

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Case No. 2003-0346

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

MICHAEL TURNER,

Common Pleas Case
No. 01CR-04-3615

Defendant-Appellant.

DEATH PENALTY CASE

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING DEFENDANT-
APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL FOR
APPLICATION FOR REOPENING**

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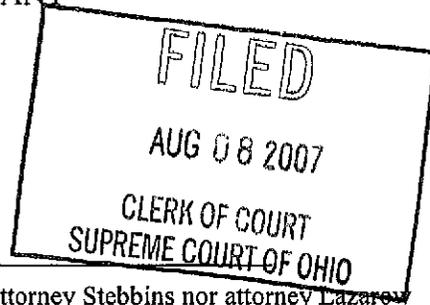
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**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING DEFENDANT-
APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL FOR
APPLICATION FOR REOPENING**

This Court filed its judgment entry affirming defendant Michael Turner's convictions and death sentence on May 11, 2005. Under S.Ct.Prac.R. XI(6)(A), the 90-day deadline for filing an application for reopening regarding such judgment expired on August 9, 2005. Now, nearly two years past that deadline, defendant asks this Court to appoint him counsel for purposes of preparing and filing an application for reopening. For the following reasons, the State opposes the motion for appointment of counsel.

Defendant errs in contending that he is entitled to the appointment of counsel. The constitutional right to appointed counsel only extends to the first appeal of right, "and no further." *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555; *State v. Buell* (1994), 70 Ohio St.3d 1211, 1212. In *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, this Court rejected the claim that there is a constitutional right to counsel to file an application for reopening. This Court relied on *Finley* and other cases:

{¶20} The Supreme Court of the United States has "declined to extend the right to counsel beyond the first appeal of a criminal conviction." *Coleman v. Thompson* (1991), 501 U.S. 722, 756, 111 S.Ct. 2546, 115 L.Ed.2d 640. And nothing in the United States Constitution requires that the state provide counsel to every indigent criminal defendant who wants to challenge the work of his or her original appellate attorney. See *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 ("the right to appointed counsel extends to the first appeal of right, and no further").

{¶21} Similarly, we have never recognized in our decisions that an indigent accused has a constitutional right to a second appellate lawyer to challenge the effectiveness of his original appellate counsel. Nor does App.R. 26(B) require this. If we were to so hold, then logically an accused would have a constitutional right to yet a third

appellate lawyer to challenge the adequacy of representation of his second appellate lawyer, and so on ad infinitum. We reject such an approach precisely because the App.R. 26(B) process is not a part of the direct appeal. “[N]either the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment’s equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right.” *Coleman v. Thompson*, 501 U.S. at 756, 111 S.Ct. 2546, 115 L.Ed.2d 640. * * *

{¶22} The fact that Ohio has created this special postappeal opportunity to challenge an appellate judgment does not change Ohio’s obligations under the Sixth Amendment. The procedure to appoint counsel under App.R. 26(B)(6)(a) is one that Ohio has chosen to provide to criminal defendants whose appeal of right has ended. Ohio had no constitutional obligation to create App.R. 26(B) at all, and it has no constitutional obligation now to provide counsel to those defendants who file applications under that rule.

As in *Morgan v. Eads*, the application for reopening procedure in this Court is not a part of the direct appeal, but rather is a collateral post-conviction/post-appeal matter, and therefore there is no constitutional right to counsel during such post-appeal procedure.

To the extent defendant invokes the discretion of this Court to appoint counsel, the State opposes such a discretionary request. Defendant is seeking appointment of counsel nearly two years past the expiration of the 90-day deadline for filing an application for reopening, a fact which should weigh heavily against defendant’s motion. Lack of representation and/or pro se status does not provide “good cause” for untimely filing of an application for reopening, see *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, ¶10, and neither should it excuse the tardiness of a motion for appointment of counsel.

Moreover, attorney William S. Lazarow—the signing attorney on defendant’s motion for appointment of counsel—has represented defendant since August 15, 2006. On that date, Lazarow and attorney Carol Wright filed on defendant’s behalf a memorandum opposing the State’s motion to set an execution date. Wright and Lazarow also filed on that date a substitution of counsel, naming themselves as counsel for defendant (replacing Ohio Public Defender David Bodiker and Assistant Public Defender Richard Vickers). Thus, although Wright was designated as “counsel of record,” Lazarow has been involved in this case for almost a year (at least). Defendant has not even attempted to explain why he waited to file his motion nearly a year after Lazarow first entered his appearance in this case and nearly two years after this Court affirmed his convictions and death sentence.

The State respectfully submits that defendant’s motion for appointment of counsel should be denied.

Respectfully submitted,

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STEVEN L. TAYLOR 0043876

(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 9 day of August 2007, to David C. Stebbins, 400 South Fifth Street, Suite 202, Columbus, Ohio 43215, and William S. Lazarow, 400 South Fifth Street, Suite 202, Columbus, Ohio 43215; Counsel for Defendant-Appellant.

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