IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2002-1377
v.	:	Common Pleas Case No. CR 2002 0010
JERONIQUE CUNNINGHAM,	:	THIS IS A DEATH PENALTY CASE
Appellant.	:	

MOTION FOR APPOINTMENT OF COUNSEL

Michael J. Benza - 0061454
4403 St. Clair Avenue
cleveland, Ohio 44103
(216) 361-1026
(216) 881-3928 (fax)
COUNSEL OF RECORD

William Lazarow - 0014625
400 S. Fifth Street, Suite 202
Columbus, Ohio 43215-5430
(614) 228-9058
(614) 221-8601 (fax)

COUNSEL FOR APPELLANT

David Bowers
Jana Gutman
Allen County Prosecutor
Court of Appeals Building, Suite 302
204 North Main Street
Lima, Ohio 45801

COUNSEL FOR APPELLEE

FILED
JAN 08 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2002-1377
v.	:	Common Pleas Case No. CR 2002-0010
JERONIQUE CUNNINGHAM,	:	THIS IS A DEATH PENALTY CASE
Appellant.	:	

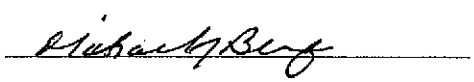
MOTION FOR APPOINTMENT OF COUNSEL

Now comes Appellant Jeronique Cunningham, by and through the undersigned attorneys, and moves this Court for the appointment of counsel for the purpose of preparing and filing an application for reopening pursuant to S. Ct. Prac. R. XI(5) ("*Murnahan* Application"). Appellant requests the appointment of the undersigned counsel for this Application. Further support for this request is set out in the attached Memorandum in Support.

Respectfully submitted,

Michael J. Benza - 0061454
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 361-1026
(216) 881-3928 (fax)

William Lazarow - 0014625
400 S. Fifth Street, Suite 202
Columbus, Ohio 43215-5430
(614) 228-9058
(614) 221-8601 (fax)



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2002-1377
v.	:	Common Pleas Case No. CR 2002 0010
JERONIQUE CUNNINGHAM,	:	THIS IS A DEATH PENALTY CASE
Appellant.	:	

MEMORANDUM IN SUPPORT

Mr. Cunningham requests appointed counsel for the purpose of preparing and filing an application for the reopening of his direct appeal as of right with this Court. S.Ct. Prac. R. XI(5). Pursuant to S.Ct. Prac. R. XI(5), an application must rest entirely on a claim of ineffective assistance of appellate counsel. S.Ct. Prac. R. XI(5)(A). Inasmuch as Mr. Cunningham is constitutionally entitled to the effective assistance of counsel before this Court this would be the most logical time to prepare and file for a review of the effectiveness of prior counsel.

I. FACTUAL PREDICATE

Mr. Cunningham was convicted of aggravated murder and was sentenced to death. At trial, Mr. Cunningham was represented by Gregory W. Donohue and Robert H. Grzybowski.

During the timely appeal to this Court, Mr. Cunningham was represented, by court appointment, by the Office of the Ohio Public Defender, and specifically by Kelly Culshaw and Pamela Prude-Smithers.[1]

[1]Mr. Cunningham was convicted of an offense committed after January 1, 1995 and therefore had no direct appeal to the court of appeals.

Simultaneously with his direct appeal to this Court, Mr. Cunningham pursued collateral relief pursuant to O.R.C. § 2953.21. Mr. Cunningham was represented by the Office of the Ohio Public Defender. This counsel was neither appointed nor paid by the courts.

II. LEGAL ARGUMENT

Mr. Cunningham is entitled to a direct appeal as of right to the Supreme Court of Ohio. Ohio Constitution, Article IV, Section (B)(2)(b); O.R.C. § 2929.05(A). *See also Gregg v. Georgia*, 428 U.S. 153 (1976); *Evitts v. Lucey*, 469 U.S. 387 (1985). Mr. Cunningham is also entitled to appointed counsel. Ohio Constitution, Article I, Section 10; Sup. R. 20; *Douglas v. California*, 372 U.S. 353, 355 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Additionally, Mr. Cunningham is entitled to the *effective* assistance of counsel in his direct appeal of right. *Evitts v. Lucy*, 469 U.S. 387 (1985). *See also* S.Ct. Prac. R. XI(5), Staff Commentary to Rule XI, Section 5. The right to effective assistance of counsel is dependent on the right to counsel itself. *Wainwright v. Torna*, 455 U.S. 586, 587-588 (1982); *State v. Buell*, 70 Ohio St.3d 1211 (1994). The right to counsel would be meaningless if the counsel provided was inept, incompetent, or ineffective. *Evitts*.

Ohio guaranteed the promise of *Evitts* by providing appellate counsel to those on direct review of death sentences. Ohio Constitution, Article I, Section 10; Sup. R. 20. S.Ct. Prac. R. XI(5) is the only state mechanism available to assure that Mr. Cunningham received effective assistance of counsel during his appeal of right. As such, it is logical that, in order to challenge the effectiveness of state appointed counsel, Mr. Cunningham be appointed counsel to investigate and review the case.

The Supreme Court of the United States stated that "[o]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that

procedure because of their poverty." *Burns v. Ohio*, 360 U.S. 252, 257 (1959). Therefore, Mr. Cunningham is entitled to the assistance of counsel at the drafting of his *Murnahan* Application because S. Ct. Prac. R. XI(5) is the only state mechanism to assure that Mr. Cunningham received effective assistance of counsel during his appeal of right. *State v. Murnahan*, 63 Ohio St.3d 60 (1992). The importance of receiving effective assistance of counsel where a sentence of death is imposed goes without saying. However, the fact that Ohio limits *Murnahan* Applications to ineffective assistance of counsel claims demonstrates a recognition of the importance of effective appellate counsel for capital defendants. S.Ct. Prac. R. XI(5). In fact, the Supreme Court of the United States' decision in *Gideon v. Wainwright* is premised on the "obvious truth" that lawyers are "necessities, not luxuries" in our adversarial criminal justice system. 372 U.S. at 344. The State of Ohio and this Court have correctly determined that the effective assistance of appellate counsel is constitutionally guaranteed on appeals as of right and instituted S.Ct. Prac.R. XI(5) to protect the right.

III. OHIO'S CURRENT SCHEME TO ADDRESS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF OHIO AND DENIES MR. CUNNINGHAM THE EFFECTIVE ASSISTANCE OF COUNSEL.

S.Ct.Prac. R. XI(5), as it is currently formulated, denies Mr. Cunningham due process and equal protection of the law as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States and Article IV, Sections 2, 9, 10, 16 and 20 of the Ohio Constitution. The State cannot make the availability of S.Ct. Prac.R. XI(5) review contingent on the ability to pay for the process. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). S.Ct. Prac.R. XI(5)(B) identifies what must be contained in an application for reopening. S.Ct. Prac.R. XI(5)(B)(5) requires "[a]ny parts of the record available to the applicant and all supplemental

affidavits upon which the applicant relies." Mr. Cunningham was indigent on his direct appeal. His financial situation has not changed during his time on death row. Mr. Cunningham is unable to afford the costs of reproducing the parts of the record necessary to support the application for reopening. This is especially so in light of S.Ct.Prac.R. VII(5) which requires the filing of the original application and twelve copies. The failure to comply with this rule may result in the clerk's office refusing to accept Mr. Cunningham's filings. S.Ct. Prac. R. VII(6). A defendant with financial resources would be capable of reproducing the materials necessary to support an application for reopening as well as submitting the necessary copies. Mr. Cunningham cannot be prohibited from accessing the Court due to his indigence. *Griffin*; *Burns*.

Additionally, the appointment of counsel for the *Murnahan* Application is currently contingent upon this Court determining that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." S.Ct. Prac.R. XI(5)(E). "If the Supreme Court grants the application, . . . the Supreme Court will . . . (1) appoint counsel." S.Ct. Prac.R. XI(5)(F)(1). It is inconsistent with due process and fair procedure to require an indigent defendant to demonstrate the merits of claims before counsel can be appointed. *Douglas v. California*, 372 U.S. 353, 357 (1963); *Anders v. California*, 386 U.S. 738, 744 (1967). *See also Draper v. Washington*, 372 U.S. 487 (1963) (state cannot make free transcript contingent on determination of a judge that an appeal would not be frivolous). Currently, Mr. Cunningham must proceed without counsel to challenge the performance of the court appointed counsel who represented him on appeal. This requires an indigent capital defendant to sift through legal books and court documentation with the skill of a finely trained lawyer in an effort to draft this "genuine issue" of ineffective assistance of appellate counsel and to identify issues that the court appointed attorneys missed, despite their qualification under Sup.Ct. R. 20. Certainly, the

defendant with the resources to retain counsel to prepare the application for reopening would not be forced to proceed alone though the quagmire that is capital litigation. It is for this reason that the Supreme Court of the United States held that:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have enough money to buy transcripts.

Griffin, 351 U.S. at 19. The thought of an indigent capital defendant attempting to draft legal documentation of such magnitude demonstrates why the right to counsel cannot be contingent on a preliminary showing of ineffective assistance of appellate counsel.

B. The *Murnahan* Application is a continuation of the direct appeal and Mr. Cunningham is therefore constitutionally entitled to counsel to prepare the Application.

The Court recognizes that an application for reopening is a direct appeal of right. The Court routinely appoints counsel to prepare *Murnahan* Applications in death penalty cases. *State v. Cassano*, 101 Ohio St.3d 1478 (2004); *State v. White*, 88 Ohio St.3d 1439 (2000); *State v. Getsy*, 87 Ohio St.3d 1471 (1999). The Court ordered lower courts to appoint counsel to appeal the denial of a *Murnahan* Application. *State v. Brooks*, 90 Ohio St.3d 1495 (2000). More recently, the Court ordered the Richland County Court of Common Pleas to appoint *Murnahan* counsel to prepare an application for a capital defendant. *State v. Cassano*, 101 Ohio St.3d 1478 (2004).

The Court also granted a stay of execution in a capital case to pursue a petition for certiorari to the Supreme Court of the United States from the denial of a *Murnahan* Application. *State v. Gillard*, 86 Ohio St.3d 1448 (1999).

The Court repeatedly treats appeals from the denial of *Murnahan* Applications as appeals of right which is only proper if the *Murnahan* process is in fact a part of the direct appeal

process. *See State v. Mack*, 101 Ohio St.3d 397 (2004) ("The cause is now before this court *upon an appeal as of right*.") (emphasis added); *Accord State v. Mitts,* 98 Ohio St.3d 325 (2003) *State v. Goff*, 98 Ohio St.3d 327 (2003); *State v.* Smith, 95 Ohio St.3d 127 (2002); *State v. Bryant* Bey, 97 Ohio St.3d 87 (2002); State *v. Davie*, 96 Ohio St.3d 133 (2002); *State v. Frazier*, 96 Ohio St.3d 189 (2002); *State v. Sneed*, 96 Ohio St.3d 348 (2002); *State v. Woodard*, 96 Ohio St.3d 344 (2002); *State v. Moore*, 93 Ohio St.3d 649 (2001); *State v. Carter,* 93 Ohio St.3d 581 (2001); *State v. Biros*, 93 Ohio St.3d 250 (2001); *State v. Hooks*, 92 Ohio St.3d 83 (2001); *State v. Palmer*, 92 Ohio St.3d 241 (2001); *State v. Jalowiec*, 92 Ohio St.3d 421 (2001); *State v. Brooks*, 92 Ohio St.3d 537 (2001); *State v. Sheppard*, 91 Ohio St.3d 329 (2001); *State v. Jones*, 91 Ohio St.3d 376 (2001); *State v. Hill*, 90 Ohio St.3d 571 (2001); *State v. Luna*, 75 Ohio St.3d 1506 (1996) ("Under S.Ct. Prac.R. II(1)(A)(2), an appeal from a decision of a court of appeals under App.R. 26(B) shall be designated as a claimed appeal of right...")

C. Sup.Ct. R. 20 mandates appointment of two counsel.

The language of Sup.Ct. R. 20(C) is extremely clear: "If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to this rule." Mr. Cunningham is entitled to the appointment of counsel and therefore this Court must appoint two Rule 20 certified attorneys. Mr. Cunningham requests the appointment of the undersigned counsel to represent him in this proceeding. Attorneys Benza and Lazarow are certified pursuant to Rule 20 to represent capital defendants on appeal.

IV. CONCLUSION

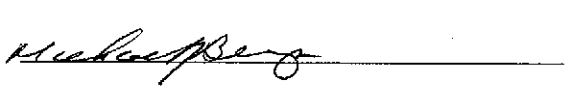
To ensure adequate appellate review of his conviction and sentence, Mr. Cunningham requests appointment of the undersigned counsel consistent with Sup.Ct. R. 20 for the purpose of drafting, researching, and filing an application for reopening of his direct appeal pursuant to

S.Ct. Prac.R. XI(5). Furthermore, Mr. Cunningham requests adequate financial resources to comply with the Court's rules regarding filing and other procedures. Mr. Cunningham also requests adequate time to prepare and file his application for reopening.

Respectfully submitted,

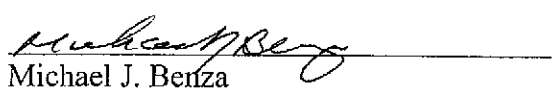
Michael J. Benza - 0061454
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 361-1026
(216) 881-3928 (fax)

William Lazarow - 0014625
400 S. Fifth Street, Suite 202
Columbus, Ohio 43215-5430
(614) 228-9058
(614) 221-8601 (fax)



CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MOTION FOR APPOINTMENT OF COUNSEL was forwarded by regular U.S. Mail to David Bowers and Jana Gutman, Allen County Prosecutor, Court of Appeals Building, Suite 302, 204 North Main Street, Lima, Ohio 45801 on this 2n day of January, 2007.



Michael J. Benza