

ORIGINAL

In The Supreme Court Of Ohio

State of Ohio, :

Appellee, : Case No. 11-0857

-vs- : Appeal taken from Cuyahoga County

Denny Obermiller, : Court of Common Pleas

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

: **Expedited Ruling Requested.**

Appellant Denny Obermiller's Motion for Appointment of Counsel

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FILED

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SUPREME COURT OF OHIO

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Appellant Denny Obermiller's Motion for Appointment of Counsel

Appellant Denny Obermiller 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. 11.06. He has attached in support of this motion a Memorandum of Law.

Respectfully submitted,

/s/ Dennis L. Sipe

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Counsel for Denny Obermiller

MEMORANDUM IN SUPPORT

On April 20, 2016, this Court affirmed Appellant Denny Obermiller's ("Appellant") convictions and death sentences. *State v. Obermiller*, __ Ohio St.3d __, 2016-Ohio-1594. On August 31, 2016, this Court denied Appellant's motion for reconsideration. *State v. Obermiller*, __ Ohio St.3d __, 2016-Ohio-5585. Appellant moves this Court to appoint undersigned counsel for the purpose of preparing his application for reopening pursuant to S.Ct.Prac.R. 11.06. His application is due November 29, 2016.

I. The Sixth and Fourteenth Amendments Entitled Appellant to Effective Assistance of Counsel on his Direct Appeal of Right to this Court.

Because Appellant is 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, 79 S. Ct. 1164, 3 L. Ed. 2d 1209 (1959). Because Appellant was indigent, he had appointed counsel on his appeal as of right to this Court. See *Douglas v. California*, 372 U.S. 353, 355, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

That right to counsel encompassed the right to effective assistance of counsel. *Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982); *State v. Buell*, 70 Ohio St.3d 1211, 639 N.E.2d 110 (1994). 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 an application for reopening pursuant to S.Ct.Prac.R. 11.06..

II. Appellant Will Be Denied Due Process And Equal Protection If He Does Not Have the Benefit of Appointed Counsel to Prepare and File an Application for Reopening on His Behalf.

The appointment of counsel to pursue a claim of ineffective assistance of appellate counsel 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 to this Court.” S.Ct.R.Prac. 11.06(E). Only if this Court finds a genuine issue will it appoint counsel. S.Ct.R.Prac. 11.06(F)(1). The rule as drafted requires the applicant to proceed without counsel to challenge the performance of the court appointed counsel who represented him on appeal. The applicant must sift through legal books and court documentation with the skill of a finely trained lawyer to identify a “genuine issue” that his court appointed attorneys missed. It is highly unlikely that an applicant will identified any genuine issue(s) without the benefit of appointed counsel. It is inconsistent with due process to require an indigent applicant to present the merits of claims before counsel is appointed. *Douglas v. California*, 372 U.S. 353, 357, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). See also *Draper v. Washington*, 372 U.S. 487, 499-500, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963) (state cannot make free transcript contingent on determination of a judge that an appeal would not be frivolous).

A death sentenced individual must include in his application “[a]ny parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.” 11.06(B). Because Obermiller is both indigent and incarcerated he lacks the means and resources to satisfy these requirements. This Court cannot premise the availability of S.Ct.R.Prac. 11.06 review on the ability to pay for the process. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585. 100 L. Ed. 891 (1956). There can be no equal justice where the kind of due process an individual receives 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.

III. The Court Has Previously Appointed Counsel To Pursue Applications To Reopen.

This Court has previously appointed counsel to prepare S.Ct.Prac.R. 11.06 applications for reopening, See e.g. *State v. Dean*, 145 Ohio St.2d 1403, 2016-Ohio-775; 46 N.E.3d 699; *State v. Pickens*, 143 Ohio St.3d 1471, 2015-Ohio-3855, 37 N.E.3d 1254; *State v. Jackson*, 143 Ohio St.3d 1469, 2015-Ohio-3759, 37 N.E.3d 1253; *State v. Osie*, 140 Ohio St.3d 1431, 2014-Ohio-4071, 16 N.E.3d 6776; *State v. Nyland*, 143 Ohio St.3d 1493, 2015-Ohio-4424, 39 N.E.3d 1266; *State v. Wesson*, 137 Ohio St.3d 1494, 2014-Ohio-4575, 2 N.E.3d 285.

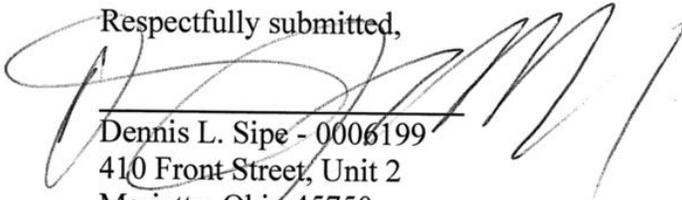
IV. Undersigned Counsel Is Qualified to Accept Appointment

Undersigned counsel is certified to represent both death sentenced individuals on appeal and individuals who have been capitally charged at the trial level. Counsel has represented individuals charged with the death penalty at the trial level and individuals sentenced to death at the direct appeal, post-conviction, federal habeas, and clemency stages. He currently represents three death sentenced individuals, one on direct appeal and two in federal habeas.

IV. CONCLUSION.

To ensure adequate appellate review of his conviction and sentence, Appellant Denny Obermiller requests appointment of the undersigned counsel for the purpose of researching, drafting, and filing an application for reopening of his direct appeal pursuant to S.Ct.R.Prac. 11.06.

Respectfully submitted,



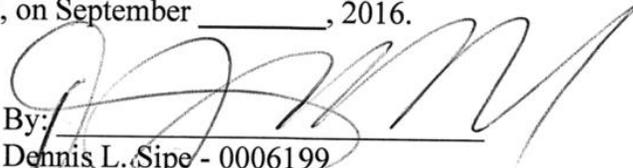
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Counsel for Denny Obermiller

Certificate Of Service

I hereby certify that a true copy of the foregoing *Appellant Denny Obermiller's Motion for Appointment of Counsel* was forwarded by first-class, postage prepaid U.S. Mail to Richard S. Kasay, Assistant Prosecuting Attorney, Appellate Division, Summit County Prosecutor's Office, 53 University Avenue, 6th Floor, Akron, OH 44308, on September _____, 2016.


By: _____
Dennis L. Sipe - 0006199
Counsel for Appellant