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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

MAXWELL D. WHITE,

Defendant-Appellant.

SUPREME COURT CASE No.
2009-1661

FIFTH DISTRICT CASE Nos.
07-COA-037 and 07-COA-038

ASHLAND COUNTY COMMON
PLEAS CASE No. 96-CRI-07366

STATE'S RESPONSE TO THE APPELLANT'S MOTION FOR COUNSEL

Now comes the State of Ohio in response to the Defendant-Appellant's Motion for Appointment of Counsel. The State is opposed to the Appellant's request. The Appellant's assertion that he is under a sentence of death is false. Further, the Appellant has failed to articulate any legal or factual basis for his request. The Appellant has merely made a bald allegation that his appellate counsel was ineffective before the court of appeals without providing any specific reasons.

Further, the legal remedies that the Appellant alleges he intends to seek are either unavailable or not yet ripe. The Appellant indicates that the purpose of this request is so that he may apply to the Fifth District Court of Appeals to reopen his case pursuant to Rule 26(B) of the Ohio Rules of Appellate Procedure. The Appellant's request though is essentially untimely. Pursuant to Rule 26(B)(1), the Appellant was required to file his request with the court of appeals within ninety days after the challenged decision was journalized. The Fifth District Court of Appeals decided the Appellant's case and

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journalized its opinion on August 3, 2009. *State v. White*, 2009 Ohio App. LEXIS 3285. Therefore, the Appellant was required to file his application for reopening by November 2, 2009. The Appellant failed to meet this deadline and, to date, has still not filed a request to reopen his appeal with the Fifth District Court of Appeals. The Appellant has not articulated to this Court any good cause that would justify his failure to timely file an application to reopen his case. Absent a showing of good cause for the delay, the Appellant has effectively waived his right to reopen the appeal before the Fifth District Court of Appeals.

Appellant further alleges that he intends to request that this Court reopen his appeal pursuant to Rule XI of the Rules of Practice of the Supreme Court of Ohio. This rule though does not apply to the present case. First, this Court has not yet decided whether to even accept jurisdiction over the case let alone rule on the merits of the Appellant's claims. In regards to Section 6 of Rule XI, the Appellant has falsely asserted that he is under a sentence of death. In fact, the Appellant has yet to be re-sentenced following the Sixth Circuit Court of Appeals decision to set aside the Appellant's original sentence. The present appeal concerns whether the State may even seek the death penalty on remand. Therefore, the Appellant's request does not concern an underlying conviction and sentence.

The Appellant has not cited any legal or factual basis for his claim that his appellate counsel as ineffective. The State would note that in the Fifth District Court of Appeals the Appellant was given the benefit of having a brief filed on his behalf by not only his present legal counsel, but also by the Ohio Public Defender's Office. After filing the Appellant's

Response Brief, the Ohio Public Defender's Office was permitted to withdraw from the case. Attorney Ray and Attorney Pappas were then assigned to the case and were permitted to file an additional brief on the Appellant's behalf. Attorneys Ray and Pappas have intelligently articulated the Appellant's position. Since the underlying appeal to the Fifth District Court of Appeals was filed by the State, there can be no claim in this case that appellate counsel failed to pursue a particular assignment of error as their sole purpose before the Fifth District was to defend the decision of the trial court. After the decision of the trial court, Attorney Ray timely filed a Notice of Appeal with this Court. There is nothing before this Court indicating that the Appellant's appellate counsel have provided ineffective assistance of counsel.

WHEREFORE, the State of Ohio opposes the Appellant's Motion for Counsel.

Respectfully submitted,



Paul T. Lange (0078466)
Assistant Prosecuting Attorney

PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing State's Response to the Appellant's Motion for Counsel was served on (1) Attorney Nathan A. Ray, legal counsel for the Appellant, 137 South Main Street, Suite 201, Akron, Ohio 44308; and (2) Maxwell White, the Appellant, Inmate No. A323742, c/o Ohio State Penitentiary, 878 Coitsville-Hubbard Road, Youngstown, Ohio 44505, by regular U.S. mail postage prepaid on the 6th day of November, 2009.



Paul T. Lange (0078466)
Assistant Prosecuting Attorney