

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Appellee :
 v. : Case No. 2005-1678
 DELANO HALE, :
 :
 Appellant. :

DELANO HALE'S MOTION FOR APPOINTMENT OF COUNSEL

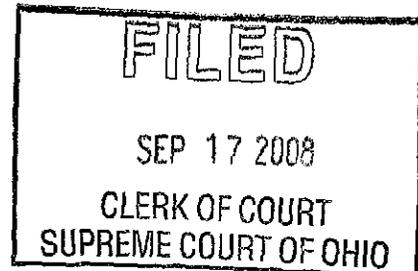
William D. Mason
Cuyahoga County Prosecutor

Matthew E. Meyer #0075253
Assistant Prosecuting Attorney
Justice Center
9th Floor, 1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800 (Voice)
(216) 443-7602 (Facsimile)
p4mm4@cuyahogacounty.us (Email)

Counsel for Appellee

Dennis L. Sipe #0006199
BUELL & SIPE CO., L.P.A.
322 Third Street
Marietta, OH 45750
(740) 373-3219 (Voice)
(740) 373-2892 (Facsimile)
attorneys@buellesipe.com (Email)

Counsel for Appellant



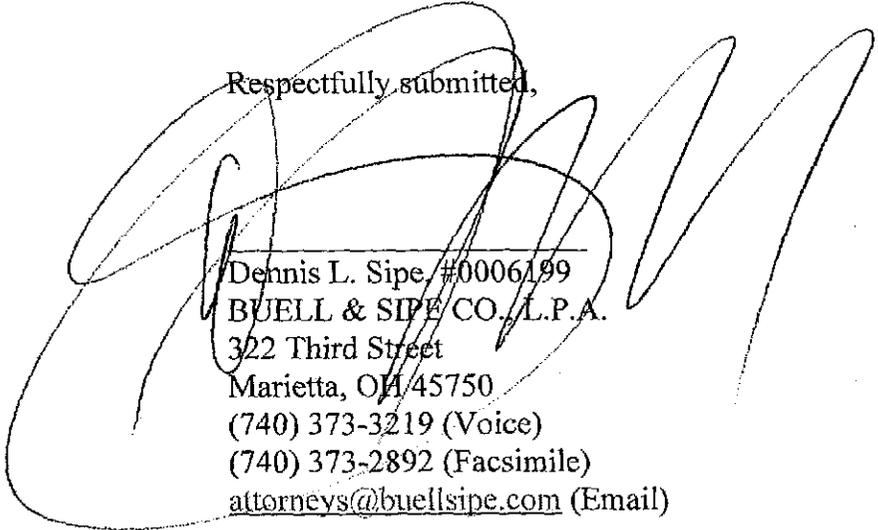
IN THE SUPREME COURT OF OHIO

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DELANO HALE'S MOTION FOR APPOINTMENT OF COUNSEL

Appellant Delano Hale moves this Court for the appointment of undersigned counsel for the purpose of preparing and filing his application for reopening pursuant to S. Cr. Prac. R. XI Section 6. Delano Hale has attached a Memorandum of Law in Support of this Motion.

Respectfully submitted,



Dennis L. Sipe, #0006199
BUELL & SIPE CO., L.P.A.
322 Third Street
Marietta, OH 45750
(740) 373-3219 (Voice)
(740) 373-2892 (Facsimile)
attorneys@buelisipe.com (Email)

COUNSEL FOR DELANO HALE

MEMORANDUM IN SUPPORT

On July 15, 2008, this Court affirmed Appellant Delano Hale's ("Appellant") convictions and death sentence. *State v. Hale*, __ Ohio St. 3d ____, 2008-Ohio-3426. Appellant Delano Hale requests that this Court appoint counsel for the purpose of preparing and filing his application for reopening pursuant to S. Cr. Prac. R. XI Section 6. His application is due October 13, 2008.

The Office of the Ohio Public Defender represented Appellant on his direct appeal of right to this Court. To avoid a potential conflict and the appearance of impropriety that Office requested that undersigned counsel represent Appellant in his application for reopening proceedings.

I. THE SIXTH AND FOURTEENTH AMENDMENTS ENTITLES APPELLANT TO APPOINTED COUNSEL.

Appellant is currently under a sentence of death. Appellant had a direct appeal as of right to this Court. Ohio Constitution, Article IV, Section (B)(2)(b); O.R.C. § 2929.05(A). "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* (1959), 360 U.S. 252, 257. Because Appellant was indigent, Appellant was entitled and received the benefit of appointed counsel on his appeal right to this Court. See *Douglas v. California* (1963), 372 U.S. 353, 355; *Evitts v. Lucey* (1985), 469 U.S. 396.

That right to counsel encompassed the right to effective assistance of counsel. *Wainwright v. Torna* (1982), 455 U.S. 586, 587-588; *State v. Buell* (1994), 70 Ohio St.3d 1211. The only means that Appellant has available to insure that he received effective assistance of

counsel to this Court to file an Application to Reopen pursuant to S.Ct. Prac R. XI(5). In order to vindicate that right to effective assistance of counsel, he requires the assistance of appointed counsel to review the record, identify any omitted issues and prepare and draft an application.

II. APPELLANT WILL BE DENIED DUE PROCESS AND EQUAL PROTECTION BY APPLICATION OF S.CT. R. PRAC. XI(5).

S.Ct. R. Prac. XI(6) as it is currently formulated, denies Appellant 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(6) review on the ability to pay for the process. *Griffin v. Illinois*, (1956) 351 U.S. 12, 18. S.Ct. R. Prac. XI(6)(B) identifies what must be contained in an application for reopening Appellant must include: “[a]ny parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.” Appellant is indigent and unable to afford the costs of reproducing the parts of the record necessary to support the application for reopening. Appellant is without the financial resources necessary to reproduce the materials in support of an application for reopening as well as submitting the necessary copies.

In addition, 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(6)(E). Currently, Appellant must proceed without counsel to challenge the performance of the court appointed counsel who represented him on appeal. This requires an Appellant 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 Appellant with the resources to retain counsel to prepare the application for reopening would not be forced to proceed alone through this procedural quagmire. ““If the Supreme Court grants the application, . . . The Supreme Court will . . . (1) appoint counsel.” S.Ct. R. Prac. XI(6)(F)(1). It is inconsistent with due process and fair procedure to require an indigent defendant to proceed the merits of claims before counsel can be appointed. *Douglas v. California*, (1963) 372 U.S. 353, 357; *Anders v. California*, (1967) 386 U.S. 738, 744. See also *Draper v. Washington*, (1963) 372 U.S. 487 (state cannot make free transcript contingent on determination of a judge that an appeal would not be frivolous).

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 appellant attempting to draft legal documentation of such complexity demonstrates the need for the appointment of counsel.

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

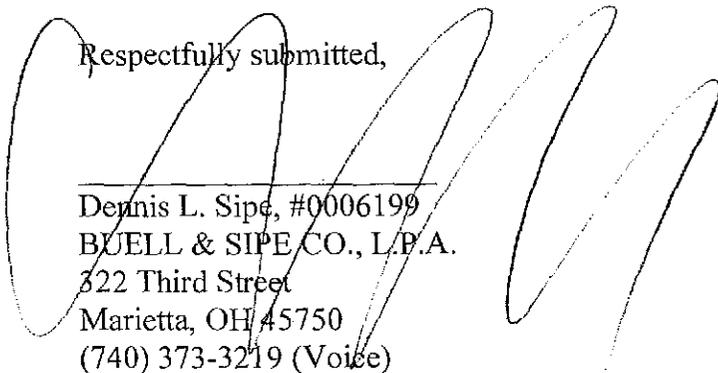
This Court has appointed counsel to prepare S. Ct. R. Prac. XI Applications in death penalty cases. *State v. Turner*, 114 Ohio St.3d 1494, 2007-Ohio-4092; *State v. Jackson*, 108 Ohio St.3d 1477, 2006-Ohio-788; *State v. Monroe*, 107 Ohio St. 3d 1679; 205 Ohio 648; *State v. Cassano*, (2004) 101 Ohio St.3d 1478; *State v. White*, (2000), 88 Ohio St.3d 1439; *State v. Getsy*, (1999) 87

Ohio St.3d 1471.

IV. CONCLUSION.

To ensure adequate appellate review of his conviction and sentence, Appellant Delano Hale 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(6). Furthermore, Hale requests adequate financial resources to comply with the Court's rules regarding filing and other procedures.

Respectfully submitted,

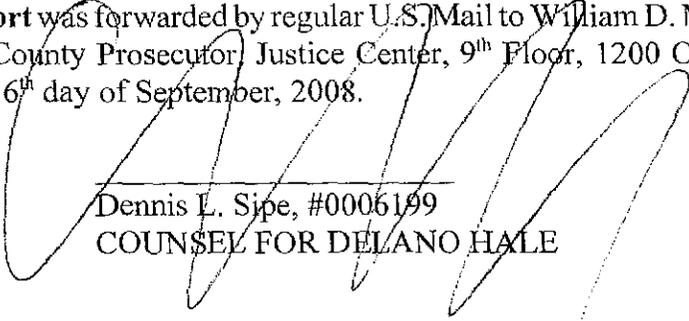


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(740) 373-3219 (Voice)
(740) 373-2892 (Facsimile)
attorneys@buellesipe.com (Email)

COUNSEL FOR DELANO HALE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of **Delano Hale's Motion for Appointment of Counsel and Memorandum in Support** was forwarded by regular U.S. Mail to William D. Mason and Matthew E. Meyer, Cuyahoga County Prosecutor, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 16th day of September, 2008.



Dennis L. Sipe, #0006199
COUNSEL FOR DELANO HALE