ORIGINAL

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No: 2006-1366
Duane A. Short,	:	
Appellant.	:	**This Is A Capital Case.**

Appellant Duane A. Short's Motion For Appointment Of Counsel

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SUPREME COURT OF OHIO

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Appellant.	:	**This Is A Capital Case.**

Appellant Duane A. Short's Motion For Appointment Of Counsel

Appellant Duane A. Short moves this Court for the appointment of undersigned counsel for the purpose of preparing and filing his application for reopening pursuant to S. Ct. Prac. R. XI Section 6. A Memorandum of Law in Support of this Motion is attached.

Respectfully submitted,

Office of the
Ohio Public Defender

By: _____
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MEMORANDUM IN SUPPORT

On July 28, 2011, this Court affirmed Appellant Duane Short's ("Appellant") convictions and death sentence. *State v. Short,* Slip Opinion No. 2011 Ohio 3641. Appellant 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 26, 2011.

1. THE SIXTH AND FOURTEENTH AMENDMENTS ENTITLE 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*, 360 U.S. 252, 257 (1959). Because Appellant was indigent, he was entitled to, and received the benefit of, appointed counsel on his appeal as of right to this Court. See *Douglas v. California*, 372 U.S. 353, 355 (1963); *Evitts v. Lucey*, 469 U.S. 396 (1985).

That right to counsel encompassed the right to effective assistance of counsel. *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982); *State v. Buell*, 70 Ohio St.3d 1211 (1994). The only means that Appellant has available to insure that he received effective assistance of counsel in his first appeal of right to this Court is 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(6).

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,* 351 U.S. 12, 18 (1956). 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 . . . If the Supreme Court grants the application, . . . The Supreme Court will . . . (1) appoint counsel." S.Ct. R. Prac. XI(6)(E) and (F)(1). All of this means that 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 qualifications 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. It is inconsistent with due process and fair procedure to require an indigent defendant to present 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).

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 appellate review that is as adequate as defendants who have enough money to buy transcripts. *Griffn,* 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. See e.g. *State v. Turner,* 114 Ohio St.3d 1494 (2007); *State v. Jackson,* 108 Ohio St.3d 1477 (2006); *State v. Monroe*, 107 Ohio St. 3d 1679 (2005); *State v. Cassano*,101 Ohio St.3d 1478 (2004); *State v. White*, 88 Ohio St.3d 1439 (2000).

IV. CONCLUSION.

To ensure adequate appellate review of his conviction and sentence, Appellant Duane A. Short 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. X1(6).

Respectfully submitted,

Office of the
Ohio Public Defender

By: _____
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Counsel of Record

By: _____
Gregory A. Hoover - 0083933
Assistant State Public Defender

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Counsel For Appellant

Certificate Of Service

I hereby certify that a true copy of the foregoing **Motion For Appointment Of Counsel** was forwarded by regular U.S. mail to Carley J. Ingram, Assistant Montgomery County Prosecuting Attorney, Post Office Box 972, 301 West Third Street, Fifth Floor, Dayton, Ohio 45422 on the 18th day of August, 2011.

By: _____
Kimberly S. Rigby - 0078245
Counsel for Appellant