IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	**Case No. 2005-2264**
Plaintiff-Appellee,	:	
	:	**On Appeal from the Court of Common**
v.	:	**Pleas of Lorain County**
	:	**Case No. 04 CR 065248**
NICOLE DIAR,	:	
	:	**THIS IS A DEATH PENALTY CASE**
Defendant-Appellant.	:	

APPLICATION FOR REOPENING PURSUANT TO S.CT. PRAC.R. XI(6)

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Now comes Nicole Diar, by and through counsel, and moves this Court to reopen her direct appeal pursuant to Supreme Court of Ohio Rule of Practice XI(6) ("Rule XI(6)"). Under the familiar two-prong test delineated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), Diar received constitutionally ineffective representation when her appellate counsels' performance fell far below the prevailing professional norms for appellate counsel in capital cases, and Diar was prejudiced by counsels' failures. Critically, prior appellate counsel failed "to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards of applicable high quality capital defense representation . . . [and] to present issues in a manner that will preserve them for subsequent review." ABA Guidelines 10.15.1.C. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (as reprinted in 31 Hofstra L. Rev. 913, 2003) (the "ABA Guidelines").

The Supreme Court of the United States and the U.S. Sixth Circuit Court of Appeals have recognized the ABA Guidelines as establishing the relevant criteria of what counsel must do in a capital case to satisfy the Sixth Amendment's effective assistance of counsel requirement. *See Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005) (considering the ABA Guidelines' requirements in context of conducting ineffective assistance of counsel analysis from *Strickland*); *Wiggins v. Smith*, 539 U.S. 510, 524-33 (2003) (describing the ABA Guidelines as "standards to which we have long referred as 'guides to determining what is reasonable'" and then applying *Strickland* analysis); *Williams v. Taylor*, 529 U.S. 362 (2000) (same); *Hamblin v. Mitchell*, 354 F.3d 482, 485-88 (6th Cir. 2003) (explaining that "the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases," *id.* at 486). *See also Johnson v. Bagley*, 544 F.3d 592, 2008 U.S. App. LEXIS 21200, *15 (6th Cir. Oct. 10, 2008) (*citing Rompilla*, 545 U.S. at 387 & n.7).

In *Hamblin*, the Sixth Circuit explained that "the ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland*. They are the same type of longstanding norms referred to in *Strickland* in 1984 as 'prevailing professional norms' as 'guided' by 'American Bar Association standards and the like.'" *Hamblin*, 354 F.3d at 487. The court reasoned that "we see no reason to apply to counsels' performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past." *Id.*

Demonstrating ineffective assistance of appellate counsel requires showing that "the issue not presented was clearly stronger than issues that counsel did present." *Franklin v. Anderson*, 434 F.3d 412, 429 (6th Cir. 2006) (*quoting Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (*quoting Smith v. Robbins*, 528 U.S. 259, 289 (2000) (internal citations omitted))). In determining whether appellate counsel's performance was deficient under *Strickland*'s first prong, the Sixth Circuit has set out a non-exhaustive list of eleven factors to be reviewed. *Mapes v. Coyle*, 171 F. 3d 408, 427-28 (6th Cir. 1999). The Sixth Circuit recently made clear that the *Mapes* factors are to be considered *in* *addition* to the "prevailing norms of practice as reflected in the [ABA Guidelines] and the like." *Franklin*, 434 F.3d at 429. If after a review of these and other factors, it appears to the court that the omitted claims are so "significant and obvious" that a competent capital appellate attorney "would almost certainly present [them] on appeal, "the deficient performance prong under *Strickland* is established, and a review of the merits of the omitted claims to establish prejudice is required." *Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001)). *See also*, *Franklin*, 434 F.3d at 430-31 (finding that appellate "counsel did not meet the ABA standards in their dealings with [defendant] concerning his appeals.").

To demonstrate prejudice under the second *Strickland* prong, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 at 694. Here, Diar was denied the effective assistance of appellate counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution when his appellate counsel failed to include certain critical claims in Diar's direct appeal. Diar was prejudiced because the claims appellate counsel failed to raise were strong claims, including the ineffective assistance of trial counsel for failing to obtain and effectively utilize necessary arson, pathology, and fingerprint experts. *See Franklin*, 434 F.3d at 430-31 (holding that failure to raise strong claim on appeal was prejudice under *Strickland*). Appellate counsel also prejudiced Diar by failing to comply with the applicable ABA Guidelines, as discussed above. *Id.* In the absence of appellate counsels' failures, these claims would have been considered and it is likely that the trial court's and trial counsels' failures would have compelled a different result on sentencing. Appellant is unable to fully brief these errors due to page limit constraints; thus this application is not presented in lieu of full briefing on the facts and law. To demonstrate that this Court should reopen his appeal and permit full briefing on the omitted claims, however, Diar shall hereafter demonstrate "*colorable* claim[s] of ineffective assistance of appellate counsel." *State v. Murnahan*, 63 Ohio St.3d 60, 66 (1992) (emphasis added); S. Ct. R. Prac. XI(6).

I. Procedural Posture

The Ohio Public Defender's Office was appointed to represent Diar on her sole appeal of right to this Court. The attorneys assigned to his case were Assistant Public Defenders Linda Prucha, Thomas Lee, and Justin Thompson. This Court affirmed Diar's convictions in an opinion dated December 10, 2008. *State v. Diar*, 120 Ohio St.3d 460, 492, 2008-Ohio-6266. The Court, however, vacated Diar's death sentence because of the trial court's failure to give a "solitary juror" instruction, and remanded the case for a new mitigation hearing pursuant to R.C. 2929.06. *Id.* This Court's judgment entry was journalized on December 10, 2008. Ohio law allows a capital defendant to file an application to reopen his or her direct appeal pursuant to Rule XI(6) based on a claim of ineffective assistance of appellate counsel. Rule XI(6) instructs that such motion is to be filed "within 90 days from entry of the judgment of the Supreme Court, unless the appellant shows good cause for filing at a later time." S. Ct. R. Prac. XI(6)(A). This Application to Reopen is being filed within 90 days from the entry of judgment of this Court, and is therefore timely.

II. Meritorious Claims in the Record But Not Raised on Appeal

The following Proposition of Law constitutes a colorable claim for relief based on errors that appear in the trial record. Reasonably competent appellate counsel should have raised the following compelling issues on Diar's direct appeal, and were constitutionally ineffective for their failure to do so.

PROPOSITION OF LAW NO. I

TRIAL COUNSEL'S FAILURE TO OBTAIN NECESSARY EXPERT ASSISTANCE DEPRIVED DIAR OF HER RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The test for whether the right to counsel has been violated is found in *Strickland v. Washington*, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance is deficient. *Id.* at 687. If counsel's performance is deficient, the reviewing court must determine if the accused is thereby prejudiced. *Id.* To establish prejudice the accused need not establish outcome-determinative error. *Id.* Instead, the accused is prejudiced when the reviewing court loses confidence in the fairness of the trial. *Id.*

When assessing the performance prong in a capital case, counsel's performance is reviewed under the American Bar Association's Guidelines for the Appointment of Counsel in Death Penalty Cases. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Guideline 10.7.A provides: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."

The Commentary to Guideline 10.7 directs counsel to make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense as well as the underlying materials. The Guideline further provides: "**With the assistance of appropriate experts**, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." (Emphasis added.)

Because trial counsel failed to obtain their own experts, the State was given free reign to introduce the testimony of numerous damaging "expert" witnesses during the guilt determination phase of Diar's capital trial. Although obviously aware that the State intended to present the opinion testimony of numerous expert witnesses, trial counsel failed to obtain their own experts to aggressively re-examine all of the government's forensic evidence, conduct appropriate analyses of all other available forensic evidence, and provide trial testimony to point out errors and otherwise respond to the State's unexamined and otherwise un-refuted opinion testimony.1

Because trial counsel failed to obtain and present their own experts, the State was able to argue in closing that defense counsel had, "[T]he same subpoena power as the State of Ohio to call witnesses, expert or otherwise; and that includes fingerprint experts and that includes arson experts, to say the things that he's asserting to you should have existed." T.p. 2849. In regard to arson investigator Genevieve Bures, the State was likewise was able to denigrate the defense, "I mean, there was no challenge to her testimony at all. Nothing. **I guess you really can't unless you knew what she was talking about.**" T.p. 2860. (Emphasis added.)

A. No independent pathologist.

The State presented the testimony of Lorain County Coroner Paul M. Matus who testified that he performed an autopsy on Jacob Diar and determined the cause to be "homicidal violence of an undetermined origin." T.p. 1681. He further testified that in cases such as this where "there is too much destruction of a body, or evidence is lost and you cannot come to a specific cause, ... we look at the elements and circumstances surrounding the individual's death and try to put that death and the situation into context." T.p. 1682. Dr. Matus acknowledged that whereas he initially considered a hematoma or blow to the head as a possible cause of death, he subsequently ruled that out. T.p.

1 The importance of expert assistance in capital cases was recognized by the Supreme Court in *Ake v. Okalahoma*, 470 U.S. 68 (1985), holding that an indigent defendant charged with a capital offense has a due process right to a state provided psychiatrist when he makes an *ex parte* showing that his sanity will be a significant factor in his defense as well as on the question of

1686-87. Despite the fact that Dr. Matus was unable to determine a cause of death and acknowledged a subjective element to his analysis (i.e. ruling out certain scenarios as unlikely), trial counsel failed to obtain their own pathologist to conduct an independent investigation, challenge the coroner's findings and opinions, and testify at Diar's trial. This failure deprived Diar of her right to a fair trial.

B. No independent fire expert.

The State introduced the testimony of three "forensic experts" in support of its theory that Nicole set a fire to cover up the crime after intentionally killing her son. These experts included State Fire Marshall Lee Bethune, self-employed fire investigator Genevieve Bures (hired by the landlord's casualty insurance company), and self-employed fire origin and electrical expert Ralph Dolence (engaged by Genevieve Bures). Significantly these three experts could not even agree as to where the fire originated. Lee Bethune testified that he listed the bedroom as the point of origin in his original report, but that was a mistake. T.p. 1635. He was now sure that the fire started in the living room (even though the couch and rug did not ignite) and opined that the front door was open at the time the fire was lit. T.p. 1636. Genevieve Bures first testified that the bedroom was the point of origin (T.p. 1745) and then later stated that the fire started in the living room carpet. T.p. 1819. Ralph Dolence testified that the fire did not originate in either the living room or bedroom, but rather in the dining room. T.p. 1839.

Despite the obvious importance of the State's forensic experts in establishing its theory that Nicole Diar had set a fire to cover up the intentional killing of her son, trial counsel failed to obtain their own fire investigator to conduct an independent investigation, challenge the findings and opinions of the State's experts, and testify at Diar's trial. This failure deprived Diar of her right to a

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dangerousness at the penalty phase.

fair trial.

C. No independent criminalist or fingerprint expert.

In his closing argument, trial counsel noted that there was no attempt to fingerprint the windows, the front door (which had a brass knob), the rear door, nor gather additional forensic evidence which would have shown that another individual or individuals had entered the apartment the date of the fire. (T.p. 2818, 2820). Because trial counsel failed to obtain and present their own expert, the State was able to argue in closing that defense counsel had "[T]he same subpoena power as the State of Ohio to call witnesses, expert or otherwise; and that includes fingerprint experts and that includes arson experts, to say the things that he's asserting to you should have existed." T.p. 2849.

Although trial counsel argued that the State failed to obtain readily available forensic evidence that would likely have exonerated Diar, trial counsel failed to obtain their own criminalist or fingerprint expert to conduct an independent investigation, rebut the State's arguments, and testify at Diar's trial regarding the past and present availability of forensic evidence. This failure deprived Diar of her right to a fair trial.

Diar was prejudiced by counsel's failure to obtain necessary experts. Counsel's errors deprived Diar of her rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

III. Demand for Discovery and an Evidentiary Hearing.

Diar requests full discovery and an evidentiary hearing on these claims in order to properly and fully litigate these claims. *Morgan v. Eads*, 2004 Ohio 6110 (2004). In *Morgan* this Court abandoned the clear holding of prior cases that the taking of new evidence is not permitted in *Murnahan* proceedings. *State v. Burke*, 97 Ohio St.3d 55 (2002); *State v. Hooks*, 92 Ohio St.3d 83 (2001); *State v. Moore*, 93 Ohio St.3d 649 (2001). Therefore, Diar hereby demands this newly created right to conduct discovery in support of his claims and to have an evidentiary hearing on this matter. The failure to provide discovery and hearing will deny Diar a full and fair opportunity to litigate his claims and deny him due process of law.

IV. Conclusion.

For the above state reasons, Diar requests this Court grant her application for reopening and reopen her direct appeal to this Court. Further, the Court must permit discovery and conduct an evidentiary hearing on the claims raised in this Application.

Respectfully submitted,

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Counsel for Nicole Diar

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPLICATION FOR REOPENING PURSUANT TO S.CT. PRAC.R. XI(6) was forwarded by regular U.S. Mail to Dennis P. Will, Prosecuting Attorney, Lorain County Prosecutor's Office, and Anthony Cillo, Assistant Prosecuting Attorney, Lorain County Prosecutor's Office, 3rd Floor, Justice Center, 225 Court Street, Elyria, Ohio 44035 on the 10th day of March, 2009.

Counsel for Nicole Diar

Exhibit A

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Defendant-Appellant.	:	

AFFIDAVIT OF WILLIAM S. LAZAROW

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, William S. Lazarow, after being duly sworn, hereby state as follows:

1) I am an attorney licensed to practice law in the state of Ohio since 1972, and am currently engaged in the private practice of law in Columbus, Ohio. I was an Assistant State Public Defender in Ohio from 1989 to 2001 where I was assigned to the Death Penalty Unit. I was also a Deputy Federal Public Defender in the Capital Habeas Units in the Central District of California and District of Arizona from 2002 to 2006. My primary area of practice is capital litigation. I am certified under Sup. R. 20 as appellate counsel and trial co-counsel in capital cases.

2) Due to my focused practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed or recommended.

3) The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).

4) The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05

(Anderson 1995); *State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District*, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).

5) After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.

6) For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.

7) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.

8) Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues, unique to the case, that impinge on federal constitutional rights.

9) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

10) It is important that appellate counsel realize that the capital reversal rate in the state of Ohio is eleven percent on direct appeal and less than one percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Therefore, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, the real audience of the direct appeal is the federal court.

11) Based on the foregoing standards, I have identified a three-part proposition of law that should have been presented to this Court by appellate counsel. The propositions of law identified in this application for reopening were either not presented, or not fully presented, to this Court.

12) Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, those errors would have been preserved for federal review.

13) Therefore, Nicole Diar was prejudiced as a direct result of the deficient performance of her appellate counsel on her direct appeal to this Court.

Further Affiant sayeth naught.

WILLIAM S. LAZAROW
Counsel for Appellant,
Nicole Diar

Sworn to and subscribed before me this 9TH day of March, 2009.

Notary Public
HARRY R. [illegible], Attorney-at-Law
[illegible]
My commission has no expiration date.
Sec. 147.03 R.C.