

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 01-1518

Plaintiff-Appellee,

**ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF COMMON PLEAS,
CASE NO. 00-CR-2945**

vs.

LARRY JAMES GAPEN

**THIS IS A DEATH PENALTY
CASE**

Defendant-Appellant.

**PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO
DEFENDANT-APPELLANT'S MOTION FOR APPOINTMENT OF
COUNSEL FOR APPLICATION FOR REOPENING OF DIRECT APPEAL
PURSUANT TO SUPREME COURT OF OHIO RULE OF PRACTICE XI(6)**

MATHIAS H. HECK, JR.

PROSECUTING ATTORNEY

By **KIRSTEN A. BRANDT (COUNSEL OF RECORD)**

REG. NO. 0070162

Assistant 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

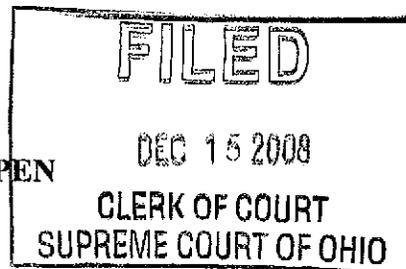
ATTORNEY FOR APPELLEE, STATE OF OHIO

WILLIAM S. LAZAROW

400 South Fifth Street, Suite 301

Columbus, Ohio 43215

COUNSEL FOR APPELLANT, LARRY JAMES GAPEN



MEMORANDUM

Defendant-Appellant Larry James Gapen's direct appeal concluded on December 15, 2004 when this Court affirmed all but one of his convictions and affirmed the death sentence for the aggravated murder of 13-year-old Jesica Young. Four years later, Gapen requests appointment of counsel for the purpose of preparing an application for reopening of his direct appeal.

Gapen is not entitled to appointed counsel to pursue an application for reopening. The constitutional right to appointed counsel "extends to the first appeal of right, and no further." *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539. An application for reopening that raises claims of ineffective assistance of appellate counsel is not part of the original appeal. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, at ¶10. This Court stated:

* * * [W]e 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. "Neither 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* [(1991), 501 U.S. 722,] 756, 111 S.Ct. 2546, 115 L.Ed.2d 640. * * *

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.

Morgan v. Eads, at ¶¶21-22. Although *Morgan v. Eads* involved an application for reopening under App.R. 26(B), S.Ct.Prac.R. XI(6) and App.R. 26(B) are virtually identical in their language. And a review of the commentary to S.Ct.Prac.R. XI reveals that Section 6 (formerly Section 5) is based on App.R. 26(B). It is therefore appropriate to apply *Morgan v. Eads* to this case and deny Gapen's motion for appointment of counsel to investigate and prepare his application for reopening.

Accordingly, the State asks this Court to deny Gapen's motion for appointment of counsel.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By 

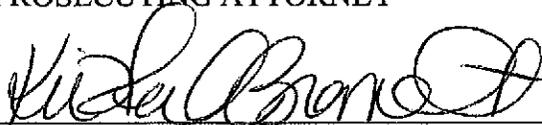
KIRSTEN A. BRANDT
REG. NO. 0070162
Assistant Prosecuting Attorney
Montgomery County Prosecutor's
Office
Appellate Division
301 West Third Street – 5th Floor
P.O. Box 972
Dayton, Ohio 45422
(937) 225-4117

ATTORNEY FOR STATE OF OHIO
PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition was sent by first class mail on this 13th day of December, 2008, to the following: William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 

KIRSTEN A. BRANDT
REG. NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION