No. 02-8286

In The
Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

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

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Dated: July 11, 2003

TABLE OF CONTENTS **Page**

TABLE OF CONTENTS **Page**

TABLE OF CONTENTS **Page**

TABLE OF CONTENTS **Page**

TABLE OF AUTHORITIES **Page**

CASES

AMERICAN BAR ASSOCIATION MATERIALS

TABLE OF AUTHORITIES **Page**

TABLE OF AUTHORITIES **Page**

MISCELLANEOUS

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE 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, thereby establishing the foundation for a lawyer's obligations to his client in all representations. In 1908, the ABA adopted

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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. In accordance with Rule 37.3, two letters are being filed concurrently with this brief granting permission by both parties to the filing of this *amicus* brief.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. 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.

the original *Canons of Professional Ethics*, and in 1913 the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA issued the *Model Code of Professional Responsibility*, which subsequently was adopted by the vast majority of state and federal jurisdictions. In 1983, the ABA drafted the *Model Rules of Professional Conduct*, since adopted by all but seven jurisdictions, and in February 2002, the ABA approved amendments to the Rules consistent with recommendations of its "Ethics 2000" Commission.

In addition, the ABA has adopted numerous policies concerning the administration of justice and effective and ethical representation by both prosecution and defense counsel. These policies, addressing the due process and right to counsel guarantees under the Constitution,[2] include the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*,[3] *ABA Standards for Criminal Justice Discovery and Trial by Jury*,[4] and *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[5]

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[2] Relevant portions of the policies cited herein are attached hereto at Appendix A.

[3] *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* (3d ed. 1993) ("ABA Prosecution Standards").

[4] *ABA Standards for Criminal Justice Discovery and Trial by Jury* (3d ed. 1996) ("ABA Criminal Discovery Standards").

[5] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) ("ABA Death Penalty Guidelines").

This case involves claims both of inappropriate conduct by counsel for the prosecution and of ineffective assistance of counsel for the defendant. These claims fall within the scope of the ABA Standards that have been developed for prosecutors in all cases and for defense counsel in death penalty cases. Although the ABA Standards do not necessarily establish constitutional guidelines for counsel, this Court previously has cited to the ABA's Standards when addressing constitutional claims. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Indeed, in its recent decision in *Wiggins v. Smith*, 71 U.S.L.W. 4560 (U.S. June 26, 2003), *rev'g sub nom. Wiggins v. Corcoran*, 288 F. 3d 629 (4th Cir. 2002), this Court cited extensively from various ABA Standards in addressing the defendant's Sixth Amendment claims. "Prevailing norms of practice as reflected in the American Bar Association Standards and the like . . . are guides to determining what is reasonable." *Wiggins*, 71 U.S.L.W. at 4563 (quoting *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984)). The Court's consideration of the ABA Standards similarly would be appropriate in this instance.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is essential to the fair administration of the death penalty in the United States that both prosecutors and defense counsel undertake their representation appropriately, effectively, and ethically. Due process demands that the ultimate penalty in our justice system not be implemented unless both the defendant's guilt and the existence of aggravating factors have been established clearly and fairly following the presentation of all relevant evidence. A death sentence must be called into serious question if it is found that the prosecution has withheld material evidence from the

defense or has presented false testimony, or that defense counsel has conducted an inadequate investigation or examination of witnesses or has failed to present mitigating evidence.

ABA Standards Applicable to Counsel for the Prosecution

ABA Prosecution Standard 3-1.2(c) provides that "[t]he duty of the prosecutor is to seek justice, not merely to convict." The Commentary to this Standard states:

> Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent, as well as to convict the guilty, to guard the rights of the accused, as well as to enforce the rights of the public.

ABA Prosecution Standard 3-1.2 cmt. at 5.

Although this Standard cannot be equated to any specific constitutional due process requirement, a number of other ABA Standards intended to uphold constitutional due process rights do flow directly from this same proposition that it is the prosecutor's duty to seek justice and protect the innocent.

For example, several ABA Standards deal with the prosecution's obligation to disclose to the defense information that tends to negate guilt or mitigate the offense charged,[6] statements made by witnesses to law enforcement

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[6] ABA Prosecution Standard 3-3.11(a); ABA Criminal Discovery Standard 11-2.1(a)(viii).

officials,[7] and the relationship between the prosecution and any witness whom the prosecution intends to call at trial.[8]

These ABA Standards, by helping ensure that the defendant has the opportunity to present all relevant information at trial regarding his guilt or appropriate punishment, reinforce a core principle of constitutional due process. As this Court has held:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly . . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .

Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

In this case, notwithstanding both the prosecution's assurances that it would disclose to Petitioner all information called for by the ABA Standards and notwithstanding the Petitioner's discovery requests for this information, it is undisputed that the prosecution failed to make such information available to the Petitioner, in violation, at a minimum, of applicable ABA Standards addressing constitutional due process concerns.

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[7] ABA Criminal Discovery Standard 11-2.1(a)(ii).

[8] *Id*. at 11-2.1(a)(iii).

The ABA Prosecution Standards regarding disclosure not only address due process concerns, but also are relevant to the exhaustion issue in this case. The prosecution's disclosure obligations are continuing in nature, applicable even after the trial has ended, precisely because lack of disclosure at any time could result in a miscarriage of justice. If material information is withheld after conviction, counsel pursuing post-conviction *habeas corpus* relief have much more difficulty in ascertaining the existence of such information and raising claims that depend upon that information.

Another relevant ABA Standard provides that prosecutors should not knowingly offer false evidence or fail to seek the withdrawal of such evidence upon discovery of its falsity.[9] The rationale for prohibiting the presentation of false testimony by the prosecution is apparent. As this Court has held on a number of occasions, it is "clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio*, 405 U.S. at 153.

In this case, the prosecution violated this Standard by presenting indisputably false testimony by two witnesses (Farr and Cook). Farr falsely asserted that he was not an informant for the prosecution and provided false testimony concerning Petitioner's purported use of his gun. Tr. Ex. B-01 ¶ 8; 10 SR at 2500-02; 9 SR at 2279. Cook testified falsely that he had not discussed his testimony with the prosecution before the trial. Tr. at 45-47; Tr. Ex. B-04.

In a case such as this one, where a death sentence is involved, the constitutionality of the prosecution's use of

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[9] ABA Prosecution Standard 3-5.6(a).

false testimony in obtaining that sentence should be examined closely.

ABA Standards Applicable to Counsel for the Defendant

The ABA Death Penalty Guidelines require that defense counsel conduct a thorough and independent investigation not only of the factors relating to the guilt phase of a death penalty proceeding, but also of the factors relating to the penalty phase.[10] As the Commentary to the Guidelines explains, such an investigation is necessary for counsel to develop trial strategy in both phases of the trial. Investigation also is essential in order for defense counsel to present a coherent case in the penalty phase and to cross-examine the prosecution's witnesses and rebut the prosecution's evidence.[11]

This continuing obligation of counsel to investigate in order to represent their client adequately during the penalty phase of a trial is consistent with this Court's prior holdings on the right to counsel. As the Court held in *Williams*, 529 U.S. at 393, a death penalty defendant has "a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *See also Wiggins*, 71 U.S.L.W. at 4563-4564.

Defense counsel in this case indisputably failed to conduct the thorough and independent investigation called for under the ABA Guidelines. Indeed, counsel did not undertake any significant preparation at all for the penalty

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[10] ABA Death Penalty Guidelines 10.7.A, 10.11.A.

[11] *See* ABA Death Penalty Guideline 10.7 cmt. at 81-86.

phase. Counsel failed to conduct an investigation of the Petitioner's social history, failed to interview the prosecution's two penalty phase witnesses (Farr and Jefferson), and failed to prepare the witnesses who testified for the Petitioner. Individually and collectively, these failures raise significant Sixth Amendment concerns.

ARGUMENT

I. THE OBLIGATIONS OF THE PROSECUTION

A. THE PROSECUTION HAS AN OBLIGATION TO MAKE MATERIAL INFORMATION AVAILABLE TO THE PETITIONER PRIOR TO THE TRIAL

1. Applicable ABA Standards

There are a number of ABA Standards that address the prosecution's obligation to make material information available to the defense.

Paragraphs (a) and (b) of ABA Prosecution Standard 3–3.11 – Disclosure of Evidence by the Prosecutor – provide as follows:

> (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

> (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

Paragraphs (a)(ii), (iii) and (viii) of ABA Criminal Discovery Standard 11-2.1 – Prosecutorial Disclosure – provide as follows:

> (a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material:
>
> . . . .
>
> (ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.
>
> (iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.
>
> . . . .

> (viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

The prosecutor's obligation to disclose relevant information also is incorporated into the ABA's *Model Rules of Professional Conduct* ("MRPC"). In particular, MRPC R. 3.8(d) provides that the prosecutor in a criminal case shall:

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The ABA does not assert that its Standards and Model Rules, in and of themselves, establish constitutional standards by which prosecutorial conduct should be evaluated in order to determine the validity of a conviction.[12]

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[12] ABA Prosecution Standard 3-1.1 provides that the Standards are to be used as a guide to professional conduct and performance and not as criteria for the judicial evaluation of prosecutorial misconduct or the validity of a conviction. However, this Standard goes on to provide that the ABA Standards "may or may not be relevant in such judicial evaluation, depending upon all the circumstances." *Id.*

However the ABA Standards and Model Rules regarding disclosure by the prosecution are intended to implement generally this Court's rulings in *Brady* and its progeny. They therefore may be helpful in the evaluation of the constitutional issues raised by the Petitioner regarding prosecutorial misconduct. Indeed, this Court has cited ABA Prosecution Standard 3-3.11(a) in describing generally the obligation of the prosecution to disclose information regarding a prosecution witness. *See Giglio*, 405 U.S. at 153-54.[13]

The reason for the constitutional disclosure requirement is, as this Court held in *Brady*, the "avoidance of an unfair trial to the accused." 373 U.S. at 87. The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Justice is done when evidence favorable to the defendant is disclosed because such evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

2. Factors Bearing on the Materiality of Suppressed Evidence

It is not enough simply to show that the prosecution withheld information from the defendant. An important element in considering *Brady* claims is the materiality of the withheld information. *See, e.g., Bagley*, 473 U.S. at 674-76.

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[13] This Court cites in *Giglio* to other ABA Standards as well. *Id.* at 154 (citing to ABA Project on Standards for Criminal Justice, Discovery & Procedure Before Trial § 2.1(d) (approved Draft 1970) (current version at ABA Criminal Discovery Standard 11-2.1(a))).

The ABA takes no position on whether the information withheld by the prosecution here satisfies this Court's materiality standard. However, ABA Criminal Discovery Standard 11-2.1(a), quoted in relevant part above, sets forth a number of specific categories of information that should be disclosed by the prosecution. These specific categories of information represent the types of information that are most likely to be material. This Standard therefore is applicable to this Court's consideration of the materiality of the information that the prosecution indisputably withheld in this case.

a. Prosecution Witness Farr's Status as an Informant

Subparagraph (a)(iii) of ABA Criminal Discovery Standard 11-2.1 requires that the prosecution disclose the nature of any relationship that it has with any of the witnesses that it calls, including "any agreement [or] understanding … that constitutes an inducement for the cooperation or testimony of the witness." The Commentary to this subparagraph makes clear that it includes an obligation to disclose whether a witness is a government informant. *Id*. cmt. at 24 ("Under this provision, the government is required to disclose, first of all, whether any of its trial witnesses are . . . informants . . . .").[14]

The obligation to disclose the nature of the relationship between the prosecution and its witnesses is raised in this Petition with respect to two of the State's witnesses. It is uncontested that Witness Farr was a

[14] In *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957), this Court held that a defendant has the right to learn the identity of any informant whose testimony might be helpful to the defense.

government informant who had been paid by Deputy Sheriff Huff to obtain the Petitioner's gun. It also is uncontested that the State withheld this fact from the Petitioner not only during the trial, but also during the Petitioner's three state *habeas* proceedings. Such withholding violated ABA Criminal Discovery Standard 11-2.1(a)(iii).

The mere fact of a relationship between the State and a witness that can influence the witness's testimony constitutes strong impeachment evidence, as this Court found in *Giglio*. 405 U.S. at 154-55. Indeed, in *Giglio*, this Court reversed the conviction because the prosecution failed to disclose a promise of immunity that it had made to the chief prosecution witness. *Id.*

In this case, however, there is more than the mere fact of the relationship that bears on the materiality of the withheld information. Witness Farr was one of two prosecution witnesses to testify at the penalty phase regarding the future dangerousness of the Petitioner. Farr testified at trial that the Petitioner had wanted to retrieve his gun so that he could commit armed robberies. 10SR at 2500-02. This testimony was characterized by the prosecution as being of "upmost importance" in its argument to the jury that imposition of a death sentence was appropriate. 10SR at 2579. But the testimony was false. The undisclosed fact was that Farr, at Deputy Sheriff Huff's direction, had asked the Petitioner to retrieve his gun; thus, Petitioner had not expressed any motive indicative of future dangerousness. Tr. Ex. B-01 ¶ 8.

If, as required by subparagraph (a)(iii) of ABA Criminal Discovery Standard 11-2.1, Farr's status as an informant directed to request Petitioner to retrieve the gun

had been "disclosed and used effectively," [15] counsel for the defense could have countered the prosecution's purported showing that the Petitioner would be dangerous in the future if not executed.

b. Prosecution Witness Cook's Relationship with the Prosecution

The prosecution's undisclosed relationship with Witness Cook also potentially violates subparagraph (a)(iii) of ABA Criminal Discovery Standard 11-2.1. Petitioner asserts that Cook's testimony was given in exchange for a promise not to prosecute other charges against Cook, a claim that the Respondent disputes. To the extent that this Court determines that Cook's testimony was given pursuant to an understanding with the prosecution, subparagraph (a)(iii) requires that fact to have been disclosed. Under *Giglio,* such a failure to disclose would be a material factor. 405 U.S. at 153-54.

c. Transcript of Cook Interview

Even disregarding whether there was any understanding between the prosecution and Cook, it is undisputed that the prosecution withheld a 74-page transcript of a pre-trial interview with Cook. Tr. at 45-47; Tr. Ex. B-04. Failure to disclosure this transcript to the defense is a violation of ABA Criminal Discovery Standard 11-2.1, subparagraph (a)(ii), which requires production of written statements of persons who offer information regarding the offense charged. If this interview transcript had been available to defense counsel, it could have been used to impeach Cook's assertion that he had not discussed his testimony with the prosecution. In addition, the transcript

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[15] *Bagley*, 473 U.S. at 676.

contained other impeachment material, such as information contradicting the official statement by Cook that was turned over to the Petitioner, as well as expressions of doubt by law enforcement officials and the prosecutor regarding Cook's credibility. Tr. at 45-47; Tr. Ex. B-04.

B. THE PROSECUTION HAS AN OBLIGATION TO MAKE INFORMATION AVAILABLE TO THE PETITIONER SUBSEQUENT TO THE TRIAL

Farr's status as an informant never was disclosed or even acknowledged by the prosecution until revealed by Deputy Sheriff Huff during the Petitioner's federal *habeas* proceeding. Tr. at 86.[16] As a result, this evidence was not considered in the state *habeas* proceedings. The Fifth Circuit found that the exhaustion doctrine barred use of this evidence for the first time in the federal proceedings. *Banks v. Cockrell*, No. 01-40058, slip op. at 19-20 (5th Cir. Aug. 20, 2002). Petitioner now raises the issue of the extent to which he had cause for his failure to present evidence regarding Farr's status in the state proceedings.

In *Strickler*, this Court found that a claim based upon withheld evidence is not procedurally barred when the failure results from: (a) the failure of the prosecution to produce the evidence; (b) the petitioner's reliance on the prosecution's open file policy; and (c) the State's assurances during the state *habeas* proceeding that the petitioner has received everything known to the government. *Strickler*, 527 U.S. at 289. This Court left open the question of

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[16] Deputy Sheriff Huff revealed the connection at the hearing only after the Petitioner located Farr in California and obtained the declaration from him.

whether any one or two of these factors could overcome a failure to present the evidence in state *habeas* proceedings. *Id.*

Although the ABA takes no position on whether the Petitioner is barred from raising the evidence in his federal petition as a consequence of his failure to present the evidence in the state proceedings, several relevant ABA Standards address the prosecution's obligation to have made the materials available to the Petitioner after the trial and prior to the conclusion of the Petitioner's state *habeas* proceedings.

First, ABA Criminal Discovery Standard 11-4.1(c) provides that each party has "a continuing obligation to produce discoverable material to the other side." The Commentary to this Standard makes clear that the obligation continues after trial: "Even after trial . . . the discovery of exculpatory material may require reevaluation of the fairness of the conviction or of the sentence." ABA Criminal Discovery Standard 11-4.1 cmt. at 69. The prosecution's failure to make the information regarding Farr available during the state *habeas* proceedings clearly violated this obligation, and, if the information had been made available to the Petitioner, it clearly could have been presented in earlier proceedings.

Second, ABA Prosecution Standard 3-3.11(c) provides that "[a] prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." The Commentary to this Standard expands upon this obligation as follows:

> Just as it is unprofessional for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the

> accused in order to provide a "free hand" in the client's defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all relevant evidence without regard to its impact on the success of the prosecution.

ABA Prosecution Standard 3-3.11 cmt. at 83 (footnote omitted).

In this case, the Petitioner alleged in his third state *habeas* petition that Farr was indeed a state informant. Rather than investigate this allegation – which would have led to the State's admission of its validity during the state *habeas* proceeding – the prosecution chose not to respond to the allegation. As a consequence, the state court did not initiate a hearing on this issue and did not discuss the issue in its decision. Had the prosecution complied with Standard 3-3.11(c), the issue would have been presented to and addressed by the state court.

C. THE PROSECUTION HAS AN OBLIGATION NOT TO PRESENT FALSE TESTIMONY KNOWINGLY

A much older and more fundamental due process rule than the disclosure requirement announced in *Brady* is the rule against obtaining a conviction based upon perjured testimony. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court stated that due process is violated:

> if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

This holding was underscored in *Pyle v. Kansas*, 317 U.S. 213, 216 (1942), where the Court stated that "allegations [of the use of perjured testimony to obtain a conviction] sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody." In 1959, this Court held that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Consistent with this longstanding series of decisions, ABA Prosecution Standard 3-5.6(a) provides that:

> A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

Citing *Napue*, the Commentary to ABA Prosecution Standard 3-5.6(a) states that the Standard applies to evidence going to the credibility of a witness, as well as directly to the guilt of the defendant. ABA Prosecution Standard 3-5.6 cmt. at 101-02 & n.2.

1. Prosecution Witness Farr's False Testimony

Witness Farr's testimony was false in ways that went both to his credibility as a witness and to the question of the Petitioner's future dangerousness. This question was critical to Petitioner's due process rights because, without a finding of future dangerousness, the jury could not have imposed the death penalty.

As noted above, Farr's trial testimony that the Petitioner wanted to retrieve his gun to commit armed robberies is inconsistent with Farr's statement in *habeas* proceedings that he himself had suggested that Petitioner retrieve the gun. Tr. Ex. B-01 ¶ 8. The false testimony about the Petitioner's intent to commit armed robberies in the future clearly was important to the determination of the future dangerousness issue. Moreover, Farr's credibility on this point at trial arguably was enhanced by his additional false testimony that he was not a government informant.

It now is undisputed that Farr's testimony on both issues was false. The prosecution's actions therefore violated ABA Prosecution Standard 3-5.6(a), which requires the prosecution not to solicit such testimony and to correct the testimony if it was unsolicited.

2. Prosecution Witness Cook's False Testimony

Witness Cook testified at trial that he had spoken to no one in preparation for his testimony prior to trial. 9SR at 2314. The 74-page transcript of his interview by law enforcement officials, including handwritten notes by one of the prosecutors, conclusively demonstrates that this testimony was untrue. Tr. Ex. B-04. This transcript shows that the prosecution spent a significant amount of time with

Cook to review his statement prior to the trial. In fact, Cook confirmed at the federal *habeas* hearing that he had rehearsed his testimony with the prosecution. Tr. at 135, 137-38, 144-46. Yet, not only did the prosecution fail to correct this false testimony; the prosecution affirmatively argued to the jury that Mr. Cook's testimony was completely truthful. 10SR at 2450.

The prosecution's presentation of this false testimony, which enhanced Cook's credibility, clearly violated ABA Prosecution Standard 3-5.6(a). But its presentation also raises serious due process concerns, particularly given the prosecution's endorsement to the jury of the truthfulness of the testimony.

II. THE OBLIGATIONS OF DEFENSE COUNSEL IN DEATH PENALTY CASES

A. DEFENSE COUNSEL HAS AN OBLIGATION TO CONDUCT A THOROUGH AND INDEPENDENT INVESTIGATION WITH RESPECT TO PENALTY

The second question raised in the Petition is the extent to which the Fifth Circuit's decision contravenes *Strickland* and *Williams* in the way it weighed the materiality of the mitigation evidence that could have been presented if defense counsel had conducted an adequate investigation. The ABA Death Penalty Guidelines, which address in detail the duty to investigate and the potential materiality of the evidence that comes from such an investigation, may aid in an analysis of this issue.

1. Applicable ABA Guidelines

One of the most important obligations for defense counsel in death penalty cases is the obligation to investigate. ABA Death Penalty Guideline 10.7.A provides that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The obligation to investigate with respect to penalty, as well as guilt, is re-emphasized in ABA Death Penalty Guideline 10.11, which addresses the minimum requirements of defense counsel in preparing for the penalty phase of a proceeding. Guideline 10.11.A provides that:

> As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

Although stated as a separate obligation, the need for investigation does not exist in a vacuum. An adequate investigation is essential for counsel to present a case on the penalty issue. It is required in order to cross-examine the prosecution's witnesses effectively and to rebut aggravating factors presented by the prosecution. An adequate investigation also is necessary in order for the defense to present mitigating circumstances that will support a finding that the death penalty should not be imposed. As the Commentary to ABA Death Penalty Guideline 10.7 notes:

> Because the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the

> defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."

ABA Death Penalty Guideline 10.7 cmt. at 82. (quoting *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393 (1987)) and Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion, Jan./Feb. 1999, at 35).

As detailed below, the Fifth Circuit found that defense counsel's investigation of mitigation and impeachment evidence concerning penalty did not meet the minimum required level of reasonableness (a finding that the Respondent appears not to contest). *Banks*, slip op. at 36. The court went on to find, however, that the Petitioner was not prejudiced by his counsel's failure to conduct an adequate investigation. *Id.* at 39.

In *Williams*, this Court cited to the ABA's Standards for Criminal Justice, adopted in 1980, in describing trial counsel's obligation to conduct a through investigation of a defendant's background. 529 U.S. at 396 (citing to *ABA Standards for Criminal Justice* 4-4.1 cmt. at 4-55 (2d ed. 1980)). The Court concluded that defense counsel's failure to conduct such an investigation violated Williams's Sixth Amendment right to counsel. *Williams*, 529 U.S. at 398-99. The ABA Death Penalty Guidelines describe the specific application of this obligation to death penalty cases, and in *Wiggins* this Court referred to both the 1980 Standards for Criminal Justice and the ABA Death Penalty Guidelines in discussing defense counsel's obligation to investigate. *Wiggins*, 71 U.S.L.W at 4563-4564. The ABA Death Penalty Guidelines are similarly applicable to a determination in this case of whether defense counsel's

performance was sufficiently prejudicial to violate the Petitioner's Sixth Amendment rights.

2. Defense Counsel's Failure to Obtain Social History and Investigate Mitigating Psychological Evidence

It is uncontested that the Petitioner's trial counsel failed to obtain a social history or investigate mitigating psychological evidence. The Fifth Circuit found that this failure fell below an objective level of reasonableness. *Banks*, slip op. at 36.

ABA Death Penalty Guideline 10.11.F.2 describes the type of testimony this investigation is intended to support:

> Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor[.]

The Commentary to Guideline 10.11 expands upon the need for such testimony:

> Since an understanding of the client's extended, multigenerational history is often

> needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and, in any event, are almost always crucial to explain the significance of the observations. For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control.

ABA Death Penalty Guideline 10.11 cmt. at 110 (footnotes omitted).

In *Williams*, this Court provided a similar rationale regarding the need for social history and expert psychological mitigating testimony. In that case, this Court found that Williams was denied effective assistance of counsel by his counsel's failure, among other things, to investigate his social history. *Williams*, 529 U.S. at 396. This Court found that even if the other available mitigating evidence may not have rebutted a finding of future dangerousness, the social and psychological evidence still might have prevented a jury finding that a death sentence was appropriate:

> [T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. *See Boyde v. California*, 494 U.S. 370, 387

> (1990). The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.

529 U.S. at 398. This Court found that Williams "had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Id.* at 393.

In *Wiggins*, this Court again found that defense counsel's investigation failed to meet constitutional standards when counsel failed to adequately investigate the defendant's social history. *Wiggins,* 71 U.S.L.W. at 4567. This Court found that "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 4568. The failure of defense counsel to investigate in *Wiggins* was, as the Fifth Circuit found here, "the result of inattention, not reasoned strategic judgment." *Id*. at 4567.

3. Defense Counsel's Failure to Investigate and Prepare Mitigating Fact Witnesses

The record shows that Petitioner's trial counsel did not spend significant time investigating or interviewing mitigating fact witnesses, and in particular, failed to discuss with the Petitioner's parents the nature of the testimony that he wished to elicit from them about mitigating aspects of Petitioner's life. Tr. at 216-17, 224, 227. This lack of

investigation and preparation was found by the Fifth Circuit to be deficient performance. *Banks*, slip op. at 39.

ABA Death Penalty Guideline 10.11.F.1 addresses the importance of various kinds of mitigation testimony:

> Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death.

In addition, ABA Death Penalty Guideline 10.11.F.4 requires counsel to consider presenting "[w]itnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones."

The significance of fact witness mitigation testimony is very similar to the significance of psychological mitigation testimony, described previously. As the Court explained in *Williams*, testimony of this nature could cause the jury to decide not to impose a death sentence even if the testimony does not go directly to the issue of future dangerousness that is the question directly before the jurors. *Williams*, 529 U.S. at 398.

4. Defense Counsel's Failure to Interview Prosecution Witness Jefferson

ABA Death Penalty Guideline 10.11.I provides that "Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate,

misleading or not legally admissible." The Commentary to this Guideline elaborates upon this obligation:

> Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase. Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted or undercut.

ABA Death Penalty Guideline 10.11 cmt. at 113 (footnote omitted).

The record reflects that Petitioner's defense counsel did not interview prosecution Witness Jefferson, who was the only prosecution witness other than Witness Farr to testify for the prosecution at the penalty phase. Tr. at 167-168. Jefferson testified at trial that the Petitioner had been the aggressor in a fight they had shortly before the Petitioner was arrested, and that the Petitioner had threatened him. 10SR at 2493-94. In the federal *habeas* proceeding, however, Jefferson testified that *he himself* in fact had been the aggressor in the fight. Tr. at 166. Jefferson further stated that he would have been willing to talk to defense counsel prior to the trial, but that defense counsel never had attempted to interview him. *Id*. at 168.

The Fifth Circuit found that this failure to interview Jefferson also fell below an objective standard of reasonableness, but that the failure was not prejudicial to the Petitioner. *Banks*, slip op. at 41-43. Although the ABA takes no position on the Fifth Circuit's holding regarding

prejudice, counsel's failure to attempt to interview Jefferson is a clear violation of ABA Death Penalty Guideline 10.11.I that raises serious constitutional concerns.

CONCLUSION

The actions of both the prosecutors and defense counsel in this case departed from the standards and guidelines established by the ABA for prosecutors in all cases and for defense counsel in death penalty cases. The ABA respectfully urges this Court to consider these standards and guidelines and the bases underlying them in adjudicating Petitioner's claims of constitutional violations in this case.

Respectfully submitted,

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APPENDIX A

RELEVANT PROVISIONS FROM ABA STANDARDS

1. ABA Prosecution Standards

3-1.1 – The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

3-1.2 – The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

3-3.11 – Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

3-5.6 – Presentation of Evidence

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

2. ABA Criminal Discovery Standards

11-2.1 – Prosecutorial Disclosure

(a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, coping, testing, and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to

the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, documents, photographs,

buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and, insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial.

(vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation, or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

11-4.1 – Timely Performance of Disclosure

(a) Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable in the process. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

(b) The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.

(c) Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.

3. ABA Death Penalty Guidelines

10.7 – Investigation

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

10.11 – The Defense Case Concerning Penalty

A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.

F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2. Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;

3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;

5. Demonstrative evidence, such as photos, videos, and physical objects (*e.g.*, trophies,

artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses

associated with the government, defense counsel should:

1. carefully consider

   a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

   b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview ; and

3. attend the interview.

K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

4. Model Rules of Professional Conduct

3.8 – Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence

about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.