



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

:

:

:

:

Case No. 03-0346

Franklin County

Common Pleas Case No.

01CR-06-3615

MICHAEL TURNER,

:

**THIS IS A DEATH**

**PENALTY CASE**

Appellant.

:

**MOTION FOR APPOINTMENT OF COUNSEL**

Now comes Appellant Michael Turner, by and through undersigned counsel 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). Undersigned counsel represent Turner on his Petition for Writ of Habeas Corpus. Undersigned counsel did not represent Turner on his direct appeal. Mr. Turner has requested that undersigned counsel represent him on this Application to Reopen. Michael Turner requests the appointment of the undersigned counsel for his Application to Reopen. Further support for this request is set out in the attached Memorandum in Support.

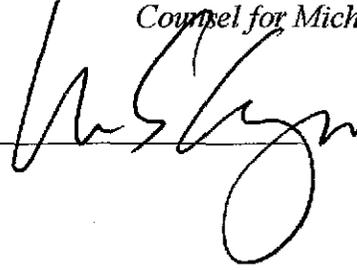
Respectfully submitted,

DAVID C. STEBBINS  
Attorney at Law  
400 South Fifth Street, #202  
Columbus, OH 43215  
(614) 228-9058

WILLIAM S. LAZAROW  
Attorney at Law  
400 South Fifth Street, #202  
Columbus, OH 43215  
(614) 228-9058

*Counsel for Michael Turner*

By:

A handwritten signature in black ink, appearing to read 'W. S. Lazarow', written over a horizontal line.

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	
	:	
Appellee,	:	Case No. 03-0346
	:	Franklin County
-vs.-	:	Common Pleas Case No.
	:	01CR-06-3615
	:	
MICHAEL TURNER,	:	<b>THIS IS A DEATH</b>
	:	<b>PENALTY CASE</b>
	:	
Appellant.	:	

**MEMORANDUM IN SUPPORT**

Michael Turner requests appointment of 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 Rule XI(5)(A), an application must rest entirely on a claim of ineffective assistance of appellate counsel. Michael Turner was entitled to the effective assistance of counsel before this Court on his direct appeal. He is therefore likewise entitled to counsel to assist him in vindicating that right before this Court.

**I. FACTUAL PREDICATE**

Michael Turner was convicted of aggravated murder and was sentenced to death. At trial, Turner was represented by appointed counsel J. Tullis Rogers and Blaise Baker of Columbus.

On his direct appeal to this Court, Turner was represented by appointed counsel W. Joseph Edwards and Todd Barstow of Columbus.<sup>1</sup>

Simultaneously with his direct appeal to this Court, Turner pursued collateral relief pursuant to Ohio Rev. Code §2953.21. Turner was represented by Richard Vickers of the Ohio

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<sup>1</sup>Mr. Turner was convicted of an offense committed after January 1, 1995 and therefore had no direct appeal to the court of appeals.

Public Defenders Office on his Post-Conviction Litigation and Appeals therefrom. Inexplicably, post-conviction counsel did not file a S.C. Prac. R. XI(5) application to re open the appeal.

## II. LEGAL ARGUMENT

Michael Turner is entitled to a direct appeal as of right to the Supreme Court of Ohio. Ohio Constitution, Article IV, Section (B)(2)(b); Ohio Rev. Code §2929.05(A); *see also Gregg v. Georgia*, 428 U.S. 153 (1976); *Evitts v. Lucey*, 469 U.S. 387 (1985). Since he is indigent, he was entitled to the assistance of appointed counsel. Ohio Constitution, Article I, Section 10; R. Sup. C.P. 20; *Douglas v. California*, 372 U.S. 353, 355 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984); *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 on appeal 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 appeal of death sentences. An Application to Reopen pursuant to S.Ct. Prac. R. XI(5) is the only mechanism available to Turner to vindicate his constitutional right to the effective assistance of counsel on this appeal of right. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-610 (2004). In order to vindicate this constitutional right to the effective assistance of appellate counsel, Turner requires the assistance of appointed counsel to investigate and review the case.

“Once 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, Turner is entitled to the assistance of counsel to

investigate and prepare his Application to Reopen pursuant to S. Ct. Prac. R. XI(5). *State v. Murnahan*, 63 Ohio St.3d 60 (1992). The State of Ohio and this Court have 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 that right. Counsel is necessary to vindicate that right.

### **III. MICHAEL TURNER WILL BE DENIED DUE PROCESS AND EQUAL PROTECTION BY APPLICATION OF S.CT. R. PRAC. XI(5.)**

S.Ct. R. Prac. XI(5) as it is currently formulated, denies Turner due process and equal protection of the law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 10, and 16 of the Ohio Constitution. The State cannot premise the availability of S.Ct. R. Prac. XI(5) review on the ability to pay for the process. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). S.Ct. R. Prac. XI(5)(B) identifies what must be contained in an application for reopening: “[a]ny parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.” Turner is indigent (an Affidavit of Indigency is attached to this Application). Turner is unable to afford the costs of reproducing the parts of the record necessary to support the application for reopening. Turner is without the financial resources necessary to reproduce the materials in support of an application for reopening as well as submitting the necessary copies as a non-indigent defendant would Turner cannot be prohibited from accessing the Court process due to his indigence. *Griffin v. Illinois*, 351 U.S. at 18, *Burns v. Ohio*, 360 U.S. at 257.

Additionally, the appointment of counsel for the Application to Reopen 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. R. Prac. XI(5)(E). (“If the Supreme Court grants the application, . . . the Supreme Court will . . . (1) appoint counsel.” S.Ct.

R. Prac, 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, Michael Turner 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 through this procedural quagmire.

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 v. Illinois*, 351 U.S. at 19. The thought of an indigent capital defendant attempting to draft legal documentation of such complexity demonstrates the need for the appointment of counsel.

#### **IV. THE PRACTICE OF THIS COURT HAS BEEN TO APPOINT COUNSEL TO PURSUE APPLICATIONS TO REOPEN IN CAPITAL CASES.**

This Court routinely appoints counsel to prepare S. Ct. R. Prac. XI Applications in death penalty cases. *State v. Monroe*, 2002-2241, order 12/14/2005; *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 has ordered lower courts to appoint counsel to appeal the denial of these

Applications. *State v. Brooks*, 90 Ohio St.3d 1495 (2000); *State v. Cassano*, 101 Ohio St.3d 1478 (2004).

This Court has 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 an Application to Reopen. *State v. Gillard*, 86 Ohio St.3d 1448 (1999).

The Court repeatedly treats appeals from the denial of Ohio R. App. P. 26(b) Applications by the Courts of Appeals as appeals of right. 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. Bryan-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...”.) In order, to pursue these appeals, Turner is entitled to the appointment of counsel.

## V. CONCLUSION

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

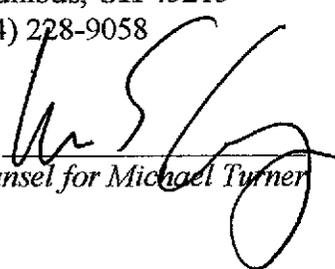
pursuant to S.Ct. R. Prac. XI(5). Furthermore, Turner requests adequate financial resources to comply with the Court's rules regarding filing and other procedures. Turner also requests adequate time to prepare and file his application for reopening.

Respectfully submitted,

DAVID C. STEBBINS  
Attorney at Law  
400 South Fifth Street, #202  
Columbus, OH 43215  
(614) 228-9058

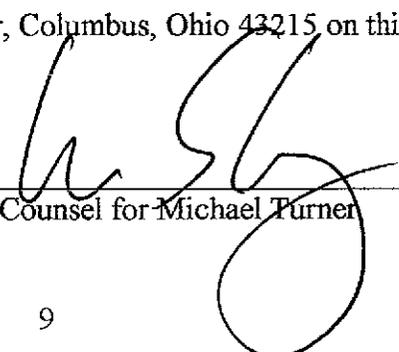
and

WILLIAM S. LAZAROW  
Attorney at Law  
400 South Fifth Street, #202  
Columbus, OH 43215  
(614) 228-9058

By:   
*Counsel for Michael Turner*

**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 Stephen Taylor, Assistant Franklin County Prosecutor, 375 South High Street, 10<sup>th</sup> Floor, Columbus, Ohio 43215 on this 30<sup>th</sup> day of July, 2007.

  
Counsel for Michael Turner

AFFIDAVIT

I Michael R. Turner, declare that I am the (check appropriate box):

petitioner/plaintiff/movant       other

in the above-entitled proceeding; that in support of my request to proceed without prepayment of the full filing fee or costs under 28 U.S.C. § 1915, I declare that I am unable to prepay the full filing fee or the costs of these proceedings and that I am entitled to the relief sought in the complaint/petition/motion.

In support of this application, I answer the following questions under the penalty of perjury:

1. Are you currently incarcerated?       Yes       No

If "Yes", state the place of incarceration: Mansfield Corr. Inst.

(If "No," this is the wrong form for you. You should request the Non-Prisoner Declaration in Support of Request to Proceed *In Forma Pauperis*.)

2. Do you have a work, program, status assignment or other circumstances which causes you to be paid by the prison, jail, or other custodial institution?       Yes       No

If "Yes", state the amount credited to you each month: \$ 16.00 /month

3. In the past 12 months have you received any money from the following sources? If so, state the total amount received.

- |   |                              |  | <u>Amount</u> |
|---|------------------------------|--|---------------|
| a. Business, profession or other self-employment  | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | \$ _____      |
| b. Rent payments, interest or dividends           | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | \$ _____      |
| c. Pensions, annuities or life insurance payments | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | \$ _____      |
| d. Disability or workers compensation payments    | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | \$ _____      |
| e. Gifts or inheritances                          | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | \$ _____      |
| f. Any other sources                              | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No | \$ _____      |

If the answer to any of the above is "Yes", describe each source of money and state the amount received **and** what you expect you will continue to receive.

4. Do you have **any** cash or checking or savings accounts outside the prison?

Yes  No Amount \$ \_\_\_\_\_

5. Do you have a secondary savings account, such as a certificate of deposit or a savings bond, which is recorded by the prison cashier?

Yes  No Amount \$ \_\_\_\_\_

6. Do you own any assets, including real estate, stocks, bonds, securities, other financial instruments, automobiles or other valuable property?

Yes  No

If "Yes", describe each asset and state its value.

<u>ASSET</u>	<u>VALUE</u>
Autos _____	\$ _____
(Make/model/year) _____	
Stocks _____	\$ _____
_____	\$ _____
Bonds _____	\$ _____
Notes _____	\$ _____
Real Estate _____	\$ _____
	\$ _____ (mortgage)
Other _____	\$ _____

7. Have you on three or more prior occasions, while incarcerated or detained in any prison, jail or other facility, brought an action in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief may be granted?

Yes       No

If "Yes," list the dismissals:

Date Dismissed	Case Name	Case No.

**DECLARATION UNDER PENALTY OF PERJURY**

I declare under penalty of perjury that I have submitted above a complete statement of all the assets I possess and that all of the information is true and correct.

I understand that my signature below authorizes the institution of incarceration to forward from my account to the Clerk of the Court any initial partial filing fee assessed by the Court in the amount of 20 percent of the greater of the average monthly deposits to my prison ~~account~~ or the average monthly balance in my prison account for the six-month period immediately preceding the filing of the complaint. Thereafter, I authorize the institution of incarceration to forward monthly payments of 20 percent of my preceding month's income credited to my prison account until I have paid the full amount of the filing fee.

01-12-07  
DATE

Michael B. Turner  
SIGNATURE OF APPLICANT

Have the institution fill out the Certificate portion of this affidavit and attach a certified copy of your prison trust fund account statement from the institution(s) of your incarceration showing at least the past six months' transactions.

## Inmate Demand Statement

Inmate Name: TURNER, MICHAEL R  
 Lock Location: ManCI,5,DR3,,,1071

Number: A438811

Date Range: 07/01/2006 Through 01/04/2007

## Beginning Account Balances:

	Saving	Debt	Payable
Pos Exemption	\$0.00	\$0.00	\$0.00
<b>Begin Totals</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$0.00</b>

## Ending Account Balances:

	Saving	Debt	Payable
Pos Exemption	\$0.40	\$0.00	\$0.00
<b>End Totals</b>	<b>\$0.40</b>	<b>\$0.00</b>	<b>\$0.00</b>

Transaction Date	Transaction Amount	Description	Comment	Saving Balance	Debt Balance	Payable Balance
07/12/2006	\$0.49	Beginning Cactas Balance	Beginning Cactas Balance	\$0.49	\$0.00	\$0.00
07/12/2006	\$9.51	Reservation to Inmate's Personal Account	OdrC Pos Exemption	\$0.49	\$0.00	\$0.00
07/13/2006	\$16.00	State Pay	State Pay	\$16.49	\$0.00	\$0.00
07/21/2006	(\$8.96)	Commissary Sale	Ticket Number 51	\$7.53	\$0.00	\$0.00
07/25/2006	(\$7.50)	Withdrawal to OHIO CRIME VICTIMS		\$0.03	\$0.00	\$0.00
08/01/2006	\$9.97	Reservation to Inmate's Personal Account	OdrC Pos Exemption	\$0.03	\$0.00	\$0.00
08/01/2006	\$100.00	Money Order	Money Order	\$100.03	\$0.00	\$0.00
08/04/2006	(\$58.16)	Commissary Sale	Ticket Number 3228	\$41.87	\$0.00	\$0.00
08/10/2006	\$16.00	State Pay	State Pay	\$57.87	\$0.00	\$0.00
08/11/2006	(\$18.52)	Commissary Sale	Ticket Number 4293	\$39.35	\$0.00	\$0.00
08/16/2006	(\$15.00)	Withdrawal to Attorney General of Ohio Crime Victi		\$24.35	\$0.00	\$0.00
08/25/2006	(\$22.26)	Commissary Sale	Ticket Number 6386	\$2.09	\$0.00	\$0.00
09/01/2006	\$7.91	Reservation to Inmate's Personal Account	OdrC Pos Exemption	\$2.09	\$0.00	\$0.00
09/01/2006	(\$1.84)	Commissary Sale	Ticket Number 7444	\$0.25	\$0.00	\$0.00
09/08/2006	\$16.00	State Pay	State Pay	\$16.25	\$0.00	\$0.00
09/19/2006	(\$7.50)	Withdrawal to OHIO CRIME VICTIMS		\$8.75	\$0.00	\$0.00
09/22/2006	(\$8.55)	Commissary Sale	Ticket Number 10366	\$0.20	\$0.00	\$0.00
10/01/2006	\$0.00	\$10.00 Reservation to Pos Exemption	OdrC Pos Exemption	\$0.20	\$0.00	\$0.00
10/06/2006	\$16.00	State Pay	State Pay	\$16.20	\$0.00	\$0.00
10/10/2006	\$37.20	Release of Claim	COURT OF CLAIMS CHECK	\$53.40	\$0.00	\$0.00
10/17/2006	(\$7.50)	Withdrawal to OHIO CRIME VICTIMS		\$45.90	\$0.00	\$0.00
10/20/2006	(\$40.69)	Commissary Sale	Ticket Number 14545	\$5.21	\$0.00	\$0.00
10/27/2006	(\$4.75)	Commissary Sale	Ticket Number 15639	\$0.46	\$0.00	\$0.00

10/31/2006	\$10.00 Money Order	Money Order	\$10.46	\$0.00	\$0.00
11/01/2006	\$0.00 \$10.00 Reservation to Pos Exemption	Pos Exemption	\$10.46	\$0.00	\$0.00
11/03/2006	(\$10.18) Commissary Sale	Ticket Number 16585	\$0.28	\$0.00	\$0.00
11/08/2006	\$16.00 State Pay	State Pay	\$16.28	\$0.00	\$0.00
11/24/2006	(\$8.52) Commissary Sale	Ticket Number 19416	\$7.76	\$0.00	\$0.00
11/28/2006	\$20.00 Money Order	Money Order	\$27.76	\$0.00	\$0.00
11/30/2006	\$10.00 Money Order	Money Order	\$37.76	\$0.00	\$0.00
12/01/2006	\$0.00 \$10.00 Reservation to Pos Exemption	Pos Exemption	\$37.76	\$0.00	\$0.00
12/01/2006	(\$23.37) Commissary Sale	Ticket Number 20464	\$14.39	\$0.00	\$0.00
12/05/2006	(\$7.50) Withdrawal to OHIO CRIME VICTIMS		\$6.89	\$0.00	\$0.00
12/08/2006	(\$6.66) Commissary Sale	Ticket Number 21467	\$0.23	\$0.00	\$0.00
12/08/2006	\$16.00 State Pay	State Pay	\$16.23	\$0.00	\$0.00
12/18/2006	\$25.00 Money Order	Money Order	\$41.23	\$0.00	\$0.00
12/22/2006	(\$32.06) Commissary Sale	Ticket Number 23522	\$9.17	\$0.00	\$0.00
12/26/2006	\$10.00 Money Order	Money Order	\$19.17	\$0.00	\$0.00
12/29/2006	(\$11.27) Commissary Sale	Ticket Number 24679	\$7.90	\$0.00	\$0.00
01/01/2007	\$0.00 \$10.00 Reservation to Pos Exemption	Pos Exemption	\$7.90	\$0.00	\$0.00
01/02/2007	(\$7.50) Withdrawal to OHIO CRIME VICTIMS		\$0.40	\$0.00	\$0.00

Outstanding Debts:

Start Date	Description	Case	Agency	County	Total Debt	Paid to Date	Balance Owed
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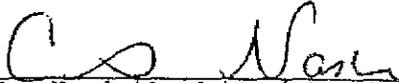
<b>Total Outstanding Case Balances</b>	<b>\$0.00</b>
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Outstanding Holds:

Start Date	Description	Case	Agency	County	Total Debt	Paid to Date	Balance Owed
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<b>Total Outstanding Case Holds</b>	<b>\$0.00</b>
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I certify this document is a true and accurate account of inmate Turner 438-811's financial record on file in my office.

  
Cris Nash/Cashier/ ManCI

**CRIS NASH**  
**CASHIER**  
**MANCI**

1-3-07  
Date