LORAIN COUNTY COURT OF COMMON PLEAS

LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook
Presiding Judge

Date May 28, 2025 Case No. 20CR102273

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

JUSTIN L. HENSLEY
Defendant

Pro Se
Defendant's Attorney

This matter is before the Court on a Letter by the Defendant, directed to the Court, filed on May 28, 2025, on the Defendant's behalf. The State has not had an opportunity to respond.

By way of this Letter, captioned, "Motion Request for counsel," the Defendant seeks the appointment of counsel "to file motions on my Behalf to the supreim [sic] courts."

The motion is not well-taken and hereby DENIED.

IT IS SO ORDERED. No Record. See Judgment Entry.

Judge D. Chris Cook

cc: Griffin, Asst. Pros. Atty.
Defendant, *Pro Se*

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I. INTRODUCTION

This matter is before the Court on a Letter by the Defendant, directed to the Court, filed on May 28, 2025. The State has not had an opportunity to respond.

By way of this Letter, the Defendant seeks the appointment of counsel "to file motions on my Behalf to the supreim [sic] courts."

Accordingly, this Court will treat the Defendant's letter as a motion for the appointment of counsel to pursue a delayed, post-guilty plea, post direct-appeal, remedy, to wit: to file a discretionary, jurisdictional appeal in the Ohio Supreme Court.

II. PROCEDURAL HISTORY

On May 20, 2022, this Court issued a comprehensive Judgment Entry where the Court granted the Defendant appellate counsel for the purpose of pursuing a *discretionary*, delayed direct appeal.[1] In that Entry, the Court discussed the procedural history of this case, from the Defendant's indictment, to plea, and ultimate prison sentence of eight to twelve (8-12) years.

[1] The Court also denied what the Court designated as a request for post-conviction relief. The Ninth District Court of Appeals found this part of the Court's 5/23/22, decision to be error. See *State v. Hensley*, 2023-Ohio-2910, ¶ 38 (9th Dist.).

On August 21, 2023, the Ninth District Court of Appeals affirmed the Defendant's conviction and sentence, while, as noted above, reversed the post-conviction determination.[2] The Court of Appeals also discussed the procedural history of this case in its Decision and Journal Entry.[3]

Importantly, the Defendant did not seek jurisdictional leave to appeal in the Ohio Supreme Court after the Ninth District released its decision in August, 2023.

That background noted, the Defendant's motion is fraught with problems.

III. ANALYSIS

THE TIME IN WHICH TO FILE A DISCRETIONARY APPEAL IN THE OHIO SUPREME COURT HAS LAPSED AND THERE IS NO APPEAL PENDING

Recall that after being appointed counsel by this Court, the Defendant was granted leave by the Ninth District Court of Appeals to file a delayed, direct appeal,[4] which appeal was consolidated with an appeal the Defendant had previously filed *pro se*.[5] Thereafter consolidated, both appeals proceeded to decision, which as noted above, was released by the Ninth District on August 21, 2023.

Pursuant to S.Ct.Prac.R. 7.01(A)(1), the Defendant was required to perfect an appeal in the Ohio Supreme Court, ". . . within forty-five days from the entry of the judgment being appealed." Thus, the Defendant had until October 5, 2023, in which to seek a jurisdictional appeal in the Supreme Court. That deadline came and went more than 19 months ago.

S.Ct.Prac.R. 7.01(A)(4) does provide a vehicle in which a defendant convicted of a felony may seek leave to file for a delayed appeal by filing a notice of appeal and motion for delayed appeal, which requires, among other things, the reason for the delay.

Important herein, however, is a decision directly on-point requiring the appointment of post-conviction appellate counsel where no appeal is actually pending and the time in which to file the appeal has expired.

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[2] *Id.* at ¶ 40.
[3] *Id.* at ¶ 2-10.
[4] See: *State v. Hensley,* 22CA011920.
[5] See: State v. Hensley, 22CA011872.

In the matter of *State v. Diamond*, 2023-Ohio-40, (9th Dist.), the defendant plead no-contest to the aggravated murder of his wife and was sentenced by this Court to life in prison. Well after the Defendant was sentenced and the time in which to file a direct appeal had lapsed, he sought the appointment of appellate counsel. This Court improvidently denied him appellate counsel, believing at the time, incorrectly, that he had no right to the appointment of appellate counsel after pleading no-contest.

Judge Teodosio of the Ninth District correctly pointed out that a plea of no-contest does not divest a defendant from the right to the appointment of appellate counsel for the purpose of pursuing a direct appeal as of right.[6] In fact, a plea of no-contest preserves for review a number of issues, the ability to take an appeal of right, and the attendant right to the appointment of counsel.

Crim. R. 12(I) is helpful.

> Effect of plea of no contest.
>
> The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

This section instructs that unlike a plea of guilty, which generally waives constitutional and non-jurisdictional errors, a plea of no-contest preserves the defendant's right to raise errors on appeal.

In *State v. Beasley,* 2018-Ohio-16, the Ohio Supreme Court observed,

> A plea of no contest, however, does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a motion to suppress evidence. Crim R. 12(I). **A valid guilty plea by a counseled defendant, however, generally waives the right to appeal all prior non-jurisdictional defects, including the denial of a motion to suppress. * * ***

Beasley, at ¶ 15, emphasis added.

And, in the matter *State v. Hendrix,* 2024-Ohio-5048 (9th Dist.), at ¶ 9-12, Judge Lanzinger of the Ninth District discussed when a plea of no-contest preserves issues for appeal and compared them to motions *in limine* (not preserved) and motions to suppress (preserved).

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[6] See: *Diamond,* at ¶ 12.

But back to *Diamond.*

In this case, in addition to discussing the effect of a no-contest plea on the right to post-conviction counsel, Judge Teodosio noted an interesting, important fact. Mr. Diamond's appeal time had run and there was no motion pending for a delayed appeal. As such, the Ninth District reasoned, this Court was correct to deny him appellate counsel.

> . . . **the trial court nonetheless correctly denied Mr. Diamond's motion to appoint appellate counsel**. Indeed, at that juncture, Mr. Diamond's time for direct appeal had expired and Mr. Diamond had not yet filed a motion, pursuant to App. R. 5(A), for delayed appeal.

Diamond, at ¶ 12, emphasis added.

Now to be sure, this Court, like all courts, strives to get it right, even if it took the wrong road to get to the correct destination. And, being affirmed by the Ninth District in the *Diamond* case, despite misconstruing post, no-contest plea appellate rights, is reassuring.

Nevertheless, there is a troubling aspect to this case as it presents a classic "chicken or egg" conundrum. Mr. Diamond had no right to the appointment of appellate counsel because the time in which to file an appeal of right had lapsed, thus, his only avenue to perfect an appeal was to seek leave of the Ninth District to file a delayed appeal. But without the assistance of counsel, how could this be accomplished? In other words, he had no right to counsel because no appeal was filed. But without the assistance of counsel, perhaps an appeal would never be filed.

Regardless, *Diamond* stands for the proposition that where the time in which to file a direct appeal as of right has run, unless leave to file a delayed appeal is sought, there is no right to the appointment of appellate counsel. The upshot is, in this Court's opinion, that in such a situation, the right to post, no-contest plea appellate counsel is illusory once the time in which to file has elapsed.

It seems to this Court, with great respect to the Ninth District, that the better approach would be to dispense with any distinction between when appellate counsel is sought after a plea of no-contest. That is, if a defendant who pleads no-contest does in fact have a right to appeal, which we know is the case, then when the defendant seeks the appointment of counsel, whether in-rule or not, should be of no accord.

Now, back to the case at bar and whether or not *Diamond* is applicable.

THE REQUEST FOR COURT-APPOINTED COUNSEL IN ORDER TO SEEK A DELAYED, POST-GUILTY PLEA, POST-DIRECT APPEAL, DISCRETIONARY, JURISDICTIONAL APPEAL IN THE OHIO SUPREME COURT

Here, the Defendant seeks the appointment of appellate counsel in order to perfect a delayed, post-guilty plea, post-direct appeal, discretionary, jurisdictional appeal in the Ohio Supreme Court.

Under these circumstances, he simply has no right to the appointment of appellate counsel.

At the outset, it cannot be forgotten that our Defendant herein, Mr. Hensley (hereinafter, "Hensley" or "the Defendant"), *plead guilty*, not no-contest. Moreover, he has been afforded a direct appeal as this Court appointed him appellate counsel and the Ninth District granted him leave to file a delayed, direct appeal.

The question then becomes, does he have a right to the appointment of additional, or subsequent counsel, after resolution of his direct appeal?

In making his case to this Court, the Defendant relies heavily upon the Ninth District's decision in his direct appeal.[7] That decision addressed four assignments of error and despite being somewhat critical of this Court, affirmed the Defendant's conviction and sentence.[8]

The criticism of this Court in the *Hensley* decision ("*Hensley* I") stems from this Court's *apparent* failure to follow the mandates of the *Diamond* decision relative to the appointment of appellate counsel for Mr. Hensley. Recall that *Diamond* was released on January 9, 2023, and *Hensley* I was released eight months later, on August 21, 2023.

The problem with the analysis in *Hensley* I with the application of *Diamond* is twofold, first with its timing, and second with its conclusion. In *Hensley* I, the Ninth District noted,

> This Court recently addressed this issue with the same trial court in *State v. Diamond*, 9th Dist. Lorain No. 22CA011837, 2023-Ohio-40, 2023 WL 127789. Although the defendant in *Diamond* entered a no-contest plea rather than a guilty plea, it is a distinction without merit on this issue.

Id. at ¶ 33.

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[7] *State v. Hensley*, 2023-Ohio-2910, (9th Dist.)

[8] Though as noted above, reversed this Court's decision on the post-conviction relief issue.

TIMING

The implication with this passage is that this Court, in failing to timely appoint Hensley appellate counsel, disregarded the mandates of *Diamond.* But such is not the case.

Recall that Diamond was released on January 9, 2023, thus its holding was instructive from that date forward. In the *Hensley* I decision, the Ninth District correctly notes two significant dates: the first is August 27, 2020, the day Hensley was sentenced and first requested appellate counsel. The second is May 15, 2022, the day Hensley again requested appellate counsel in a letter to the Court, which this Court granted.

Of the two dates, the more important one is August 27, 2020, because that is the date this Court failed to appoint Hensley appellate counsel. Significantly, *Diamond* was released on January 9, 2023, almost 29 months *after* this Court took Hensley's request for appellate counsel under advisement and 10-months after this Court in fact appointed him counsel. As such, this Court did not have the benefit of the *Diamond* decision's analysis when it initially failed to grant Hensley counsel and for the Ninth District to suggest that it addressed this issue, ". . . with the same trial court . . ." is inapposite.

THERE IS A DISTINCTION BETWEEN A PLEA OF NO-CONTEST AND A GUILTY PLEA

Second, and more troubling, is the Ninth District's dicta that a no-contest plea rather than a guilty plea, ". . . it is a distinction without merit on this issue." Again, with great respect to the Ninth District, the distinction matters. One need only review the Ohio Supreme Court's *Beasley* decision above to realize the significant difference on post-conviction appellate rights between the two disparate pleas.

> A plea of no contest, however, **does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a motion to suppress evidence**. Crim R. 12(I). A valid guilty plea by a counseled defendant, however, **generally waives the right to appeal all prior non-jurisdictional defects, including the denial of a motion to suppress. * * ***

Beasley, at ¶ 15, emphasis added.

As also noted above, Judge Lanzinger of the Ninth District acknowledges the difference between a no-contest plea and a guilty plea in the *Hendrix* case. And, Crim. R. 12(I), which discusses no-contest pleas is quite distinct from R.C. 2953.08, which discusses appellate rights for defendants who are, ". . . convicted of or plead[s] guilty to a felony . . ."

THE NINTH DISTRICT IN *DIAMOND* AFFIRMED THIS COURT'S DENIAL OF APPELLATE COUNSEL FOR THE DEFENDANT

Third, and also quite strangely, in addition to taking this Court to task for apparently disregarding the mandates of a decision released subsequent to the decision this Court made, the Ninth District in *Hensley* I does not acknowledge that the *Diamond* court said this Court got it right. Recall in *Diamond,* this Court erred by failing to recognize that Mr. Diamond did have a right to the appointment of appellate counsel after his no-contest plea, but, that due to the timing of the request, this Court was nevertheless correct to deny him counsel.

Hensley, on the other hand, plead guilty, which has a higher threshold for the appointment of appellate counsel, though he made his request in rule.

Confused yet?

The problem for this Court is that while both *Diamond* and *Hensley* I deal with the post-conviction appointment of appellate counsel, they do so under different facts and with different outcomes. Diamond plead no-contest and sought appellate counsel after the time in which to file a direct appeal of right had run. Hensley plead guilty but sought appellate counsel within the time in which to file a direct appeal, even though he did not have an appeal of right.

Yet neither case discusses why the difference in the nature of their pleas matters or why the timing of the request for appellate counsel is significant; both decisions simply say what they say with no substantive analysis.

Diamond says if you plead no-contest, you have the right to the appointment of appellate counsel (because you have an appeal *of right*), but only if you seek counsel within the time in which to appeal, unless you have filed a notice of appeal or motion for leave to file a delayed appeal on your own. In other words, there is an appeal "pending."

Hensley I seems to say that a defendant who pleads guilty and requests the appointment of appellate counsel within the time in which to appeal has a right to the appointment of appellate counsel because he has an appeal of right.

But does he?

Here is what the Ninth District said in *Hensley* I:

> **On a direct appeal as of right, a criminal defendant has the right to appellate counsel even though that conviction was obtained following a guilty plea. Hensley should have been granted appellate counsel when he requested it at the hearing**. However, even though the trial court erred by failing to do so, the remedy for that error is an opportunity to appeal and the appointment of appellate counsel, which Hensley has now received. Thus, Hensley ultimately got his requested remedy, rendering those issues moot.

Hensley I, at ¶ 37, emphasis added.

The first sentence is absolutely a correct statement of law. *If,* and I repeat, *if,* a criminal defendant has a direct appeal *as of right,* he has the right to the appointment of appellate counsel, even though he plead guilty. But that does not answer the question.

The unanswered question remains - why did Hensley have an "appeal of right?"

Again, with great respect to the Ninth District, quite simply, he did not. And, because he did not have a direct appeal "as of right," he had no attendant right to the appointment of appellate counsel, and nothing in the *Hensley* I decision answers this question, including the two federal cases it cites.

So, let us discuss them, and see why they are inapplicable.

GARZA v. IDAHO[9]

This case does not hold that every criminal defendant convicted after a guilty plea is entitled to *the appointment* of appellate counsel.

In *Garza,* the defendant already had counsel and requested his counsel to file a notice of appeal, despite that fact that as part of Garza's plea deal, he executed plea waivers. His counsel decided, based upon the plea waivers, that Garza had no right to appeal, and as a result, did not file an appeal for him. The United States Supreme Court held that it was ineffective assistance of counsel for an attorney to fail to file an appeal once requested by his client.

> . . . appeal waiver does not serve as an absolute bar to all appellate claims; defendant retains the right to challenge whether the waiver itself is valid and enforceable on the grounds that it was unknowing or involuntary.[10]

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[9] 586 U.S. —, 139 S.Ct. 738 744 (2019).
[10] *Garza* at Pg. 744, 746.

The *Garza* court addresses an ineffective assistance situation where an attorney fails to file a notice of appeal after his criminal defendant client requests him to do so. The case is completely silent, however, as to the right to the appointment of counsel at the outset or the requirement that counsel pursue the appeal after performing the ministerial act of filing the notice.

Finally, *Garza* does not address the trial court's duty relative to the appointment of appellate counsel *ab initio*, but instead, only addresses a lawyer's obligation to file a notice of appeal, once already engaged.

HALBERT v. MICHIGAN[11]

This case is even less helpful for two very important reasons: first, Halbert plead no-contest in his case, unlike Hensley, who plead guilty; and two, it analyzes Michigan, not Ohio law.

In *Halbert,* the United States Supreme Court held that Michigan may not deny appointed counsel to defendants who apply for leave to appeal to the Michigan Court of Appeals[12] following plea-based convictions. Michigan law provided that defendants who were convicted on a guilty or *nolo contendere* plea do not have an appeal of right to the Michigan Court of Appeals but must apply for leave to appeal.

The United States Supreme Court ruled that the Michigan Court of Appeals' review of an application for leave to appeal ranks as a first-tier appellate proceeding requiring appointed counsel for indigent defendants under *Douglas v. California,* 372 U.S. 353, (1963). The Supreme Court reasoned that two aspects of the Michigan Court of Appeals' process following plea-based convictions compelled this conclusion.

First, the Michigan Court of Appeals must look to the merits of an appellant's claims in ruling on the application for leave to appeal. Second, indigent defendants pursuing review in the intermediate appellate court are frequently ill-equipped to represent themselves. *Id.* Furthermore, the Michigan Court of Appeals "sits as an error-correction instance." *Id.*

But Ohio law, and the appellate rights afforded to Ohio criminal defendants, are different.

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[11] 545 U.S. 605 (2005).

[12] The equivalent of Ohio's twelve intermediate courts of review.

Unlike the Michigan system, every Ohio criminal defendant has a right to appeal without first seeking leave. Ohio Const. art. IV, § 3. Therefore, the appointment of appellate counsel in Michigan is necessary in order to ensure that all defendants have access to the appellate process, and the best way to ensure that is if they have an attorney. [13]

Moreover, in Ohio, in addition to the right of direct appeal without the need to seek leave, every defendant convicted *after trial* or a plea of no-contest, has the concomitant right to the appointment of appellate counsel.

Thus, *Halbert* is inapplicable because unlike in Michigan, all criminal defendants in Ohio have a right to appeal, and those convicted after trial, no-contest pleas, or satisfaction of R.C. 2953.08, also have the right to the appointment of appellate counsel.

Conversely, Ohio defendants convicted after a guilty plea *who cannot* satisfy R.C. 2953.08 <u>are not</u> entitled to the appointment of appellate counsel. *See Pennsylvania v. Finley,* 481 U.S. 551, (1987). See also: *Lopez v. Wilson,* 426 F.3d 339, 352-353, (6th Cir. 2005).

> In sum, the relevant state law, the distinctions between direct review and collateral review, and the structure and function of the AEDPA support the conclusion that a Rule 26(B) application to reopen is a collateral matter rather than part of direct review. As such, there is no federal constitutional right to assistance of counsel at that stage. *Finley*, 481 U.S. at 555, 107 S.Ct. 1990 ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today. Our cases establish that **the right to appointed counsel extends to the first appeal of right, and no further**.") (citation omitted). **The recent decision of *Halbert v. Michigan* <u>does not change our conclusion</u>**.

Lopez, at Pg. 352, emphasis added.

Notice, importantly, that the United States Supreme Court, in both *Finley* and *Lopez*, reiterates that the right to the appointment of appellate counsel only extends to first appeals *of right.* The converse of this axiom is, of course, that if a criminal defendant does not have an appeal of right, there is no right to the appointment of appellate counsel.

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[13] At this point, one might recall this Court's concerns about the results reached by the Ninth District in *Diamond.*

Now to be sure, the Federal Constitution sets the floor, not the ceiling, for constitutional rights. Yet, these federal cases and their progeny are consistent with Ohio Supreme Court precedent, Ohio's Rules of Criminal Procedure, and traditionally understood policy regarding the effect of pleading guilty. That is, a criminal defendant who has a first, direct appeal "as of right," is entitled to the appointment of appellate counsel. A defendant who does not have an appeal "of right," does not.

It should be noted, parenthetically, that this Court does not reach this conclusion lightly or simply to vindicate itself from the critical light in which it was placed in by the *Hensley* I decision, but instead, to point out that the Ninth District in *Hensley* I does not say *why* Hensley should have been granted appellate counsel when he requested it, or, more importantly, why he had an appeal of right. This is particularly apparent given that the *Hensley* I decision does not even discuss in passing R.C. 2953.08. Had it done so, it may have given this court, and others, greater direction on when a request for the appointment of appellate counsel following a guilty plea is required.

Similarly, the Ninth District in *Diamond* does not give much guidance as to why it matters when the request for appellate counsel is made after a no-contest plea. That is, why it matters if the appeal time has run or not.

In any event, if this Court, and probably other trial courts in the Ninth District, if not state wide, is struggling to determine when the appointment of appellate counsel is mandated, a critical examination of the *Diamond* and *Hensley* I decisions is necessary.

So back to the question at hand. Does Hensley have the right to the appointment of appellate counsel in order to seek a delayed, post-guilty plea, jurisdictional, discretionary appeal in the Ohio Supreme Court? Put another way, does Hensley have an appeal "of right" in the Ohio Supreme Court such that appellate counsel must be appointed?

Crim. R. 44 is instructive.

It reads as follows,

> Assignment of Counsel.
>
> (A) Counsel in serious offenses
>
> Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant at every stage of the proceedings **from their initial appearance before a court <u>through appeal as</u>**

of right, unless the defendant, after being fully advised of their right to assigned counsel, knowingly, intelligently, and voluntarily waives their right to counsel.

(Emphasis added.)

As discussed above, Hensley was afforded an appeal "as of right" when this Court (ultimately) granted him appellate counsel and the Ninth District granted him leave to file a delayed appeal

Here, however, Hensley is not seeking the appointment of counsel in order to pursue an appeal of right or counsel to represent him from his "initial appearance" through an appeal of right. He was granted court-appointed counsel and had said counsel at the initial stages of these proceedings, throughout these proceedings, and for his delayed, direct appeal.

Instead, Hensley seeks the appointment of appellate counsel to pursue a delayed, discretionary, jurisdictional appeal in the Ohio Supreme Court, which is most certainly, and by definition, not an "appeal of right."

In addition to Crim. R. 44, we must look to the Ohio Revised Code. After all, despite what *Hensley* I seems to imply, there is simply no "absolute right" to the appointment of appellate counsel after a guilty plea, even if the request is timely made.

The Revised Code sheds light on this issue. R.C. 2953.08 – Appeal as Matter of Right; Grounds, is referenced above. It reads *in part*, emphasis added:

> (A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant **on one of the following grounds**:
>
> (1) Max sentence;
>
> (2) Prison term for 4th or 5th degree felony;
>
> (3) Person plead guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to R. C. 2971.03(A)(3);
>
> (4) Sentence is contrary to law;

(5) Court imposes full 10-years on RVO Spec.

(C)(1) Consecutive sentences imposed pursuant to R.C. 2929.14(C)(3) that exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense.

(C)(2) A defendant may seek leave to appeal an additional sentence imposed pursuant to R.C. 2929.14(B)(2)(a) or (b) if the additional sentence is for a definite prison term that is longer than five years.[14]

(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

It is clear that a defendant convicted after trial has an appeal of right and thus, the right to the appointment of appellate counsel. Same for a defendant who pleads no-contest.

But we now see that even a defendant who pleads guilty *may* have an appeal of right, at least to challenge his sentence, and if so, the right to the appointment of counsel *if* he can meet one of the factors listed in R.C. 2953.08, unless the sentence imposed was authorized by law, jointly recommended by the parties, and imposed by a sentencing judge. R.C. 2953.08(D)(1).

It goes without saying that any other reading of this statute would render it superfluous. After all, if every defendant who pleads guilty makes a timely request for the appointment of appellate counsel, they why did the General Assembly draft R.C. 2953.08? The reason is obvious. The statute is a carve-out that provides for an appeal of right for *some,* but *not all*, defendants who plead guilty.

But what about the right to the appointment of appellate counsel to pursue a discretionary appeal in the Ohio Supreme Court?

The post-conviction right to counsel to pursue non-error correction remedies such as post-release control, judicial release, jail-time credit, and other post-conviction remedies have been addressed.

[14] This is for imposition of the RVO Spec. R.C. 2941.149.

The Ohio Supreme Court has said the following,

> We agree with the court of appeals that an indigent petitioner **has neither a state nor a federal constitutional right to be represented by an attorney in a postconviction proceeding**. See *Pennsylvania v. Finley* (1987), 481 U.S. 551; *State v. Crowder,* Ohio St. 3d 151, 152, (1991). See also: *State v. Craig,* 9th Dist. Summit No. 24580, 2010-Ohio-1169, ¶ 9. (Emphasis added.)

The Tenth District Court of Appeals put it well when it noted,

> **The right to appointed counsel extends to only the first appeal of right, and since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, * * * he has no such right when attacking, in post-conviction proceedings, a conviction that has become final upon exhaustion of the appellate process.** * * * States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause **does not require that the State supply a lawyer as well.**" ' " *Id.* at 10–11, quoting *Pennsylvania v. Finley* (1987), 481 U.S. 551, syllabus.

State v. Scudder, 131 Ohio App. 3d 470, 472-473, (10th Dist. 1998), emphasis added.

Most, if not all, appellate districts in Ohio have reached the same conclusion relative to the appointment of counsel for the purpose of filing for judicial release. To cite one example, the Eight District noted,

> Thus, regardless of the trial court's reference to its jurisdiction to consider the request, we find **the trial court did not err in denying Reid's motion for the appointment of counsel to represent him during the judicial release proceedings. There is simply no language in the Federal or Ohio Constitution to suggest Reid was entitled to court appointed representation at this stage.**

State v. Reid, 8th Dist. Cuyahoga No. 106944, 2019-Ohio-531, ¶ 18, emphasis added.

Given the case precedent cited above, and despite any holdings that might be directed *contra* by the *Hensley* I and *Diamond* decisions, it is this Court's firm conclusion that the Defendant herein does not have the right to the appointment of counsel in order to pursue a delayed, post-guilty plea, jurisdictional, discretionary appeal in the Ohio Supreme Court.

THERE ARE TWO PENDING APPEALS IN THE NINTH DISTRICT THAT COULD PROVIDE ADDITIONAL GUIDANCE ON THESE ISSUES

This Court recently had the opportunity to address a similar matter where a defendant serving a lengthy prison sentence sought the appointment of post-guilty, post-direct appeal[15] counsel for the purpose of challenging his status as a sexual predator and the imposition of Tier III SORN reporting requirements. In *State v. James Osborne,* Lorain County Court of Common Pleas, Case No. 13CR088498, this Court determined that the defendant was not entitled to the appointment of counsel as he had already been afforded a direct appeal (with the appointment of counsel), and thus, had no appeal of right to challenge his status as a sexual predator or SORN reporting requirements.[16]

The defendant in that case, James Osborne, has filed two *pro se* appeals that are currently pending in the Ninth District challenging this Court's decision to deny him the appointment of counsel.[17] It will be interesting to see how those cases resolve, and whether they lend some additional clarity to these issues.

IV. CONCLUSION

For the reasons explained above, the Defendant's motion for the appointment of appellate counsel is DENIED.

Judge D. Chris Cook

[15] In his direct appeal, the defendant unsuccessfully argued that the trial court erred in failing to comply with Crim.R. 11 by never eliciting a guilty plea from him, and his convictions were affirmed. See id. at ¶ 5-9.

[16] See: *State v. Osborne, Id.*, 2/13/2025.

[17] See: Case Nos. 25CA012235 & 25CA012270.