

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

LARRY JAMES GAPEN,

Defendant-Appellant.

:  
: Case No. 2001-1518  
:  
: On Appeal from the Montgomery County  
: Court of Common Pleas,  
: Case No. 00 CR 2945  
:  
: THIS IS A DEATH PENALTY CASE  
:

---

MOTION FOR APPOINTMENT OF COUNSEL FOR APPLICATION FOR  
REOPENING OF DIRECT APPEAL PURSUANT TO SUPREME COURT OF OHIO  
RULE OF PRACTICE XI(6) AND MEMORANDUM IN SUPPORT

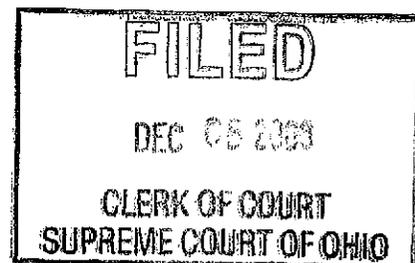
---

WILLIAM S. LAZAROW (0014625)  
400 South Fifth Street, Suite 301  
Columbus, Ohio 43215  
Phone: (614) 228-9058  
Fax: (614) 221-8601  
[BillLazarow@aol.com](mailto:BillLazarow@aol.com)

COUNSEL FOR APPELLANT,  
LARRY J. GAPEN

MATHIAS H. HECK, JR. (0014171)  
Prosecuting Attorney  
Montgomery County Prosecutor's Office  
Appellate Division  
P.O. Box 972  
301 West Third Street - Suite 500  
Dayton, Ohio 45422  
(937) 225-4117

COUNSEL FOR APPELLEE,  
STATE OF OHIO

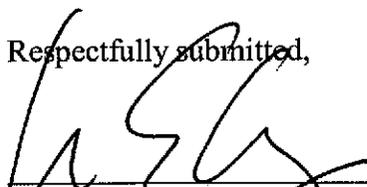


IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 : Case No. 2001-1518  
 Plaintiff-Appellee, :  
 : On Appeal from the Montgomery County  
 v. : Court of Common Pleas,  
 : Case No. 00 CR 2945  
 LARRY JAMES GAPEN, :  
 : THIS IS A DEATH PENALTY CASE  
 Defendant-Appellant. :

**MOTION FOR APPOINTMENT OF COUNSEL FOR APPLICATION FOR  
REOPENING OF DIRECT APPEAL PURSUANT TO SUPREME COURT OF OHIO  
RULE OF PRACTICE XI(6)**

Now comes Appellant Larry J. Gapen, 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 Supreme Court of Ohio Rule of Practice XI(6). Undersigned counsel did not represent Gapen on his direct appeal. Mr. Gapen has requested that undersigned counsel represent him on this Application to Reopen. Larry Gapen 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,  
  
WILLIAM S. LAZAROW (0014625)  
400 South Fifth Street, Suite 301  
Columbus, Ohio 43215  
Phone: (614) 228-9058  
Fax: (614) 221-8601  
[BillLazarow@aol.com](mailto:BillLazarow@aol.com)

*Counsel for Larry Gapen*

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO,</b>	:
	: <b>Case No. 2001-1518</b>
<b>Plaintiff-Appellee,</b>	:
	: <b>On Appeal from the Montgomery County</b>
<b>v.</b>	: <b>Court of Common Pleas,</b>
	: <b>Case No. 00 CR 2945</b>
<b>LARRY JAMES GAPEN,</b>	:
	: <b>THIS IS A DEATH PENALTY CASE</b>
<b>Defendant-Appellant.</b>	:

**MEMORANDUM IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL  
FOR APPLICATION FOR REOPENING OF DIRECT APPEAL PURSUANT TO  
SUPREME COURT OF OHIO RULE OF PRACTICE XI(6)**

Larry Gapen 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 pursuant to Supreme Court of Ohio Rule of Practice XI(6) (“Rule XI(6)”). Pursuant to Rule XI(6)(A), an application must rest entirely on a claim of ineffective assistance of appellate counsel. *Id.* Larry Gapen 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**

Larry Gapen was convicted of aggravated murder and was sentenced to death. At trial, Gapen was represented by appointed counsel David Greer and Bobby Joe Cox of Dayton, Ohio. On his direct appeal to this Court, Gapen was represented by the Ohio Public Defender’s Office, namely Stephen Ferrell, Jane Perry, and Robert Lowe.<sup>1</sup>

---

<sup>1</sup> Mr. Gapen was convicted of an offense committed after January 1, 1995 and therefore had no

Simultaneously with his direct appeal to this Court, Gapen pursued collateral relief pursuant to Ohio Rev. Code §2953.21. Gapen was represented by Ruth Tkacz, also of the Ohio Public Defenders Office on his post-conviction litigation and appeals therefrom. Inexplicably, post-conviction counsel did not file a Rule XI(6) application to reopen Gapen's direct appeal.

## II. LEGAL ARGUMENT

Larry Gapen 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, 393-400 (1985). *See also* S.Ct. Prac. R. XIX(2) ("If a capital appellant is unrepresented and is indigent, the Supreme Court will appoint the Ohio Public Defender or other counsel qualified pursuant to Sup.R. 20 to represent the appellant, or order the trial court to appoint qualified counsel."). The right to effective assistance of counsel is dependent on the right to counsel itself. *Evitts*, 469 U.S. at 397 n.7 (*citing 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*, 469 U.S. at 396-97 (*referencing Douglas and Gideon*).

Ohio guaranteed the promise of *Evitts* by providing appellate counsel to those on direct appeal of death sentences. An Application to Reopen pursuant to Rule XI(6) is the only mechanism available to Gapen to vindicate his constitutional right to the effective assistance of counsel on this

---

direct appeal to the court of appeals.

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, therefore, Gapen 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, Gapen is entitled to the assistance of counsel to investigate and prepare his Application to Reopen pursuant to Rule XI(6). *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 Rule XI(6) to protect that right. Counsel is necessary to vindicate that right.

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

Supreme Court Rule of Practice XI(6), as it is currently formulated, denies Gapen 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 Rule XI(6) review on the ability to pay for the process. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

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” under Rule XI(6)(E). See S.Ct. R. Prac. XI (6)(F)(1) (“If the Supreme Court grants the application, . . . the Supreme Court will . . . (1) appoint counsel to represent the applicant if the applicant is indigent.”). 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, Larry Gapen must proceed without counsel to challenge the performance of the court-appointed counsel who represented him on direct 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 in these situations and, critically, at the procedurally appropriate juncture.

#### **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 Applications to Reopen in death penalty cases. *See, e.g., 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).

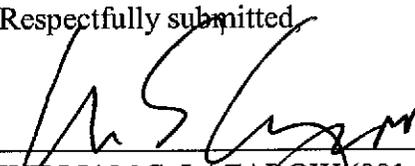
The Court repeatedly treats appeals from the denial of Rule XI(6) (or its non-capital analogue, Ohio Rule of Appellate Procedure 26(b)) Applications to Reopen as appeals of right. *See State v. Mack*, 101 Ohio St.3d 397 (2004) (“The cause is now before this court *upon an appeal as of right.*”) (emphasis 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.”).  
Gapen is entitled to the appointment of counsel in order to pursue these appeals.

## V. CONCLUSION

To ensure constitutionally adequate appellate review of his conviction and sentence, Larry Gapen 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 Supreme Court of Ohio Rule of Practice XI(6). Furthermore, Gapen requests adequate financial resources to comply with the Court's rules regarding filing and other procedures. Gapen also requests adequate time to prepare and file his Rule XI(6) Application for Reopening.

Respectfully submitted,



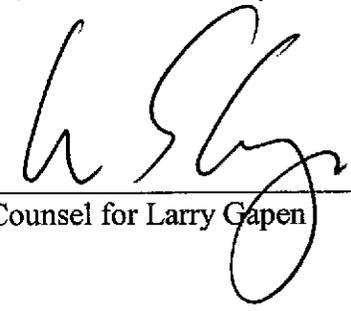
---

WILLIAM S. LAZAROW (0014625)  
400 South Fifth Street, Suite 301  
Columbus, Ohio 43215  
Phone: (614) 228-9058  
Fax: (614) 221-8601  
[BillLazarow@aol.com](mailto:BillLazarow@aol.com)

*Counsel for Larry Gapen*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing MOTION FOR APPOINTMENT OF COUNSEL FOR APPLICATION FOR REOPENING OF DIRECT APPEAL PURSUANT TO SUPREME COURT OF OHIO RULE OF PRACTICE XI(6) AND MEMORANDUM IN SUPPORT was forwarded by regular U.S. Mail to Mathias H. Heck, Jr., Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, P.O. Box 972, Dayton, Ohio 45422 on the 5<sup>th</sup> day of December, 2008.



---

Counsel for Larry Gapen