No. 02-311

In the Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

On Writ Of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields. [1]

The ABA has a well-established tradition of advocating for the ethical and effective representation of all clients. For nearly one hundred years, the ABA has provided leadership in legal ethics and professional responsibility, establishing the foundation for a lawyer's obligations to his client in all representations. In 1908 the ABA adopted the original Canons of Professional Ethics and in 1913 the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA adopted the Model Code of Professional Responsibility that was subsequently adopted by the vast majority of state and federal jurisdictions. In 1983, the ABA drafted the Model Rules of Professional Conduct. All but seven jurisdictions adopted the Model Rules.

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of *amicus* briefs.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

Finally, building on the work of its "Ethics 2000" Commission, the ABA adopted amendments to the Model Rules in February of 2002.

The ABA takes no position on the death penalty as a general matter. However, the ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. The ABA is especially concerned about the effective representation of criminal defendants who might be or have been sentenced to death.[2] One of the several ABA entities that focus on legal issues related to capital punishment is the Special Committee on Death Penalty Representation, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Death Penalty Guidelines"; see* App. A1 – A__,) which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the *minimal resources and practices necessary to provide effective assistance of counsel.*" *Id.*, A__ (emphasis supplied); *see also* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 12 (3d ed. 1992) ("*ABA Providing Defense Services Standards*") ("These guidelines are incorporated by reference into the [*ABA Providing Defense Services Standards*]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function,

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[2] *See, e.g.*, ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 11 (3d ed. 1992) ("*ABA Providing Defense Services Standards*") ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("*ABA Death Penalty Guidelines*"); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 13 (1990).

Standard 4-1.2(c) (3d ed. 1993) ("*ABA Prosecution Function and Defense Function Standards*") ("Defense counsel should comply with the [*ABA Death Penalty Guidelines*]."). The Guidelines were based on the experiences of those who handled post-conviction cases on collateral review and the lessons learned from the pattern of inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. The ABA called upon each death penalty jurisdiction to adopt the *ABA Death Penalty Guidelines*.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough investigation. Such an investigation is necessary with respect to all matters lawyers handle for their clients, but never more so than when lawyers and their clients must be properly informed with regard to the many choices that must be made concerning the guilt/innocence phase and the penalty phase of a capital trial. Decision-makers cannot act reasonably if they lack an informed basis for choosing one defense over another, one expert over none, or the presentation of some facts over others.

In a capital case, effective representation includes a *complete* investigation into all areas from which a reasonable attorney would develop mitigation evidence including, but not limited to, a client's cognitive and neurological condition and history; his family, friends and associates; school, employment and military records; medical history; and incarceration and corrections

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[3] *See id.*

records, as well as other areas on which counsel is put on notice because of the particular facts in the case. A reasonably conscientious investigation into each of those areas is also *thorough.*

Without such an investigation, counsel and client cannot effectively choose what, if any, mitigation evidence to present at trial because they will not know the likely benefits and costs of presenting it. The scope of pre-trial *investigation* is necessarily independent from the scope of trial *presentation*; a decision not to present evidence requires the knowledge of that evidence and its implications just as does a decision to present the evidence. By conducting a complete and thorough pre-trial investigation into mitigation evidence, counsel protects the adversarial nature of the justice system and helps ensure that an individualized determination regarding the appropriateness of the death penalty will be made for the defendant.

The ABA respectfully submits that the *ABA Death Penalty Guidelines* represent a consensus within the profession regarding principles to guide capital defense counsel on the subject of mitigation evidence and the necessity of investigating the same. Long prior to the trial this Court now considers, the ABA informed the legal profession, through the *Guidelines*, about the scope of potentially mitigating evidence that could be available and warned lawyers against incomplete investigations. The *Guidelines* reflect the insight of practitioners with years of experience and the instruction of relevant case law and statutory provisions. The standard of care set forth in the *Guidelines* resulted from the ABA's study of what reasonably performing lawyers were doing and what ineffectively performing lawyers were not doing. The *Guidelines* are proffered to the Court, not as a substitute for counsel's own determination of the necessary scope of investigation presented by the unique character and background of his client, but rather as an essential starting point from which counsel should develop the individualized research necessary to humanize the client.

ARGUMENT

I. THE GUARANTEES OF THE SIXTH AND EIGHTH AMENDMENTS REQUIRE REASONABLE INVESTIGATION OF MITIGATION EVIDENCE.

A. The Sixth Amendment Requires Reasonable Investigation.

The right to effective counsel, which derives from the right to counsel, guarantees a defendant the assistance "necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). As the Court made clear in *Strickland*, either the Government or defense counsel may be responsible for depriving the accused of the benefit of counsel. 466 U.S. at 686. Thus, either governmental stumbling blocks or defense counsel's ineptitude may undermine defense counsel's ability to make strategic and tactical decisions in an independent manner. *See id*. at 686, 689.

As identified by this Court, the basic duties of an effective lawyer are loyalty, avoidance of conflicts of interest, advocacy (described as the overarching duty), and consultation and communication with the client; "[c]ounsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688.

The *Strickland* presumption of effective representation[4] is premised upon a lawyer's strategic decision-making to promote his client's best interest. This presumption fails, however, if any of the assumptions underlying it fail. For example, if a lawyer is burdened by a conflict of

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[4] Under *Strickland*, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. 668 at 689. Thus, a lawyer is presumed effective unless the defendant can show that counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" *id.* at 687, and also that the deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

interest, the Court can no longer assume that a lawyer is acting in the best interests of his client. *See Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978). And, as demonstrated in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), a decision can be unreasonable because it is uninformed:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. . . . The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pre-trial preparation puts at risk both the defendant's right to an "'ample opportunity to meet the case of the prosecution,'" and the reliability of the adversarial testing process.

Id. at 385 (citations omitted).

For the *Strickland* presumption to stand, a lawyer's decisions must be formulated from a reasonable understanding of the law and the facts. *See id*. As with all obligations, the duty to investigate reasonably is not an independent good; rather, it is a means of ensuring that the adversarial process functions properly and that counsel's decisions are reasonable, tactical, and strategic. As a result, if lawyers' decisions are based on ignorance, they are neither reasonable nor strategic. *See, e.g., Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."). If lawyers have not

conducted a reasonable investigation, they do not have a reasonable understanding of the facts; consequently, they have nothing to which to apply their legal skill and judgment.

The *ABA Death Penalty Guidelines* reflect the professional norms in this area. They state that counsel should "conduct independent investigations… immediately upon counsel's entry into the case" and pursue them expeditiously. *See ABA Death Penalty Guidelines*, Guideline 11.4.1 ("Investigation") and cmt. ("Without investigation, counsel's evaluation and advice amount to little more than a guess.").

B. The Eighth Amendment Provides the Right to Present Mitigation Evidence for Use by the Capital Sentencer.

In 1976, this Court issued five decisions evaluating the constitutionality of death penalty statutes enacted by the states: three upholding the statutes, *Gregg v. Georgia,* 428 U.S. 153, 197, 206 (1976), *Proffitt v. Florida*, 428 U.S. 242, 251-52 (1976), *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976), and two striking down the statutes as constitutionally infirm: *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976), [Stanislaus] *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976). Ten years later, this Court summarized the salient distinction between laws that satisfied constitutional mandates and those that did not:

> In the three cases upholding the guided-discretion statutes, the opinions emphasized the fact that those capital schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual. . . . In the two cases striking down as unconstitutional mandatory capital-sentencing statutes, *the opinions stressed that one of the fatal flaws in those sentencing procedures was their failure to permit presentation of mitigating circumstances for the consideration of the sentencing authority.*

Sumner v. Shuman, 483 U.S. 66, 74 (1987) (emphasis supplied). In *Shuman*, this Court focused on the unique nature of mitigating evidence and the constitutional indispensability of access to that evidence, in holding unconstitutional a Nevada statute mandating a capital sentence to any life-term inmate convicted of murder.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 74-75 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

This principle has guided this Court in every evaluation it has made of the constitutionality of a state's sentencing scheme. Indeed, the line of cases culminating in *Mills v. Maryland,* 486 U.S. 367 (1988),[5] held that jury instructions could not serve to preclude jurors from considering mitigating evidence.

Moreover, this Court has made it clear that it is not enough for a defendant to be allowed to develop mitigating evidence; it is not even enough for a jury to be allowed to hear about and consider mitigating evidence. The sentencer must be in a position to *use* the mitigating evidence when deciding whether or not to impose the death sentence. As the Court explained:

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth

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[5] *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (concluding that it was well established that a sentencer may not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense" and "that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence" (citations omitted); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

> Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and *give effect* to [a defendant's mitigating] evidence in imposing sentence." For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."

Penry v. Johnson, 532 U.S. 782, 797 (2001) (internal citations omitted) (emphasis in original).

Likewise, if an aggravating circumstance – which constitutionally must serve to narrow the class of defendants who are death-eligible (*see, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)) – is found to be invalid, then, where the capital sentencing scheme is predicated on the weighing of aggravating and mitigating circumstances, there must be an actual reweighing of the remaining aggravating factors against all of the mitigating evidence, effectuating the "new sentencing calculus." *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (reversing); *see also [Terry] Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (citing Clemons v. Mississippi, 494 U.S. 738, 751-52 (1990))*.

In recognition of the critical nature of mitigation evidence, the *ABA Death Penalty Guidelines* recommend careful preparation by counsel for the penalty phase through proper investigation, consultation with the client, analysis of the prosecution's case, and evaluation of all reasonably available evidence in mitigation. *See ABA Death Penalty Guidelines*, Guideline 11.4.1 ("Investigation"), 11.8.3 ("Preparation for the Sentencing Phase"), 11.8.5 ("The Prosecutor's Case at the Sentencing Phase"), and 11.8.6 ("The Defense Case at the Sentencing Phase").

C. The Guarantees of the Sixth and Eighth Amendments Cannot be Satisfied Without Reasonable Investigation of Mitigation Evidence.

Defense counsel's ineptitude cannot properly be allowed to prevent the sentencer from hearing, considering and giving full effect to the mitigating evidence that it is the defendant's right to present. If lawyers do not articulate to the client the right to have mitigation evidence considered, the scope of that evidence, and the effect that evidence can have, the lawyers become obstacles to a constitutionally fair sentence. Indeed, the fundamental constitutional right to present "humanizing" information rings hollow unless defense counsel is aware of, and advises the defendant about, the breadth of mitigating material about the defendant that is available for use in the penalty phase.

Because the purpose of the penalty phase is to determine whether the individual defendant, having been found guilty, deserves to be put to death, the *nature* of mitigating evidence is fundamentally different from the evidence sought and developed for the guilt/innocence phase. The defense is entitled to present evidence for the purpose of humanizing and individualizing the defendant. In order to develop such evidence for possible presentation, defense counsel must develop a deeper understanding of the defendant's current life and life history than is usually necessary for the guilt/innocence phase. Moreover, in deciding what mitigating evidence to present, counsel must be sensitive to its tone and character.

In *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002), the state court had postulated that the defendant had no mitigation evidence to present, and therefore that the decision to present none had been strategic. The district court disagreed, pointing out that "Brownlee's counsel had not done any investigation into Brownlee's background or character, so they did not know what evidence there might have been to present." *Id*. at 1068. The Eleventh Circuit affirmed,

observing: “counsel’s failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee’s borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee’s death sentence.” *Id*. at 1070. It concluded that counsels’ failure to conduct any mitigation investigation was inherently unreasonable because it deprived the defendant of his opportunity to humanize himself before the sentencer.

The Eleventh Circuit’s reasoning is particularly instructive:

> “[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel’s deficient performance prejudice[s a petitioner’s] ability to receive an individualized sentence.” In this case, counsel’s absolute failure to investigate, obtain, or present any evidence, let alone the powerful, concrete, and specific mitigating evidence that was available, prevented the jurors from hearing anything at all about the defendant before them. An individualized sentence, as required by the law, was therefore impossible. Instead, the jury was asked to decide Virgil Brownlee’s fate without hearing anything about his borderline mental retardation, his schizotypal personality disorder, his antisocial personality disorder, his many drug and alcohol dependencies, or his history of seizures.

Id. at 1074 (citations omitted). See also Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002), *cert. denied*, 122 S. Ct. 2645 (2002); *Coleman v. Mitchell*, 268 F.3d 417, 449-51 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002); *Jermyn v. Horn*, 266 F.3d 257, 307-308 (3d Cir. 2001); *accord [Terry] Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant’s “nightmarish childhood,” borderline mental retardation, and good conduct in prison); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir.

2001) ("[T]here was no strategic decision at all because Shook was ignorant of various other mitigation strategies he could have employed.").[6]

II. TO BE REASONABLE, AN INVESTIGATION OF MITIGATION EVIDENCE SHOULD BE COMPLETE AND THOROUGH.

An investigation that may be adequate for the guilt/innocence phase may be wholly inadequate for the penalty phase. *See*, *e.g., [Terry] Williams v. Taylor,* 529 U.S. at 395 ("We are likewise persuaded that the Virginia trial judge correctly applied both components of [the *Strickland*] standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards -- a judgment barely disputed by the State in its brief to this Court."). *See also Marshall v. Hendricks*, 307 F.3d 36 (3d Cir. 2002) (remanding for further evidentiary development, since the record reflected adequate investigation for the guilt phase but no investigation for the penalty phase).

The ABA has long stressed that investigation into mitigation evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Death Penalty Guidelines*, Guideline 11.4.1(C) ("Investigation"); *see also ABA Prosecution Function and Defense Function Standards*, Standard 4.-4.1 ("Duty to Investigate") ("Defense counsel should conduct a prompt

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[6] Nor may counsel excuse inaction because they think the investigation would be fruitless. Counsel may not "sit idly by, thinking that investigation would be futile." *Voyles v. Watkins*, 489 F. Supp. 901, 910 (N.D. Miss. 1980); *accord Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (counsel's failure to investigate and present mitigating evidence at the penalty phase of the trial, on grounds that he "did not think that it would do any good," constituted ineffective assistance).

investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and *the penalty in the event of conviction*" (emphasis supplied)). By implication, these ABA policies encompass two aspects of investigation: (1) the breadth of the investigation (*where* counsel must research); and (2) the depth of the investigation (*how far* counsel must research in any particular area). In other words, the independent pre-trial investigation into mitigation evidence must be both: (1) complete; and (2) thorough.

A. A Reasonable Mitigation Investigation Is Complete.

The areas of possible mitigation are numerous. They include any evidence that tends to lessen the defendant's moral culpability for the offense or would otherwise support a sentence less than death. *See Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (evidence of defendant's positive adaptation to prison is relevant and admissible mitigating evidence even though it does "not relate specifically to petitioner's culpability for the crime he committed"). Therefore, a reasonable independent pre-trial investigation into mitigation evidence should be "complete" in the sense that counsel should examine all areas where reasonable capital defense attorneys generally search for mitigation evidence *and* any other areas of which counsel are on special notice in their particular case.

The *ABA Death Penalty Guidelines,* adopted in 1989*,* discuss types of mitigation evidence that counsel should investigate, and sources of that evidence, both documentary and through interviews. Counsel should:

> collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

ABA Death Penalty Guidelines, Guideline 11.4.1(D)(2)(C) ("Investigation"). If it seems unnecessary for the ABA to set forth such a commonsense catalogue of areas of inquiry, only a brief perusal of actual "investigations" undertaken shows that it is, indeed, necessary. Counsel in the instant case did not make any effort to follow the guidance set forth in these *Guidelines*.

B. A Reasonable Mitigation Investigation Is Thorough.

Thorough investigation and planning for mitigation must begin immediately upon counsels' acceptance of representation. *See [Terry] Williams v. Taylor*, 529 U.S. 362, 395-396 (2000) (notwithstanding fact that trial counsel "competently handled the guilt phase of the trial," counsel's failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *id.* at 415 (O'Connor, J., concurring) ("counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances" amounted to ineffective assistance of counsel); *ABA Death Penalty Guidelines*, Guideline 11.4.1 ("Investigation"); *ABA Prosecution Function and Defense Function Standards,* Standard 4-4.1(a) ("Duty to Investigate") ("Defense counsel should conduct

a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . .The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

A perfunctory or *de minimis* investigation into one or all areas that a reasonable attorney would research does not satisfy the guarantees of the Sixth and Eighth Amendments. Lawyers, in consultation with their client, cannot make a valid strategic decision about the presentation of mitigating evidence without a reasonable understanding of *all* available mitigating evidence. Skimming through a capital defendant's psychosocial history or, as here, childhood social service records, does not provide the necessary depth of understanding to enable either the lawyers or the client to make informed strategic decisions.

Lawyers need to look reasonably deeply into each mitigation area they investigate (*e.g.* family, friends, co-workers, school records, and medical records). Counsel cannot surrender simply because their first steps are frustrated, or because they find some information that they are unlikely to present. As this Court stated in *[Terry] Williams v. Taylor*:

> Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system -- for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.

529 U.S. at 396.

While this Court has upheld some decisions by counsel not to present mitigating evidence, the Court has premised such findings on counsel's having made fully informed decisions. The Court has looked into the investigation and counsel's handling of the results of the investigation before finding reasonable the decision not to present the evidence that was found. S*ee Darden v. Wainwright*, 477 U.S. 168, 185 (1986) ("The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing."); *Burger v. Kemp*, 483 U.S. 776, 790 (1987) ("Based on these interviews, Leaphart made the reasonable decision that his client's interest would not be served by presenting this type of evidence."); *Bell v. Cone*, 535 U.S. 685, *** (2002)(counsel utilized "what he believed to be the most compelling mitigating evidence in the case" extensively at trial and weighed the possibility of recalling witnesses or calling other witnesses in the penalty phase).

Sometimes, however, even a fully informed decision not to present mitigation evidence can be unreasonable. Once counsel are aware that the evidence exists, they must evaluate its potential benefit or harm by examining it and subjecting it to proper consideration. *See, e.g., Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) ("By the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons' attorney's representation was ineffective."); *accord Karis v. Calderon,* 283 F.3d 1117, 1136 (9th Cir. 2002), *cross-petitions for cert. filed* (Sept. 18, 2002) (No. 02-434); (Sept. 10, 2002) (No. 02-6265) ("Despite his conceded knowledge of this history, counsel failed to present any evidence of Karis's family abuse to the jury.").

C. A Complete and Thorough Mitigation Investigation Is Conducted by Counsel Independently and With the Assistance of Experts.

1. Counsel Should Conduct the Mitigation Investigation Independently.

Lawyers may not rely upon their own client for all of the available information that could be proffered to convince a jury to impose a sentence other than death. Nor may counsel fail to conduct an investigation because of the client's desire not to present mitigating evidence. *See, e.g., Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000) ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility. We find that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors."). *See also Blanco v. Singletary,* 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); *ABA Death Penalty Guidelines*, Guideline 11.4.1(C) ("Investigation") ("The investigation for preparation of sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered").

Counsel should never underestimate how much shame, embarrassment, and anguish certain mitigation evidence, such as childhood sexual abuse or other traumas, mental retardation or other developmental or mental disorders, causes defendants. The defendant may have repressed much of the information. In some cases, the defendant may not even comprehend the information. Even where a defendant is aware of the problem and can identify it, the defendant

may have gone to great lengths to keep the information hidden, and will be at best reluctant to divulge it to a lawyer. *See, e.g., Daniels v. O'Connor*, 243 So. 2d 144, 147 (Fla. 1971) (remarking that a mentally ill defendant "might mislead his counsel as to facts, misinform them as to his relations with other actors in the legal drama, and be utterly unreliable as a witness in his own behalf.") (quoting *State ex rel. Deeb v. Campbell*, 167 So. 805 (Fla. 1936)).[7]

Many capital defendants have had prior experience with defense lawyers, and much of it has been bad, making these defendants even less forthcoming. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 338 (1993) ("Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as 'part of the system' rather than advocates who will represent their interests. . . . [Thus,] a capital defendant . . . understandably will be reluctant to trust his attorney."). Finally, even if the defendant eventually is willing to share the information, this may not occur until much later in the representation, long after it will do the most good.

A history of physical, emotional, and sexual abuse, combined with neurological and psychiatric impairment, including mental retardation, is prevalent among defendants charged with violent crimes. *See*, *e.g.*, Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995); Dorothy O. Lewis et al., *Psychiatric, neurological, and psychoeducational characteristics of 15 Death Row inmates in the United States*, 143:7 Am. J. Psychiatry 838-45 (1986). Moreover, many mentally ill

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7 A defendant may, for example, go to great lengths to hide a developmental delay or mental retardation, but it is imperative that lawyers be aware of these limitations. *See, e.g.,* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 (continued…)

defendants self-medicate with drugs and alcohol, which further compounds their condition. A defendant's perceptions and ability to communicate may be limited by substance abuse, mental illness, or developmental problems.

An additional danger is that counsel, who are untrained and unadvised in these areas, will not know when or to what extent such a limitation exists. Thus, what counsel do not see – and do not secure expert advice on – may limit the lawyers' ability to represent their client and may unreasonably restrict the scope of their investigation. Counsel must therefore rely on sources of information other than the client to obtain all potentially relevant mitigation evidence.

2. Counsel Should Conduct the Mitigation Investigation with the Assistance of Experts.

The duty to consult one or more experts is often of critical importance. Lawyers are not equipped to assess a person's intelligence or mental state, although a client's behavior might put them on notice that these factors are at issue. *See Hull v. Freeman,* 932 F.2d 159, 168 (3d Cir. 1991) ("[F]ew lawyers possess even a rudimentary understanding of psychiatry. They therefore are wholly unqualified to judge the competency of their clients."). A lawyer is an expert in the law, not in psychiatry, medicine, or social work. In addition to the special skills and training required to discover mitigation evidence, complex or apparently conflicting records may need to be explained to the decision-maker by one or more competent experts. *See ABA Death Penalty Guidelines*, Guideline 11.8.6 ("The Defense Case at the Sentencing Phase"). Further, as this Court has recognized, "when the State has made the defendant's mental condition relevant to his

(..continued)

Geo. Wash. L. Rev. 414, 484-86 (1985). *See Atkins v. Virginia*, 536 U.S. 304, 350

(continued…)

criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80.

It is important for defense counsel to secure expert advice for another reason: when the case is one in which the death penalty will be sought, the prosecution regularly calls experts. *See* Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 24 (1998) ("*Federal Death Penalty Cases"*) (discussing federal death penalty cases), *available at* http://www.uscourts.gov/dpenalty/1COVER.htm (reporting that "both the prosecution and the defense rely more extensively on experts in death penalty cases" than in other criminal cases). *See People v. Bell*, 505 N.E. 2d 365, 371 (Ill. App. 1987) (finding a lack of zealous representation where defense counsel did not seek an independent evaluation to counter the psychiatric report proffered by the prosecutor). The penalty phase, no less than a trial, is an adversary proceeding. Lawyers must be prepared to meet the prosecutor's evidence as well as plead on their client's behalf.

(..continued)

(2002) (holding that mentally retarded defendants may not constitutionally be executed).

III. COUNSEL HAS AN ETHICAL OBLIGATION TO CONDUCT A REASONABLE INVESTIGATION INTO MITIGATION EVIDENCE.

The ethical obligation of a lawyer in a capital case with respect to mitigation matters is no different from the ethical obligation all lawyers have to premise informed strategic decision making upon an investigation into the law and facts sufficient to make the decisions informed ones. This obligation is reflected in the ABA's Model Rules of Professional Conduct and every state's ethical code which uniformly require complete and thorough investigation in order for a lawyer to provide competent and diligent counsel. *See* Model Rules of Professional Conduct R. 1.1 & R. 1.3 (2002); *see also* Peter A. Joy and Robert R. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 Clinical L. Rev. 493, 497 n.11 (2002). All lawyers are bound by the obligations of the applicable rules of professional conduct. As this Court recognized in *Strickland*, the function of the ethical codes is to enforce counsel's adherence to his basic duties: loyalty, avoidance of conflicts of interest, advocacy, consultation and communication with the client, and skill and knowledge. 466 U.S. at 688. The Model Rules classify these duties as duties of competence, diligence, and communication. *See* Model Rules 1.1, 1.3, 1.4. The Model Rules, like *Strickland*, employ a standard of reasonableness to assess a lawyer's behavior. Using "the skill and knowledge normally possessed by members of that profession or trade in good standing . . .." fulfills the duty of competence. Restatement 3d at 952 cmt. b. (quoting Restatement (Second) of Torts § 299A). A lawyer violates his duties of competence and diligence when he fails to prepare adequately and fails to inquire into or suitably evaluate the factual elements of the case before him. *See* Restatement (Third) of the Law

Governing Lawyers at § 16 cmt.d; § 52 cmt. c (2000); Model Rules of Professional Conduct, Rule 1.1 cmt. 5 (2002).

When courts evaluate claims of attorney incompetence or lack of diligence, they look to two things: (1) what is at stake and (2) whether a lawyer reached a tactical decision based on the facts and the law, or whether he merely *surmised* that a particular course of action should be undertaken. *See* Model Rules of Professional Conduct, Rule 1.1 cmt. 5 (2003) ("[M]ajor litigation… ordinarily require[s] more extensive treatment than matters of lesser complexity and consequence."); 4 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 30.27 at 528 (5th ed. 2000). *See also Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987).

Although the duties to be competent and diligent are distinct from the duty to communicate, a lawyer cannot fulfill the duty to communicate with his client if he has not first been competent and diligent. *See e.g., Attorney Grievance Comm'n v. Zdravkovich*, 762 A.2d 950, 963-64 (Md. 2000) (failure to exercise diligence, leading to the failure to keep the client reasonably informed). If a lawyer does not conduct an adequate investigation into all potentially available areas of mitigation evidence that can be presented in the penalty phase, he will not have sufficient information to make informed decisions as to those decisions he will make; nor will the client have sufficient information to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." *See* Model Rules of Professional Conduct Rule 1.4 cmt. 5 (2002).

The duty to communicate takes on added significance as the role of the client becomes more important to the decision making process. That role is recognized in the rules of professional conduct that specifically address the allocation of responsibility between the lawyer and the client. As the Model Rules observe, "[The] client has ultimate authority to determine the

purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Model Rules of Professional Conduct, Rule 1.2, cmt. 1 (2002). Thus, the ABA's ethical standards for the profession attach the same importance to full investigation and consultation with the client as is reflected in the constitutional jurisprudence of capital litigation.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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