miller's Constituional right to due process. He was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and Section 10 and 16, Article 1, Ohio Constitution. Miller's trial counsel's performance was deficient and Miller's cause was prejudiced by the deficient performance, Strickland v. Washington, (1984), 466 U.S. 668, 687, S.Ct. 2052, 80 L.Ed 2d 674; see State v.

Lamb, 156 Ohio App. 3d 128 (2004), ¶19.

Considering all of the aforementioned facts and case laws pertinent to this issue. Appellate counsel was ineffective for failing to assign the aforementioned assignment of error to the Eleventh Appellate District Court of Appeals for review.

Proposition of Law No. IV:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO ASSIGN AS ERROR, TRIAL COURT'S FAILURE TO ADDRESS DEFENDANT PERSONALLY TO DETERMINE IF DEFENDANT'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY GIVEN.

In this present case, the record clearly shows the court failed to address the defendant personally to determine if he was entering his plea of guilt knowingly, voluntarily and intelligently. The plea hearing transcripts page 15, lines 17-22 states:

THE COURT: All right. Mr. Umholtz, are you satisfied that Mr. Miller is knowingly and voluntarily entering a plea of guilty with full knowledge and understanding of the ramifications of doing so?

Grim. R. 11(C)(2) states: In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally.

Black's Law Dictionary (10th Ed. 2014) page 1339 defines plea colloquy: (1969) Criminal procedure. An open-court dialogue between the judge and a criminal defendant, usu.

The court failed to address Miller personally when the court addressed Miller's trial counsel asking if his client is entering his plea knowingly, voluntarily and intelligently. This question should have been directed at Miller to determine if he is entering a plea of guilt freely, knowingly, voluntarily and intelligently.

A criminal defendant's choice to enter a plea of guilty or no contest is a serious decision. The benefit to a defendant of agreeing to plead guilty is the elimination of the risk of receiving a longer sentence after trial. But by agreeing to plead guilty, the defendant loses several constitutional rights,

Boykin v. Alabama (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.E. 2d 274; State v. Nero (1990), 56 Ohio St. 3d 106, 107, 564 N.E. 2d 474. The exchange of certainty for some of the most fundamental protections in the criminal justice system will not be permitted unless the defendant is fully informed of the consequences of his or her plea. Thus, unless a plea is knowingly, intelligently, and voluntarily made, it is invalid, see State v. Engle (1996), 74 Ohio St. 3d 525, 527, 660 N.E. 2d 450. To ensure that pleas conform to these high standards, the trial judge must engage the defendant in a colloquy before accepting his or her plea, see State v. Ballard (1981), 66 Ohio St. 2d 473, 20 O.O. 3d 397, 423 N.E. 2d 115, paragraph one of the syllabus.

The trial court had a duty to address the criminal defendant personally to determine if he or she was entering a plea of guilt knowingly, voluntarily and intelligently. When the trial court stopped addressing the criminal defendant and turn to criminal defendant's trial counsel. The trial court failed to address the criminal defendant personally and violated Crim. R. 11(C)(2).

Considering all the aforementioned facts of this case, circumstances and case laws pertinent to this issue. Appellate counsel was ineffective for failing to assign as error, the aforementioned assignment of error to the Eleventh Appellate District Court of Appeals for review.

CONCLUSION

For all the reasons set forth above, defendant-appellant, respectfully request this Honorable Court to accept jurisdiction in this case to give a *de novo* review of the Constitutional Violations submitted herein. Justice requires and demands that the aforementioned issues to be addressed by this Honorable Court to avoid a miscarriage of justice in the interest of Law, justice, equity and good conscience.

Courts often accord pro se petitioners extra leeway when adjudicating the sufficiency of their factual pleadings. See *McNeil v. United States*, 508 U.S. 106, 113 n.10 (1993)(dicta)("we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed"(citing *Estelle V. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. (1972))).

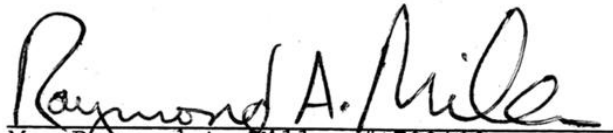
Respectfully Submitted;



Mr. Raymond A. Miller #A702482
Defendant-Appellant/Pro Se
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CERTIFICATE OF SERVICE-

I, Raymond A. Miller, hereby certify that a true copy of the foregoing **Memorandum in Support of Jurisdiction** has been sent via regular U.S. Mail on this 1 day of March 2019, to the Geauga County Prosecutor's Office at Courthouse Annex, 231 Main Street, Suite 3A, Chardon, Ohio 44024.



Mr. Raymond A. Miller #A702482
Defendant-Appellant/Pro Se

STATE OF OHIO)
)SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Plaintiff-Appellee, IN COURT OF APPEALS CASE NO. 2017-G-0136

- vs -

RAYMOND A. MILLER,

Defendant-Appellant.

FILED
FEB 14 2019

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

On January 7, 2019, appellant, Raymond A. Miller, filed an application for reopening, pursuant to App.R. 26(B), from this court's October 29, 2018 decision in *State v. Miller*, 11th Dist. Geauga No. 2017-G-0136, 2018-Ohio-4379, which affirmed the trial court's judgment of conviction and sentence. Appellee, the state of Ohio, filed a response in opposition.

An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

To prevail, defendant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Lee*, 10th Dist. Franklin No. 06AP-226,

2007-Ohio-1594, ¶2, citing *State v. Sanders*, 75 Ohio St.3d 607, 607 (1996). Under *Strickland*, a defendant must demonstrate that (1) counsel was deficient in failing to raise the issues defendant now presents and (2) defendant had a reasonable probability of success if the issue had been presented on appeal. *Id.*, citing *State v. Timmons*, 10th Dist. Franklin App. No. 04AP-840 (Jan. 19, 2006) (Memorandum Decision).

Appellant asserts appellate counsel was ineffective for failing to assign the following four assignments of error:

[1.] Trial counsel's ineffectiveness for submitting an invalid written plea agreement to the court, thereby violating the defendant-appellant's due process and constitutional rights as guaranteed under both the Ohio and United States Constitution.

[2.] The defendant's plea journal entry and nunc pro tunc plea journal entry being void due to omission R.C. 2943.032, the consequences of violating post release control.

[3.] Trial counsel's ineffectiveness for his failure to object upon the record the trial court's mis-statement of post release control during the plea colloquy.

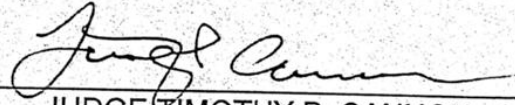
[4.] Trial court's failure to address defendant personally to determine if defendant's guilty plea was knowingly, voluntarily and intelligently given.

In his application, appellant has failed to demonstrate that appellate counsel was deficient in failing to raise the issues appellant now presents or that he had a reasonable probability of success if the issues had been presented on appeal.

Appellant's application for reopening is denied.

The clerk of courts is hereby instructed to serve Raymond A. Miller, PID: A702-482, with a time-stamped copy of this entry at his address of record: Lake

Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, Ohio
44030.



JUDGE TIMOTHY P. CANNON

THOMAS R. WRIGHT, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.