ORIGINAL

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No. **2007-1741**
Edward Lang,	:	
Appellant.	:	**Death Penalty Case**

On Appeal From the Court of Common Pleas
Stark County, Ohio
Case No. 2006 CR 1824A

Appellant Edward Lang's Motion For Appointment Of Counsel

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Appellant Edward Lang's Motion For Appointment Of Counsel

Appellant Edward Lang moves this Court for the appointment of 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

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MEMORANDUM IN SUPPORT

On August 31, 2011, this Court affirmed Appellant Edward Lang's convictions and death sentence. *State v. Lang*, 2011 Ohio 4215. Lang requests that this Court appoint counsel for the purpose of preparing and filing his application for reopening pursuant to S. Ct. Prac. R. 11.6.

Because Lang was represented by the Office of the Ohio Public Defender in both his direct appeal[1] and his post-conviction appeals[2], he does not currently have an attorney able to review his case without a conflict. This Court should appoint private counsel to review Lang's case. Lang requests that this Court appoint Attorney Laurence Komp, as Attorney Komp is Rule 20-certified and is very familiar with capital case law.

Lang further requests that this Court appoint Komp as soon as possible. The transcripts and direct appeal records in capital cases are extensive. Lang has a pending Motion for Reconsideration, but because of the time necessary for appellate review, this Court should appoint *Murnahan* counsel now instead of later. Further, if this Court grants relief on Lang's reconsideration motion, that does not necessarily obviate the need for an evaluation of whether appellate counsel were effective. For example, if this Court granted Lang sentencing relief under Proposition of Law 16, there is still the possibility that appellate counsel overlooked a trial phase issue.

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[1] Lang's direct appeal was briefed in 2008 by Ohio Public Defender attorneys Joseph Wilhelm, Kelly Schneider, and Benjamin Zober. Ohio Public Defender attorneys Rachel Troutman and Jennifer Prillo became direct appeal counsel in 2010, after the time had passed for new issues to be added to the appeal. *See* S.Ct. R. 6.8.

[2] Lang's post-conviction petition was filed in 2008 by Ohio Public Defender attorneys Richard Vickers and Tyson Fleming. Joseph Wilhelm then replaced Vickers while the petition was still in the trial court. Rachel Troutman replaced Wilhelm in 2009 in the appellate court for Lang's post-conviction appellate proceedings.

1. The Sixth and Fourteenth Amendments entitle Appellant to appointed counsel.

Lang is currently under a sentence of death. He 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 Lang is 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 Lang 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. 11.6. 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. Prac. R. 11.6.

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. Prac. R. 11.6(E) and (F)(1). All of this means that Lang 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. This Court instructs that an applicant like Lang must include: "[a]ny parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies." S. Ct. Prac. R. 11.6 (B)(5). Lang is indigent and unable to afford the costs of reproducing the parts of the record necessary to support the application for reopening. Lang is without the financial resources necessary to reproduce the materials in support of an application for reopening as well as submitting the necessary copies. Thus, S. Ct. Prac. R. 11.6, as it is currently formulated, denies Lang 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. Prac. R. 11.6 review on the ability to pay for the process. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). 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. *Griffin,* 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 often appointed counsel to prepare applications for reopening in capital cases. *See e.g. State v. Short*, 2011 Ohio LEXIS 2176 (Sept. 6, 2011); *State v. Gapen*, 120 Ohio St. 3d 1445 (2008); *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). And according to Rule 19.3 of the Supreme Court Rules of Practice, "[i]f a capital appellant is unrepresented and is indigent, the Supreme Court will appoint the Ohio Public Defender or other counsel qualified pursuant to the Rules of Superintendence to represent the appellant." The Ohio Public Defender represented Lang in his direct appeal, thus cannot represent Lang in his application for reopening, and this Court should appoint qualified counsel Laurence Komp.

IV. Conclusion

To ensure adequate appellate review of his conviction and sentence, Appellant Edward Lang requests the appointment of Laurence Komp to his case for the purpose of reviewing his direct appeal record and potentially drafting, researching, and filing an application for reopening of Lang's direct appeal pursuant to S.Ct. Prac. R. 11.6. Lang further requests that this Court appoint Komp at this time, as opposed to when the mandate issues. In the alternative, Lang requests that this Court appoint Komp when it issues its mandate.

Respectfully submitted,

Office of the Ohio Public Defender

By _____
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Counsel of Record

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Counsel For Appellant

Certificate of Service

I hereby certify that a true copy of **Motion for Appointment** was forwarded by regular U.S. Mail to John D. Ferrero, Prosecutor and Mark Caldwell, Assistant Prosecutor, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, this 20 day of September, 2011.

_____
Counsel for Appellant