

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 Appellee, : Case No. 2010-2198
 : Common Pleas Case No. CR 2010-02-0189
 CALVIN MCKELTON, : THIS IS A DEATH PENALTY CASE
 Appellant. :

MOTION FOR APPOINTMENT OF COUNSEL

Now comes Appellant Calvin McKelton, by and through the undersigned attorney, and moves this Court for the appointment of counsel for the purpose of preparing and filing an application for reopening pursuant to S. Ct. Prac. R. 11.06 ("Application for Reopening"). Appellant requests the appointment of the undersigned counsel for this Application. Further support for this request is set out in the attached Memorandum in Support.

Respectfully submitted,

MICHAEL J. BENZA - 0061454 (Ohio)
 The Law Office of Michael J. Benza, Inc.
 17850 Geauga Lake Road
 Chagrin Falls, OH 44023
 (216) 319-1247
 (440) 708-2627 (fax)
 michael.benza@case.edu


 Michael J. Benza

RECEIVED
 MAY 18 2015
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 MAY 18 2015
 CLERK OF COURT
 SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Appellee, : Case No. 2010-2198
: Common Pleas Case No. CR 2010-02-0189
CALVIN MCKELTON, : THIS IS A DEATH PENALTY CASE
Appellant. :

MEMORANDUM IN SUPPORT

Mr. McKelton requests appointed counsel for the purpose of preparing and filing an application for the reopening of his direct appeal as of right with this Court. S.Ct. Prac. R. 11.06. Pursuant to S.Ct. Prac. R. 11.06, an application must rest entirely on a claim of ineffective assistance of appellate counsel. S.Ct. Prac. R. 11.06. Inasmuch as Mr. McKelton is constitutionally entitled to the effective assistance of counsel before this Court this would be the most logical time to prepare for a review of the effectiveness of prior counsel.

I. FACTUAL PREDICATE

Mr. McKelton was convicted of aggravated murder and was sentenced to death. At trial, Mr. McKelton was represented by Gregory Howard and Melynda Cook.

During the timely appeal to this Court, Mr. McKelton was represented, by court appointment, by the Office of the Ohio Public Defender, and specifically by Pamela Prude-Smithers, Rachel Troutman and Allen Vender.¹

Oral argument was held on January 13, 2015.

¹Mr. McKelton was convicted of an offense committed after January 1, 1995 and therefore had no direct appeal to the court of appeals.

Simultaneously with his direct appeal to this Court, Mr. McKelton pursued collateral relief pursuant to O.R.C. § 2953.21. Mr. McKelton was represented by the Office of the Ohio Public Defender. This counsel was neither appointed nor paid by the courts.

II. LEGAL ARGUMENT

Mr. McKelton is entitled to a direct appeal as of right to the Supreme Court of Ohio. Ohio Constitution, Article IV, § (B)(2)(b); O.R.C. § 2929.05(A). *See also Gregg v. Georgia*, 428 U.S. 153 (1976); *Evitts v. Lucey*, 469 U.S. 387 (1985). Mr. McKelton is also entitled to appointed counsel. Ohio Constitution, Article I, § 10; Sup. R. 20; *Douglas v. California*, 372 U.S. 353, 355 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Additionally, Mr. McKelton is entitled to the *effective* assistance of counsel in his direct appeal of right. *Evitts v. Lucy*, 469 U.S. 387 (1985). *See also* S.Ct. Prac. R. 11.06, Staff Commentary to Rule XI, Section 5. The right to effective assistance of counsel is dependent on the right to counsel itself. *Wainwright v. Torna*, 455 U.S. 586, 587-588 (1982); *State v. Buell*, 70 Ohio St.3d 1211 (1994). The right to counsel would be meaningless if the counsel provided was inept, incompetent, or ineffective. *Evitts*; *Strickland v. Washington*, 466 U.S. 668 (1984); *McFarland v. Scott*, 512 U.S. 849 (1994).

Ohio guaranteed the promise of *Evitts* by providing appellate counsel to those on direct review of death sentences. Ohio Constitution, Article I, § 10; Sup. R. 20. S.Ct. Prac. R. 11.06 is the only state mechanism available to assure that Mr. McKelton received effective assistance of counsel during his appeal of right. As such, it is logical that, in order to challenge the effectiveness of state appointed counsel, Mr. McKelton be appointed counsel to investigate and review the case.

The Supreme Court of the United States held that “[o]nce 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). Therefore, Mr. McKelton is entitled to the assistance of counsel at the drafting of his Application for Reopening because S. Ct. Prac. R. 11.06 is the only state mechanism to assure that Mr. McKelton received effective assistance of appellate counsel during his appeal of right. *State v. Murnahan*, 63 Ohio St.3d 60 (1992). The importance of receiving effective assistance of counsel where a sentence of death is imposed goes without saying. However, the fact that Ohio limits Applications for Reopening to ineffective assistance of counsel claims demonstrates a recognition of the importance of effective appellate counsel for capital defendants. S.Ct. Prac. R. 11.06. In fact, the Supreme Court of the United States’s decision in *Gideon v. Wainwright* is premised on the “obvious truth” that lawyers are “necessities, not luxuries” in our adversarial criminal justice system. 372 U.S. at 344. The State of Ohio and this Court have correctly determined that the effective assistance of appellate counsel is constitutionally guaranteed on appeals as of right and instituted S.Ct. Prac.R. 11.06 to protect the right.

The Court recognizes that an application for reopening is the only state court vehicle to address ineffective assistance of appellate counsel claims. The Court routinely appoints counsel to prepare Applications for Reopening in death penalty cases. *State v. Cassano*, 101 Ohio St.3d 1478 (2004); *State v. White*, 88 Ohio St.3d 1439 (2000); *State v. Getsy*, 87 Ohio St.3d 1471 (1999). The Court also orders lower courts to appoint counsel to appeal the denial of an Application for Reopening. *State v. Brooks*, 90 Ohio St.3d 1495 (2000).

The Court also granted a stay of execution in a capital case to pursue a petition for certiorari to the Supreme Court of the United States from the denial of an Application for Reopening. *State v. Gillard*, 86 Ohio St.3d 1448 (1999).

The Court repeatedly treats appeals from the denial of Applications for Reopening as appeals of right which is only proper if the Application for Reopening process is in fact a part of the direct appeal process. *See State v. Mack*, 101 Ohio St.3d 397 (2004) (“The cause is now before this court *upon an appeal as of right.*”) (emphasis added). *Accord State v. Mitts*, 98 Ohio St.3d 325 (2003) *State v. Goff*, 98 Ohio St.3d 327 (2003); *State v. Smith*, 95 Ohio St.3d 127 (2002); *State v. Bryant Bey*, 97 Ohio St.3d 87 (2002); *State v. Davie*, 96 Ohio St.3d 133 (2002); *State v. Frazier*, 96 Ohio St.3d 189 (2002); *State v. Sneed*, 96 Ohio St.3d 348 (2002); *State v. Woodard*, 96 Ohio St.3d 344 (2002); *State v. Moore*, 93 Ohio St.3d 649 (2001); *State v. Carter*, 93 Ohio St.3d 581 (2001); *State v. Biros*, 93 Ohio St.3d 250 (2001); *State v. Hooks*, 92 Ohio St.3d 83 (2001); *State v. Palmer*, 92 Ohio St.3d 241 (2001); *State v. Jalowiec*, 92 Ohio St.3d 421 (2001); *State v. Brooks*, 92 Ohio St.3d 537 (2001); *State v. Sheppard*, 91 Ohio St.3d 329 (2001); *State v. Jones*, 91 Ohio St.3d 376 (2001); *State v. Hill*, 90 Ohio St.3d 571 (2001); *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...”)

The language of Sup.Ct. R. 20(C) is extremely clear: “If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to this rule.” Mr. McKelton is entitled to the appointment of counsel and therefore this Court must appoint Rule 20 certified attorney. Mr. McKelton requests the appointment of the undersigned counsel to represent him in this proceeding. Attorney Benza is certified pursuant to Rule 20 to represent capital defendants on appeal.

IV. CONCLUSION

To ensure adequate appellate review of his conviction and sentence, Mr. McKelton requests appointment of the undersigned counsel consistent with Sup.Ct. R. 20 for the purpose of drafting, researching, and filing an application for reopening of his direct appeal pursuant to S.Ct. Prac.R. 11.06. Furthermore, Mr. McKelton requests adequate financial resources to comply with the Court's rules regarding filing and other procedures. Mr. McKelton also requests adequate time to prepare and file his application for reopening.

Respectfully submitted,

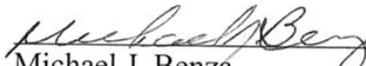
MICHAEL J. BENZA - 0061454 (Ohio)
The Law Office of Michael J. Benza, Inc.
17850 Geauga Lake Road
Chagrin Falls, OH 44023
(216) 319-1247
(440) 708-2627 (fax)
michael.benza@case.edu



Michael J. Benza

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 Lina Alkamdawi, Assistant Butler County Prosecutor, 315 High Street, 11th Floor, Hamilton, Ohio 45012 on this 13th day of May, 2015.



Michael J. Benza