IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 94-2494
	:	
Plaintiff-Appellee	:	
	:	
v.	:	On Appeal from the
	:	Hancock County Court
JOHN R. DOUGHERTY,	:	of Appeals, Third
	:	Appellate District
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association ("NLADA") is a private, non-profit, national membership organization, founded in 1911. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to afford to retain counsel. The NLADA represents approximately 3,000 offices that provide civil and criminal legal services to poor people. The membership of the NLADA comprises most public defender offices and legal services agencies around the nation, and also includes assigned counsel and other private practitioners.

John R. Dougherty, the appellant in this case, is an indigent defendant who was sentenced to death. Because he could not afford private counsel, the Court of Appeals appointed the Ohio Public Defender Commission to represent him on his first appeal as of right. However, Mr. Dougherty's appointed counsel also represent other death-sentenced people, and they could not file Mr. Dougherty's opening brief within the short period of time given to them by the appellate court below. Instead of granting an adequate extension of time, the Court of Appeals dismissed Mr. Dougherty's appeal. Unless this Court reverses the dismissal, Mr. Dougherty will be put to death by the State of Ohio without appellate review, due solely to his indigency.

The NLADA is interested in this case because the Court of Appeals' ruling would permit the State to execute indigent criminal defendants without affording them any appellate review of their convictions or sentences. The NLADA is also concerned with the Court of Appeals' apparent disregard of Mr. Dougherty's right to the assistance of counsel, as evidenced by the orders requiring capital appellate lawyers with heavy workloads to file a first brief in a capital case within an unreasonable period of time.

STATEMENT OF FACTS RELEVANT TO THE BRIEF OF AMICUS CURIAE

John R. Dougherty was convicted of aggravated murder. See Judgment Entry, State v. Dougherty, Case No. 92-190-CR (Ct. Comm. Pleas, Hancock Co., Jan. 11, 1994), at 1-2. He was represented in the trial court by appointed counsel. Id. On December 21, 1993, Mr. Dougherty was sentenced to death. Id. at 2-3. At sentencing, he told the trial judge that he wished to appeal. Id. at 6. The judge advised Mr. Dougherty of his right to the appointment of counsel on appeal if he could not afford to hire a lawyer. Id. at 5-6. On February 11, 1994, the Court of Appeals found that Mr. Dougherty was indigent and appointed the Ohio Public Defender Commission ["OPDC"] to represent him. See Journal Entry, dated Feb. 11, 1994, Ct. App.,[1] at 1.

The Death Penalty Division of the OPDC has eighteen attorneys. See Affidavit [of Gregory L. Ayers] In Support of Motion for Reconsideration, filed Aug. 8, 1994, Ct. App., at ¶ 5. Though it has only eighteen lawyers, the Division represents eighty-nine people on Ohio's death row. Id. at ¶ 4. Rule 65, § (I)(B)(1), of the Rules of Superintendence for Courts of Common Pleas ["Rule 65"] requires the assignment of at least two attorneys to every capital appeal. With at least two attorneys per capital appeal, each lawyer in the OPDC's Death Penalty Division represents an average of ten death-sentenced clients. Many of the Division attorneys are new and cannot yet carry a full caseload. Affidavit of Gregory L. Ayers, supra, at ¶ 6. The senior attorneys in the Division represent an average of fifteen people on death row. Id.

After the OPDC was appointed to represent Mr. Dougherty, the office assigned two Death

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[1] Pleadings and orders denoted "Ct. App." were filed in the case below, State v. Dougherty, Case No. 5-94-2 (Ohio Ct. App., 3d App. Dist.).

Penalty Division attorneys, Michael J. Benza and John B. Heasley, and a senior lawyer, Kathleen A. McGarry, to the appeal. With eighty-nine capital cases, the OPDC could not spare two attorneys to represent Mr. Dougherty exclusively, at least not unless the OPDC attorneys abandoned their other death-sentenced clients. In mid-1994, while he was assigned to Mr. Dougherty's appeal, Mr. Heasley represented six other persons on death row. See Affidavit [of John B. Heasley] in Support of Appellant's Motion for Extension of Time, filed July 26, 1994, Ct. App., at ¶ 4. Mr. Benza was counsel to three other persons sentenced to death, in addition to Mr. Dougherty. See Affidavit [of Michael J. Benza] in Support of Appellant's Motion for Extension of Time, filed July 26, 1994, Ct. App., at ¶ 4. Ms. McGarry, a senior attorney with almost seven years of death penalty experience, was concurrently assigned to thirteen other capital cases. See Affidavit [of Kathleen A. McGarry] in Support of Appellant's Motion for Reconsideration, filed Aug. 8, 1994, Ct. App., at ¶ 3.

The transcript for Mr. Dougherty's appeal was over five thousand pages long. See Memorandum in Support of Motion for Reconsideration and Expedited Ruling By the Court, filed Aug. 8, 1994, Ct. App., at 2. It took four months to prepare, and was filed on June 6, 1994. See Journal Entry, filed Oct. 6, 1994, Ct. App., at 1. Pursuant to App. R. 18(A), the opening brief were due within twenty days, or by June 26. The Court of Appeals granted one extension to August 5, 1994, and a further extension of time to September 1, 1994. See Journal Entry, dated Oct. 6, 1994, Ct. App., at 2.

Mr. Dougherty's counsel could not complete the brief within the time required by the Court of Appeals. On August 8, 1994, counsel asked the Court to reconsider the filing deadline of September 1, 1994. Counsel pointed out, among other things, that the transcript was over five thousand pages, that four months was needed merely to transcribe the record, that counsel was newly appointed and was unfamiliar with the case, and that counsel could not even read the full record by the September 1

filing date. See Memorandum in Support of Motion for Reconsideration and Expedited Ruling By the Court, supra, at 2. Working diligently, and mindful of commitments to other capital cases, counsel represented that the brief would be prepared by December 15, 1994, approximately six months after the record was filed. See Affidavit of Kathleen A. McGarry, supra, at ¶¶ 3, 7, 10, 11. Further, as part of counsel's motion, the Chief of the OPDC's Death Penalty Division pointed out that the office would not have accepted the case had the Court of Appeals indicated that it would impose such stringent time limitations. See Affidavit of Gregory L. Ayers, supra, at ¶ 10.

The Court of Appeals overruled the motion. See Journal Entry, dated August 12, 1994, Ct. App. Counsel therefore sought permission to withdraw, due to their inability to produce an effective brief by the Court-imposed deadline. See Motion for Leave to Withdraw as Counsel, dated August 17, 1994, Ct. App. This motion also was denied. See Journal Entry, dated September 1, 1994, Ct. App. On September 22, when no brief was filed, the Court of Appeals ordered counsel to file a brief by October 3, 1994 (i.e., in seven working days), or the appeal would be dismissed. See Journal Entry, dated September 22, 1994, Ct. App., at 1-2. On October 6, 1994, the Court dismissed Mr. Dougherty's first appeal from his sentence of death. See Journal Entry, dated October 6, 1994, Ct. App., at 3.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Every criminal defendant is entitled to the assistance of counsel on appeal and to an appellate decision that is based upon the merits of the case.

A. When The State Affords The Right To Appeal, That Right Must Be Meaningful.

States need not afford criminal defendants the right to appeal. But when States establish appellate procedures, the right to appeal must be meaningful. Indigent defendants must be given the same tools that are reasonably available to wealthy defendants.

The United States Constitution does not require each State to grant criminal defendants the right to appeal. Evitts v. Lucey, 469 U.S. 387, 393 (1985); Jones v. Barnes, 463 U.S. 745, 751 (1983); Griffin v. Illinois, 351 U.S. 12, 18 (1956); McKane v. Durston, 153 U.S. 684, 687 (1894). Nevertheless, appellate courts have been established in every State, and virtually every jurisdiction affords felony defendants at least one full appeal on the merits. See Bundy v. Wilson, 815 F.2d 125, 128, 136-42 (1st Cir. 1987) (collecting authorities and noting that all States except New Hampshire provide appeals as of right in felony cases). An Ohio statute guarantees the review of criminal cases in the Court of Appeals. See OHIO REV. CODE ANN. § 2953.02 (Page 1993). There is also an appeal as of right to this Court in capital cases. Id.; OHIO CONST., art. IV, § 2(B)(2)(a)(ii) (Page 1979).[2]

Once granted, the right to appeal must be meaningful. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, poor people must be afforded the same basic opportunities to seek appellate review as rich people.[3] Thus, indigent defendants must be furnished

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[2] For defendants sentenced to death for offenses that occur after January 1, 1995, there will be a direct appeal as of right to this Court. See Sub.H.J.R. No. 15 (providing the mechanism to amend Article IV of the Ohio Constitution, and requiring the General Assembly to enact implementing legislation).

[3] The Fourteenth Amendment cases have not always been clear as to whether the holdings are based on the Due Process Clause or the Equal Protection Clause. In Ross v. Moffitt, 417 U.S. 600, 608-09 (1974), the Court noted this lack of clarity in its previous

counsel on appeal. Douglas v. California, 372 U.S. 353, 357-58 (1963); State v. Sims, 27 Ohio St.2d 79, 272 N.E.2d 87, 89 (1971); State v. Catlino, 10 Ohio St.2d 183, 226 N.E.2d 109, 111 (1967). In Douglas, the Supreme Court denounced a system in which a poor person "has only the right to a meaningless ritual, while the rich man has a meaningful appeal." Id., 372 U.S. at 358. Indigent defendants are entitled to trial transcripts in circumstances when wealthy defendants would obtain them. Griffin, 351 U.S. at 19-20. Transcripts must be provided when necessary for adequate appellate review. Draper v. Washington, 372 U.S. 487, 496 (1963); see also Bundy, 815 F.2d at 131-36 (holding that New Hampshire's appellate procedures violate due process because defendants are not afforded transcripts before they must set forth the questions for review). This Court has held that the Ohio Constitution requires the provision of a complete and unabridged transcript in a capital appeal. State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District, 27 Ohio St.3d 13, 18, 501 N.E.2d 625, 629 (1986).

Douglas, Griffin, Draper and their progeny do more than merely guarantee that a few discrete benefits are provided to criminal defendants. These decisions reaffirm the principle that, at its heart, the Fourteenth Amendment protects the right to a meaningful hearing. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner"); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can

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opinions. In Bearden v. Georgia, 461 U.S. 660, 665 (1983), the Court stated that the principles of due process and equal protection "converge" in these decisions. Mr. Dougherty is indigent. Thus, for the purposes of his appeal, it does not matter whether the Supreme Court's holdings are characterized as due process or equal protection decisions.

be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"); see also Bounds v. Smith, 430 U.S. 817, 824-25 (1977) (States must assure all prisoners meaningful access to the courts).

This Court has been especially careful to ensure the right to a meaningful hearing when a person is in a contest with the State for his life. Spirko makes clear that the right to a meaningful hearing is only heightened in capital cases. Spirko, 27 Ohio St.3d at 18, 501 N.E.2d at 629. In State v. Johnson, 24 Ohio St.3d 87, 494 N.E.2d 1061 (1986), this Court overturned a capital conviction in part because the trial court refused to grant a continuance. The evidence against the accused was almost entirely circumstantial, and defense counsel sought a continuance to investigate new evidence that other people may have been present at the crime scene. Id., 24 Ohio St.3d at 94, 494 N.E.2d at 1067. In reversing, this Court emphasized that "the court should utilize the utmost care to ensure that a defendant is afforded every opportunity" to present his case. Id., 24 Ohio St.3d at 95, 494 N.E.2d at 1067. And "[t]his is particularly true where a penalty of death is a possibility." Id.

Thus, the State need not grant defendants the right to appeal. Once the right is afforded, however, it must be meaningful. That much is assured by the Due Process and Equal Protection Clauses.

B. A Meaningful Appeal Is An Appeal With The Assistance of An Attorney, And A Decision Based On The Merits Of The Case.

A meaningful appeal is nothing less than an appeal that is prosecuted with the assistance of

competent counsel. It is also an appeal decided on the merits, rather than upon some arbitrary factor unrelated to the legal merits of the case.

There are two lines of cases that establish the parameters of a meaningful appeal. One line of cases, already discussed, includes Douglas v. California and establishes the right to counsel on appeal under the Due Process and Equal Protection Clauses. See Evitts, 469 U.S. at 393-94 (noting that Douglas interpreted the holding of Griffin to require States to "make that [first] appeal more than a 'meaningless ritual' by supplying an indigent appellant in a criminal case with an attorney"). Another line of cases establishes a right to counsel on appeal directly under the Sixth Amendment. Those cases further provide that the right to counsel on appeal includes the right to effecttive assistance of counsel. E.g., Evitts, 469 U.S. at 394-96 (extending the right to effective assistance of counsel to include appeals); Freels v. Hills, 843 F.2d 958, 960 (6th Cir.) (applying Evitts), cert. denied, 488 U.S. 997 (1988); State v. Watson, 61 Ohio St.3d 1, 16, 572 N.E.2d 97, 109-110 (1991) (same); In re Petition of Brown, 49 Ohio St.3d 222, 223, 551 N.E.2d 954, 955 (1990) (discussing remedy for denial of right).

In addition to the requirement of counsel, a meaningful appeal is one that is decided on the legal merits of the case. A litigant may not lose a cause of action for an arbitrary reason, unrelated to the merits of the case. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the United States Supreme Court held that the State may not terminate a cause of action for reasons beyond the litigant's control. In that case, an agency had dismissed an employment discrimination claim because a clerk failed to convene a mandatory conference within the period required by statute. The Court reversed, ruling that "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Id. at 433.

Logan was a civil case, and Mr. Logan's lawsuit was characterized as a property interest. Id. at 428-30. The State may place reasonable procedural requirements on litigants and, under certain circumstances, may terminate a civil lawsuit for failure to comply with a reasonable rule. Id. at 437. Even so, the touchstone is reasonableness. This is a capital case, involving life and liberty, as well as a cause of action (which is a species of property). The federal courts have repeatedly held that a criminal defendant may not arbitrarily lose the right to appeal. See, e.g., Gilbert v. Sowders, 646 F.2d 1146, 1147 (6th Cir. 1981) (the failure of the Kentucky Supreme Court to reconsider the dismissal of criminal appeal "was arbitrary and capricious, and an abuse of due process of law"); Olson v. Hart, 965 F.2d 940, 943 (10th Cir. 1992) (State may not arbitrarily deny the right to appeal); Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900-01 (9th Cir. 1988) (arbitrary dismissal of criminal appeal violates due process).

As set forth in Propositions of Law II and III, below, the Court of Appeals' requirements in Mr. Dougherty's case were entirely unreasonable. Further, the sanction of dismissal is inappropriate in a criminal case.

Proposition of Law No. II: The appointment of an overburdened appellate attorney is the denial of the right to counsel, and violates the Sixth and Fourteenth Amendments.

A. The Appointment Of An Overburdened Lawyer Who Is Unable To File A Brief Is The Constructive Denial Of Counsel.

Appointing an overburdened lawyer to an indigent in a capital case is the constructive denial of

counsel. The primary duty of an appellate lawyer is to file a brief. If the lawyer is unable to file a brief due to heavy workload or, indeed, for any other reason, there has been no representation at all. In this case, even though Mr. Dougherty was nominally granted counsel, because of the strict filing deadlines and counsel's commitments to other capital clients, Mr. Dougherty was constructively denied counsel. This violated the Sixth Amendment as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The right to counsel on appeal includes the right to a merits brief filed by the appellate lawyer. In Austin v. United States, 115 S.Ct. 380 (1994), the Supreme Court granted an attorney's request to withdraw from a petition for a writ of certiorari. The petition in that case sought discretionary review. The Court stated that, by contrast, "indigent defendants pursuing appeals as of right have a constitutional right to a brief filed on their behalf by an attorney." Austin, 115 S.Ct. at 381.

Austin was a straightforward application of the rule in Anders v. California, 386 U.S. 738 (1967). There the Supreme Court held that appellate counsel must file a brief. Counsel has a duty to serve as "an active advocate" for the client, and to support the appeal to the best of the lawyer's ability. Id. at 744. Even if counsel determines that the appeal has no merit, counsel must file "a brief referring to anything in the record that might arguably support the appeal." Id. Thus, whatever else appellate counsel owes the client, there is a duty, at a minimum, to file a brief.

A brief is critically important on appeal. At trial, a defense lawyer may remain silent and may force the government to prove its case. An appeal is different. The client has already been convicted and it is her or his burden to convince the appellate court that reversal is required. That is why "counsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal." McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 436 (1988). In Swenson v.

Bosler, 386 U.S. 258 (1967), the Supreme Court found that a defendant was denied his right to appellate counsel. Counsel wrote a new trial motion that identified the appellate issues, but the accused was not formally represented on appeal. Id. at 259. This procedure was found to be unconstitutional because the defendant was denied "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript." Id.; see also Entsminger v. Iowa, 386 U.S. 748, 752 (1967) (finding that defendant was denied an adequate and effective appeal where appellate review did not include a full record, briefs, and argument).

The central importance of an appellate brief is also clear from the cases that follow Anders. Recognizing the primary role of the brief on appeal, courts have steadfastly held lawyers to the minimum requirements of Anders; counsel must either file a merits brief or a brief that painstakingly identifies the possible issues in the case. See, e.g., Penson v. Ohio, 488 U.S. 75, 82 (1988) (applying Anders); Freels v. Hills, 843 F.2d 958, 962-64 (6th Cir.) (same), cert. denied, 488 U.S. 997 (1988); United States v. Burnett, 989 F.2d 100, 103-05 (2d Cir. 1993) (same); State v. Duncan, 57 Ohio App.2d 83, 385 N.E.2d 323, 324 (1978) (same).

The inability of counsel to file a merits brief or an adequate Anders brief constitutes an outright denial of the right to counsel, and is not subject to the test for prejudice set forth in Strickland v. Washington, 466 U.S. 668 (1984), or the harmless error analysis described in Chapman v. California, 386 U.S. 18 (1967). As the Penson Court determined, the inability to file a brief "is unlike a case in which counsel fails to press a particular argument on appeal . . ., or fails to argue an issue as effectively as he or she might." Penson v. Ohio, 488 U.S. at 88 (citation omitted). The lack of a brief on appeal and, thus, the denial of the right to counsel on appeal, is always reversible constitutional error. Id.; see

also In re Miami County Grand Jury Directive to Creager, 82 Ohio App.3d 269, 272-73, 611 N.E.2d 881, 883-84 (1992) (finding that contemnor was denied counsel, and refusing to reach the merits of the case without the appointment of counsel).

The U.S. Court of Appeals for the Sixth Circuit has addressed a case in which a criminal appeal was dismissed because an overburdened appellate lawyer did not file a brief. The defendant in Cleaver v. Bordenkircher, 634 F.2d 1010 (6th Cir. 1980), cert. denied sub nom., Sowders v. Cleaver, 451 U.S. 1008 (1981), was convicted of murder and sentenced to life. Mr. Cleaver was indigent and was given appointed counsel. Id. at 1010. Cleaver's attorney asked for two extensions of time to file his appellate brief. Id. at 1010-11. Although counsel's second motion described his heavy workload and the other briefs that he had to file, the appellate court denied the motion and dismissed the appeal. Id. at 1011. The Sixth Circuit affirmed the grant of Mr. Cleaver's petition for writ of habeas corpus, basing its ruling primarily on the Equal Protection Clause. Id. at 1012. As the court explained, the defendant was "deprived of the right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation." Id.; see also Harris v. Champion, 15 F.3d 1538, 1558-68 (10th Cir. 1994) (holding that extraordinary delay in filing appellate brief, caused by reliance upon overburdened public defender, may violate right to due process and equal protection); Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990) (appellate delay may constitute a due process violation).

In the present case, counsel for Mr. Dougherty was unable to file a merits brief, due to time and workload restrictions. Even with extensions, the Court of Appeals gave counsel only a few months to read a five thousand page transcript, research all of the potential issues, and write a quality brief. But Mr. Dougherty's attorneys each represented between three and thirteen other people on death row;

they simply could not prepare a brief within the time required by the court below. Mr. Dougherty's cause was not furthered merely because he had counsel nominally appointed on his behalf. Reviewing the record and preparing a brief is the central task of appellate counsel. Since no brief was filed, Mr. Dougherty was in the same position as if he had no counsel at all. The constructive denial of appellate counsel deprived Mr. Dougherty of his rights under the Sixth and Fourteenth Amendments.

B. The Inability To File A Brief Is Per Se Ineffective Assistance of Counsel.

In addition to the constructive denial of counsel, Mr. Dougherty was also denied the effective assistance of counsel. As already noted, the Sixth Amendment right to counsel on appeal includes the right to the effective assistance of counsel. The test for assessing claims of effective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See State v. Watson, 61 Ohio St.3d 1, 16, 572 N.E.2d 97, 109-110 (1991) (applying Strickland to assess claim of ineffective assistance of counsel on appeal). Strickland provides a two-prong test. A person alleging ineffective assistance of counsel must show that counsel's performance was deficient. Id. at 687. Second, it must be established that counsel's performance prejudiced the defense. Id. Mr. Dougherty prevails under the two-part Strickland test.

With respect to the first prong of Strickland, Mr. Dougherty did not receive reasonably competent representation. As explained in part A of this argument, above, the main duty of appellate counsel is to file a brief. Whether it is counsel's fault or not, the inability of counsel to file a brief falls below an objective standard of reasonableness. All of the points that support the constructive denial of counsel if the assigned attorney is overburdened and is unable to file a brief apply even more forcefully

towards proving ineffective assistance of counsel. Given the mandatory obligations set forth in Anders and its progeny, the lack of an appellate brief is simply not reasonably effective assistance of counsel.

With respect to the second prong of Strickland, the prejudice is plain. Mr. Dougherty's appeal was dismissed because no brief was filed. He lost his entire right to appellate review. Mr. Dougherty need not prove that he would have prevailed on appeal. Two United States Supreme Court cases establish that the failure to file a brief and the loss of the right to appeal is per se prejudice under Strickland. In Penson v. Ohio, 488 U.S. 75, 88 (1988), the Court ruled that prejudice is presumed when counsel does not file a merits brief or an Anders brief. In Evitts v. Lucey, 469 U.S. 387 (1985), a criminal defendant's lawyer filed a brief, but failed to file a statement that was required by the state court. The appeal was dismissed. Id. at 390. The Supreme Court affirmed the grant of habeas corpus relief. The defendant was not afforded effective assistance on appeal, and he was prejudiced by the dismissal. Id. at 396-97. As the Court went on to note,

> "nominal representation on an appeal as of right -- like nominal representation at trial -- does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation on appeal is in no better position than one who has no counsel at all."

Id. at 396. Applying the same reasoning, the Sixth Circuit and lower Ohio courts have also found that prejudice must be presumed when a proper brief is not filed on the defendant's behalf. See Freels v. Hills, 843 F.2d 958, 963 (6th Cir.) (failure to file a brief may not be excused under Strickland standard), cert. denied, 488 U.S. 997 (1988); State v. Miller, 44 Ohio App.3d 42, 43, 541 N.E.2d 105, 108 (1988) (failure to file brief is ineffective assistance of counsel; court, however, may reach merits of appeal if the appeals issues were briefed by post-conviction counsel).

In addition, the court below created two separate conflicts of interest for Mr. Dougherty's counsel, and the existence of these conflicts makes the Strickland prejudice prong entirely inapplicable. The first conflict was between Mr. Dougherty and counsel's other clients. When they accepted their appointment, Mr. Dougherty's lawyers reasonably believed that the Court of Appeals would afford them enough time to read the record, research the issues and draft an opening brief. As the Chief of the OPDC's Death Penalty Division stated in his affidavit, the office would not have accepted the case had it been clear that the brief would be due in a short period of time. See Affidavit [of Gregory L. Ayers] In Support of Motion for Reconsideration, filed Aug. 8, 1994, Ct. App., at ¶ 10. Contrary to counsel's expectations, the Court of Appeals set an unreasonably short filing deadline for the merits brief. Counsel already represented other persons on death row. To attempt to meet the short filing deadline, counsel would have been required to choose between Mr. Dougherty and their already-existing clients. This is a direct conflict of interest. In a case right on point, the Florida Supreme Court recognized the direct conflict of interest created when overworked appellate counsel cannot prepare timely briefs. As that court stated, "[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1135 (Fla. 1990); see also Hatten v. State, 561 So.2d 563, 565 (Fla. 1990) (quoting this language). In this case, counsel chose not to abandon their other clients and, as a result, no brief was filed for Mr. Dougherty.

The second conflict of interest was between counsel's duty to Mr. Dougherty and their duty to comply with orders from the Court of Appeals. As Mr. Dougherty's lawyers stated in their affidavits in the court below, they could not prepare a brief within the time required by the Court of Appeals. If

counsel filed an inadequate brief, counsel would have knowingly and intentionally rendered ineffective assistance of counsel. Attorneys who provide ineffective assistance are condemned by their peers, and they may be formally disciplined by the State Bar. See OHIO CODE PROF. RESPONS. Preface (Page 1994) ("Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action); Id., DR 6-101(A)(1) (a lawyer shall not "[h]andle a legal matter which he knows . . . he is not competent to handle"); Id., DR 6-101(A)(2) (a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances"). In an analogous case, In re Sherlock, 37 Ohio App.3d 204, 525 N.E.2d 512 (1987), an Ohio appellate court overturned a contempt finding against a lawyer. The attorney refused to defend a client because she was unprepared for the trial. The Court of Appeals held that to require an unprepared lawyer to try a case would force her to violate her professional obligations to her client, under the state and federal constitutions and under the Code of Professional Responsibility. Id., 37 Ohio App.3d at 211, 525 N.E.2d at 519.

The other option for Mr. Dougherty's attorneys was not to comply with the Court's deadline, in which case Mr. Dougherty's appeal would be dismissed. If the appeal was dismissed, the attorneys' actions would also be considered ineffective assistance of counsel. Counsel were, therefore, given the untenable choice of filing an inadequate brief within the court-imposed deadline, or not filing a brief at all. Faced with two equally inappropriate choices, their only remaining solution was to move for leave to withdraw. The Court of Appeals, however, denied the motion and left counsel to labor under an active conflict of interest.

When counsel is forced to labor under a an actual conflict of interest, prejudice is presumed under the Strickland standard. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980); see also State v. Gillard, 64 Ohio St. 3d 304, 312, 595 N.E.2d 878 (1992) (remand to trial court to determine whether

conflict existed; if there was a conflict, accused must receive new trial regardless of weight of evidence of guilt); State v. Haberek, 47 Ohio App.3d 35, 380, 546 N.E.2d 1361, 1365 (1988) (no prejudice need to be shown if there was an active conflict that adversely affected lawyer's performance).

Mr. Dougherty was denied his right to the effective assistance of counsel on appeal, guaranteed by the Sixth Amendment.

Proposition of Law No. III: Because every criminal defendant is entitled to an appellate decision based on the merits of the case, an appellate court may not dismiss a criminal appeal simply because a lawyer did not file a brief on time.

Dismissing a capital appeal without reaching the merits, when an accused is not personally at fault, is a violation of the Due Process Clause. Courts have held that dismissal is an extreme remedy of last resort in civil cases, where there is only a property interest at issue. In criminal cases, where life and liberty are at stake, dismissal for a procedural default violates due process if the accused is not personally responsible for the default. In capital cases, dismissal of an appeal is especially inappropriate because death penalty appeals must receive greater scrutiny than other criminal matters. When appointed counsel cannot complete a timely appeal, for whatever reason, the remedy should be to extend the filing deadline for the brief. As a last resort, a court may grant a motion to withdraw. Dismissal is not the answer.

In civil cases, courts have held that the Due Process Clause limits the power to dismiss a case that has not been decided on the merits. As already noted, in Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982), the United States Supreme Court held that the Constitution protects the right to

present a claim and to have its merits fairly judged. In DeHart v. Aetna Life Insur. Co., 69 Ohio St.2d 189, 431 N.E. 2d 644 (1982), this Court held that the Court of Appeals abused its discretion in failing to reinstate a civil appeal that was dismissed for failure to comply with local procedural rules. This Court reasoned that when an attorney violates procedural rules in good faith, and neither opposing party nor the court are prejudiced, dismissal is too severe a punishment. Id., 69 Ohio St.2d at 192, 431 N.E.2d at 646-47. The Court emphasized that dismissing the appeal due to a procedural default goes against the "fundamental tenet" that courts should decide cases on the merits. Id., 69 Ohio St.2d at 192, 431 N.E.2d at 646; see also Russo v. Goodyear Tire & Rubber Co., 36 Ohio App.3d 175, 179-80, 521 N.E.2d 1116, 1121 (1987) (noting the constitutional limits on the power of a court to dismiss an action, and finding that dismissal was warranted only because the party apparently acted in bad faith); Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983) (holding that dismissal of action is authorized only in extreme circumstances, such as when parties have willfully deceived the court).

In criminal cases, where life and liberty interests are at stake, courts have held that it is not appropriate to dismiss an appeal when counsel has not complied with court rules. See, e.g., Gilbert v. Sowders, 646 F.2d 1146, 1147 (6th Cir. 1981) (holding that failure to reconsider dismissal was arbitrary, capricious, and an abuse of due process); People of the Territory of Guam v. Reyes, 800 F.2d 940, 944-45 (9th Cir. 1986) (court abused discretion in dismissing appeal because attorney failed to request the transcript); State v. Erwin, 554 P.2d 236, 238 (Haw. 1976) (appointed counsel cannot deprive accused of an appeal by electing to forego compliance with procedural rules).

The only circumstance in which a criminal appeal may be dismissed is when the accused is personally responsible for the procedural default or when he or she personally waives the right to

appeal. For example, in Molinaro v. New Jersey, 396 U.S. 365, 366 (1970), the Supreme Court held that a defendant's own willful failure to surrender to authorities relinquished his right to appeal. Accord, United States v. Devalle, 894 F.2d 133, 135 (5th Cir. 1990). A defendant's failure to surrender is, of course, a personal act, and the relinquishment is therefore based on the accused's own conduct, not the conduct of his counsel. Similarly, in Boyd v. Cowan, 519 F.2d 182, 183 (6th Cir. 1975), the Sixth Circuit determined that an appeal cannot be waived unless the accused personally makes the waiver; the right to appeal is personal to the defendant, and family members do not have the power to waive an appeal on his or her behalf. See also Baker v. Kaiser, 929 F.2d 1495, 1500 (10th Cir. 1991) (no waiver of right to appeal where record does not affirmatively show accused's waiver).

When the penalty imposed against a person is death, dismissal of an appeal is an especially inappropriate remedy. Capital sentences require a greater level of scrutiny than other punishments. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding that "the penalty of death is qualitatively different from a sentence of imprisonment" and that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment"). The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 498 U.S. 308, 321 (1991); see also Clemons v. Mississippi, 494 U.S. 738, 749 (1990) (stating that meaningful appellate review promotes reliability and consistency). In Ohio, a statute requires the Court of Appeals and this Court to weigh independently the evidence and circumstances that support a sentence of death. See OHIO REV. CODE ANN. § 2929.05(A) (Page 1993). This Court has held that § 2929.05 "provides a procedural safeguard against the arbitrary imposition of the death penalty." State v. Holloway, 38 Ohio St.3d 239, 245, 527 N.E.2d 831, 837 (1988), cert. denied sub nom., Holloway v. Ohio, 492

U.S. 925 (1989).

Moreover, Ohio appellate courts must conduct a proportionality review of a death sentence. An Ohio statute specifically addresses this requirement. See OHIO REV. CODE ANN. § 2929.05(A) (Page 1993). In State v. Jenkins, 15 Ohio St.3d 164, 208-09, 473 N.E.2d 264, 304 (1984), cert. denied sub nom., Jenkins v. Ohio, 472 U.S. 1032 (1985), this Court determined that appellate courts must conduct a proportionality review whether or not the appellant has provided evidence of disproportionality. Like the independent review of sentencing factors, a State court's appellate review for proportionality is an important safeguard against the arbitrary imposition of a death sentence. See Gregg v. Georgia, 428 U.S. 153, 198 (1976) (noting the importance of Georgia's appellate proportionality review). Given the unique and accepted role of appellate courts in making capital sentences less arbitrary, it is unthinkable that a human being could be executed without any appellate review at all.

When appointed counsel is plainly overburdened and cannot complete an appeal, the appropriate remedy is to extend the time limit for the briefing. In unusual circumstances, the court should permit counsel to withdraw. As already explained, the obligation to provide counsel for indigent defendants lies with the State; the accused may not be punished for the State's own failure to provide counsel.

The financial pressures on the indigent defense system, exemplified by this case, are in no way unique to the State of Ohio. Other jurisdictions also have experienced instances in which heavy caseloads have forced appointed counsel to miss briefing deadlines. When this has occurred, other jurisdictions have, appropriately, not forfeited the accused's appeal due to the State's funding difficulties. The problem has been acute in Florida. Florida courts have permitted appointed counsel to

withdraw. See, e.g., Skitka v. State, 579 So.2d 102, 104 (Fla. 1989) (granting public defender's motion to withdraw from 29 appeals because of excessive workload); Woods v. State, 595 So.2d 264, 266 (Fla. Dist. Ct. App. 1992) (permission to withdraw granted in 128 appeals); Young v. State, 580 So.2d 301, 302 (Fla. Dist. Ct. App. 1991) (permission to withdraw granted in 48 appeals).

Vermont, also, has faced this difficulty. In State v. Pitner, 582 A.2d 163 (Vt. 1990), the defendant was convicted of driving under the influence and he was fined $ 250. The public defender was appointed for appeal. However, the office could not file an appellate brief due to a heavy docket of cases with higher priority. Id. at 164. The Vermont Supreme Court discharged appointed counsel, and ordered the appointment of new counsel. Id. at 165. Even in a DUI case, the Vermont Court was unwilling to risk a violation of the accused's right to the effective assistance of counsel. Id. at 164.

Similarly, when the record shows only that appellate counsel has not filed a brief, other jurisdictions do not simply dismiss the appeal. Rather, the correct procedure has been to enquire into the reasons why the brief has not been filed, and determine whether an extension of time is needed or whether the accused needs new counsel. See e.g., Hooper v. State, 833 S.W.2d 769 (Ark. 1992) (court relieves appellate counsel who submitted belated and insufficient pleadings; new counsel is appointed to complete the appeal); State v. Hughes, 587 So.2d 31, 37 (La. Ct. App. 1991), writ denied, 590 So.2d 1197 (1992) (court permits substitute appellate counsel to raise new arguments; accused should not be penalized for previous counsel's failures); Robinson v. State, 790 S.W.2d 334, 336 (Tex. Crim. App. 1990) (attorney failed to file brief in intermediate appellate court and that court affirmed; case remanded to intermediate appellate court for reconsideration with the assistance of counsel); Brasher v. State, 555 So.2d 184, 186 (Ala. Ct. App. 1988) (no record or brief filed; case remanded to determine whether new appellate counsel should be appointed).

In sum, dismissal is inappropriate where counsel is unable to file an opening brief in a civil case. In this, a capital case, dismissal is simply impermissible.

Proposition of Law No. IV: In its remand order, this Court should take appropriate measures to ensure that appointed counsel have sufficient time and resources to provide quality representation.

This Court has previously demonstrated its concern for the right of indigent capital defendants to receive the effective assistance of counsel. In 1987, this Court adopted Rule 65 of the Rules of Superintendence for Courts of Common Pleas, which set standards for the appointment of counsel in death penalty cases. Ohio was one of the first States to implement mandatory state-wide standards to assure the provision of quality legal services in capital cases. Under Rule 65, courts that ap point counsel in death penalty cases must consider the attorney's commitment to other clients. Qualified and experienced counsel were appointed for Mr. Dougherty. In its remand order, this Court should ensure that counsel is allowed sufficient time to prepare a quality brief, keeping in mind counsel's commitment to other capital clients.

As an initial matter, amicus curiae acknowledges that courts must manage their dockets. Nevertheless, slavish adherence to short filing requirements makes no sense when a life is at stake. A death sentence is irreversible once it has been carried out. In addition, stringent rules for procedural default require that all potential issues be raised on direct appeal, if they are to be raised at all. Defense attorneys in capital cases must do careful work to provide the accused with quality representation. In the case at hand, it was unreasonable to demand a complete review of the record, research of the

likely multitude of potential issues, and the preparation of a merits brief in a few months, especially since the record was over five thousand pages long and the court reporter needed four months simply to prepare the transcript. Further, given counsel's commitments in other capital cases, complying with a short filing deadline would have required counsel to sacrifice other death-sentenced clients in order to file Mr. Dougherty's brief. That choice was simply unacceptable. It should not be condoned by this Court, which is eventually called upon to review all of Ohio's capital cases, including those of defendants who would have been abandoned to allow counsel to file Mr. Dougherty's brief.[4]

Rule 65 currently requires courts to consider an attorney's workload prior to appointing him or her in a capital case. The rule provides, in part:

> "The appointing court shall not assign, and counsel shall not accept, an appointment which creates a total workload so excessive that it interferes with or effectively prevents the rendering of quality representation in accordance with constitutional and professional standards."

Rule 65, § III(A).

This Court is presently considering an amendment to Rule 65 and a new proposed Rule 5 of the Rules of Superintendence for Courts of Appeals ("proposed Rule 5"). Both the proposed amendment to Rule 65 and the proposed Rule 5 would provide additional guidance to courts and to counsel. Both

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[4] It is particularly important for this Court to consider demands placed upon appellate counsel, given that there will be a direct appeal to this Court for capital crimes committed after January 1, 1995. In those cases, appointed counsel will be reviewing trial records and framing appellate issues to present to the first reviewing tribunal. This Court will need to implement procedures to adjudicate cases efficiently and, at the same time, afford appellate counsel sufficient time and resources to provide quality representation.

would require appointing courts to consider the "nature and volume of the workload of the prospective counsel." See Proposed Amendments to Rule 65, § IV(B)(1); Proposed Rule 5, § (B)(2). The two rules would further require that counsel accepting appointments "shall provide each client with quality representation in accordance with constitutional and professional standards" and that counsel "shall not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation . . .." See Proposed Amendments to Rule 65, § VI(B)(2); Proposed Rule 5, § (B)(2). The language of these two proposed rules tracks standards that have been promulgated by amicus curiae, the National Legal Aid and Defender Association ["NLADA"], and the American Bar Association ["ABA"]. See NLADA, Standards for the Appointment and Performance of Counsel in Death Penalty Cases Std. 6.1 ("Workload") (1987) (attached to this Brief as Appendix A); ABA, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Guideline 6.1 ("Workload") (1989) (attached to this Brief as Appendix B); see also ABA Standards for Criminal Justice, Prosecution Function and Defense Function Std. 4-1.2(b) (3d ed. 1993) (stating that defense counsel's basic duty "is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation").[5]

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[5] Several other states have adopted rules regarding workload of appointed counsel in capital cases. See, e.g., IND. CODE ANN. R. CRIM. P. 24(J)(2) (Burns 1994) (court shall assess nature and volume of workload prior to appointment of appellate counsel; no new capital cases shall be assigned to appellate counsel who already represents a death-sentenced client until counsel files appellant's brief); GA. CODE ANN. R. CT. 29.8(B) (Michie 1994) (cases shall be distributed to ensure balanced workloads among attorneys). In Florida, a statute provides that appropriates for the public defender "shall be determined by a funding formula and such other factors as may be deemed appropriate." FLA. STAT. ANN. § 27.53(4) (West 1988). Workload standards were adopted under this statute. For attorneys who represent defendants in capital appeals, the standards provide for 2.5 capital appeals per attorney per year. See National Legal

Under present Rule 65, as well as under the proposed amendment to Rule 65 and the new proposed Rule 5, courts should not make, and counsel should not accept, an appointment if it would create an excessive workload. Nevertheless, it is also clear that projections about workload that are made at the time of appointment cannot and ought not to be the sole factor that determines later filing deadlines. As noted in Mr. Dougherty's merit brief, it is difficult for counsel to forecast future workload accurately because the preparation of the transcript is in the total control of court reporters. See Merit Brief of Appellant John R. Dougherty, filed January 31, 1995 in this Court, at 5. Nor may one ignore the extraordinary demands that the public and the judicial system have placed upon attorneys in the OPDC's Death Penalty Division, who represent an average of ten death-sentenced clients apiece. Those demands are not likely to decrease, given the rise in capital cases and the financial pressures that affect Ohio's indigent defense system.[6]

The Court of Appeals may have assumed that the question of workload was relevant, if at all, only to the initial appointment of counsel. Once counsel was appointed, the Court may have believed, no additional measures were necessary to ensure that counsel had time to file a brief. This Court must make certain that the same error does not occur upon remand. The Constitution, Ohio rules and national standards all require that Mr. Dougherty be afforded quality representation. Implied in these

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Aid and Defender Assoc., Indigent Defense Caseloads and Common Sense: An Update 18-19 (1992) (attached to this Brief as Appendix C).

[6] See Report of the Task Force to Study Court Costs and Indigent Defense 1-2 (Sept. 1992) (finding that new felony case filings increased 52% in five years and, at the same time, the number of indigent cases rose nearly 36%); The Spangenberg Group, Assessment of Indigent Defense System in Ohio 40, 42 & Tbl. 6 (Apr. 1991) (noting the increase in indigent defense caseloads due to increased prosecution of death penalty cases; further, 90% of capital defendants are indigent, compared with 75% of other felony defendants).

Constitutional provisions, Ohio rules and national standards is the notion that courts must allow counsel enough time to do their job. Even under the present version of Rule 65, there must be a tacit requirement that courts make reasonable accommodations so that every accused has a meaningful appeal. It would defeat the purpose of Rule 65, for example, if the courts were unwilling to give counsel the necessary time to review the record and to file a quality merits brief. Even an attorney with no other cases, who works diligently on a single death penalty appeal, cannot provide effective representation if a court imposes an unreasonable deadline.

Amicus curiae urges this Court to ensure the right to effective assistance of counsel in death penalty cases by holding that a critical component of capital review is the allocation of sufficient time for counsel to review the record and write a brief. The remand order in this case should require the Court of Appeals to give counsel a full opportunity to review the record and file a brief. If counsel is not able to do so within an appropriate period of time -- a period of time that takes into account counsel's considerable commitments to other capital clients -- the appellate court should grant the motion to withdraw and appoint new counsel who can provide quality representation. In determining whether to appoint new counsel, the Court of Appeals should be mindful that private counsel will also likely experience workload pressures. The best course may well be to permit the lawyers from the OPDC's Death Penalty Division to remain on the case; these lawyers bring to the task years of experience in capital litigation. But whatever occurs on remand, the appeal must not be dismissed for the inability to file a brief. Mr. Dougherty must receive a meaningful appeal, and this means an appeal with counsel advocating on his behalf.

CONCLUSION

For all of the reasons set forth in this brief, the National Legal Aid and Defender Association, as amicus curiae, respectfully urges this Court to reverse the decision below.

Respectfully submitted,

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January 30, 1994

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APPENDICES

A. National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases Std. 6.1 ("Workload") (1987)

B. American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Guideline 6.1 ("Workload") (1989)

C. National Legal Aid and Defender Association, Indigent Defense Caseloads and Common Sense: An Update 18-19 (1992)

APPENDIX A

Excerpts from National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases (1987):

APPENDIX B

Excerpts from American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989):

APPENDIX C

Excerpts from National Legal Aid and Defender Association, Indigent Defense Caseloads and Common Sense: An Update 18-19 (1992):

PROOF OF SERVICE

I certify that a copy of this Brief of Amicus Curiae, National Legal Aid and Defender Association, was sent by ordinary U.S. mail to counsel for appellant, Kathleen McGarry, Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, and to counsel for appellee, Robert J. Fry, Prosecuting Attorney, Hancock County, Ohio, 116 West Lima Street, Findlay, Ohio 45840 on January 30, 1995.

_____
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