

In The Supreme Court of Ohio

ORIGINAL

State Of Ohio, :  
 Appellee, :  
 -Vs- : Case No.: 05-2364  
 Kerry Perez, :  
 Appellant. : **This Is A Capital Case.**

On Appeal From the Court of  
 Common Pleas of Clark County  
 Case No. 03-CR-1010

**APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL FOR  
 APPLICATION FOR REOPENING PURSUANT TO SUPREME  
 COURT OF OHIO RULE OF PRACTICE XI(6)**

Stephen A. Schumaker  
 Clark County Prosecutor

Office of the  
 Ohio Public Defender

Pamela J. Prude-Smithers – 0062206  
 Chief Counsel, Death Penalty Division  
 Counsel of Record

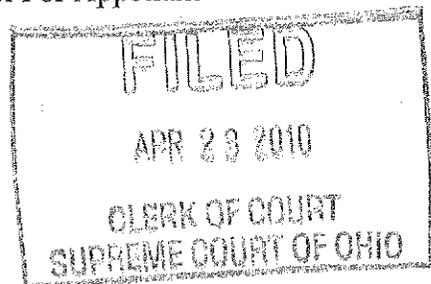
Robert K. Lowe – 0072264  
 Assistant State Public Defender

Clark County Prosecutor's Office  
 50 E. Columbia St.  
 Springfield, Ohio 45502

Office of the Ohio Public Defender  
 250 E. Broad Street, Suite 1400  
 Columbus, Ohio 43215  
 (614)466-5394  
 (614)644-0708 (FAX)

Counsel For Appellee

Counsel For Appellant



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**APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL FOR  
APPLICATION FOR REOPENING PURSUANT TO SUPREME  
COURT OF OHIO RULE OF PRACTICE XI(6)**

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Appellant Kerry Perez, 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 represented Perez on his direct appeal. Appointment of counsel is necessary to determine whether an application for reopening should be filed pursuant to Sup. Ct. Prac. R. XI(6). The reasons for this request are explained in the attached memorandum.

Respectfully submitted,

Office of the Ohio Public Defender

  
PAMELA J. PRUDE-SMITHERS – 0062206  
Supervisor, Death Penalty Division  
Counsel of Record

Robert K. Lowe – 0072264  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 E. Broad St., Suite 1400  
Columbus, Ohio 43215  
(614)466-5394

COUNSEL FOR APPELLANT

## MEMORANDUM IN SUPPORT

Appellant Kerry Perez 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. Perez was entitled to the effective assistance of counsel before this Court on his direct appeal. He is likewise entitled to counsel to assist him in vindicating that right before this Court.

Kerry Perez was convicted of capital murder and sentenced to death in the Court of Common Pleas of Clark County. Perez was found to be indigent and in his direct appeal to this Court, was represented by the Ohio Public Defender's Office. Simultaneously with his direct appeal to this Court, Perez pursued collateral relief pursuant to Ohio Rev. Code §2953.21. Perez was also represented by attorneys from the Ohio Public Defender's Office in his post-conviction litigation.

Perez is entitled to the effective assistance of counsel for his 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 also entitled to the assistance of appointed counsel. 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. Lucey, 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

Ohio guaranteed the promise of Evitts by providing appellate counsel to death sentenced defendants. An Application to Reopen pursuant to Rule XI(6) is the only mechanism available to Perez to vindicate his constitutional right to the effective assistance of counsel on this appeal of right. Morgan v. Eads, 104 Ohio St. 3d 142 (2004). Perez 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).

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. Current direct appeal counsel is unable to review the case to raise issues of appellate ineffectiveness. Moreover, Perez’s appellate counsel also represents him for post-conviction proceedings. Therefore, post-conviction counsel is also unable to review his case for appellate ineffectiveness issues.

Currently, Perez is in the position that he must proceed without counsel in order 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 trained attorney in an effort to draft a document which raises a genuine issue of ineffective assistance of appellate counsel and to identify issues that the court appointed attorneys may have missed despite their qualification under Sup. Ct. R. 20. A 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 representation a capital defendant receives depends on the amount of money he has. See Griffin v. Illinois, 351 U.S. at 19. The need for the appointment of counsel in this situation, and critically at the procedurally appropriate juncture, is clear.

This Court routinely appoints counsel to prepare Applications to Reopen in death penalty cases. Additionally, the Court repeatedly treats appeals from the denial of lower appellate courts' denials of an Application to Reopen as an appeal of right. 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.") Perez is entitled to the appointment of counsel in order to pursue these appeals.

To ensure constitutionally adequate appellate review of his conviction and sentence, Kerry Perez requests this Court to appoint Rule 20 certified counsel to review his case 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). Perez further requests this Court provide appointed counsel with adequate time to prepare and file his XI(6) Application for Reopening.

Respectfully Submitted,

Office of the Ohio Public Defender



PAMELA J. PRUDE-SMITHERS – 0062206  
Supervisor, Death Penalty Division  
Counsel of Record

Robert K. Lowe – 0072264  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 E. Broad St., Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL FOR APPLICATION OF REOPENING PURSUANT TO SUPREME COURT OF OHIO RULE OF PRACTICE XI(6)** was forwarded by regular U.S. Mail to the County Prosecutor, 50 E. Columbia Street, Springfield, Ohio, 45502, this 23rd day of April, 2010.



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PAMELA J. PRUDE-SMITHERS - 0062206  
Supervisor, Death Penalty Division  
Counsel of Record

COUNSEL FOR APPELLANT