THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001945

Charles Christopher Williams, Appellant,

v.

The State of South Carolina, Respondent.

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
2010-CP-23-~~0840~~ 9792

2013 JUN 14 P 4:16
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

CHARLES CHRISTOPHER WILLIAMS,

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent.

POST-TRIAL BRIEF FOR PETITIONER

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STATEMENT OF FACTS

Around 10:00 a.m. on September 3, 2003, Petitioner entered a Bi-Lo grocery store in Greenville where his former girlfriend, Maranda Williams (Victim), worked. Petitioner accosted Victim and forced her into an office in the bakery/deli. Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release Victim. When Victim attempted to escape Petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Petitioner. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged.

Petitioner was tried and found guilty of murder, kidnapping, and possession of a firearm during the commission of a violent crime. During the sentencing phase of the trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed while in the commission of kidnapping; and (2) the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (C)(a)(3) (2003 & Supp. 2007). As its primary witness, the State called Dr. Pamela Crawford. Dr. Crawford testified that she was associated with SLED and called by the Greenville County Solicitor's Office within an hour and fifteen minutes of the crime to "provide assistance." (This is the

identical statement of facts from the Supreme Court opinion with the exception that appellant was changed to petitioner and a footnote was removed that described Dr. Crawford's employment responsibilities with the Department of Mental Health. *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010).

STANDARD OF REVIEW

In a Post Conviction Relief action, a petitioner must establish that counsel's performance fell below an objective standard of reasonableness, and that the petitioner suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Prejudice is established if, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

STATEMENT OF FACTS REGARDING CLOSING ARGUMENT

From the opening to the closing the solicitors repeatedly told the jury that the legislature had limited the cases where the solicitor could seek the death penalty and highlighted the Solicitor's decision making process:

> "Part of that, when the legislature passed the laws, said that the state could not seek the death penalty in every case. We talked a little bit about this. It has to be a murder plus an aggravating circumstance. And I actually went back and looked at the statute. There are 11 aggravating circumstances outlined in the statute. So, if it's murder and we don't have one of those aggravating circumstances, we can't even seek the death penalty.
>
> So it's a very limited situation. There are only limited crimes for which we can even seek the death penalty. And out of those 11 we are going to rely on two. We only have to prove one. We're going to offer to you two different aggravating circumstances for your consideration, your determination."[1]

ROA 2112, Line 7. In closing the solicitor continued go outside the record and tell the jury that the legislature had limited the instances when he could seek the death penalty and that he also made the difficult decision to seek the death penalty and that he shared this difficult responsibility and decision with them.

Closing:

> "The State is asking you to impose the death penalty. That's what we're here for and what this section is about. This phase of this case, you may hear arguments from the defense. I have to anticipate what they may say. I don't know what they will say. But you may hear arguments from defense counsel that tries to persuade you that giving the death penalty is somehow wrong or that killing the

[1] The solicitor withdrew the public place aggravator before sentencing arguments. ROA 2354.

defendant is somehow wrong. Those phrases you may hear and that try to indicate to you that what you're doing may not be right.

Let me talk a little bit about that. I want to put it in context. The state, represented by the solicitor, can in certain circumstances under our law ask for the imposition of the death penalty. However, it is only in limited circumstances, specifically murder cases, and only those murder cases in which is specifically defined by our statutory law by our legislature. And only in those cases can the state seek to have the death penalty imposed.

So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government carried out by you, the citizens. And that's the way the process has been initiated and created by our state legislature and approved by our courts. This is a function of you as citizens carrying out part of our government process. You are shaping a lawful punishment to an unlawful act. So, the responsibility is given to you to decide what the appropriate punishment is.

I remember in voir dire we went over this, you are the judge. The judge does not sentence, you sentence. And that's what this process is about. And it is a process which we have entrusted to you as our citizens to carry it out fairly; and there's nothing wrong with what you're doing. You're not killing anyone, and you're not making a decision that is in any way wrong.

Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it. But responsible people make tough decisions all the time. You make tough decisions in your jobs, at your homes, regarding your children, and you make them in your marriage.

The process makes you responsible for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law entrusted it to you and it means we'll do it, just like any other tough decision that we make;"

ROA 2366, line 2.

"It's not enjoyable for me or us to ask for you to impose the death penalty. That's not something we like to do.

We wish these cases didn't exist. We wish we didn't have a case load, but we do. And our responsibility is to come to you as the

elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision."

ROA 2369, Line 22.

"They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. [Undersigned counsel can find no reference where defense attorneys ever made these comments.] Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.

The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst."

ROA 2370, Line 16.

"We will agree that the defendant could adapt to prison, because they will make him adapt. But that's not the issue. Because, otherwise, we would never have the death penalty. There would be no reason for it. And the solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime."

ROA 2374, Line 7.

There was also discussion during Dr. Crawford's testimony that she was there to help the solicitor make his decision, suggesting to the jury that both mental health experts and the solicitor had approved the death penalty in this case. Justice Pleicones specifically mentioned the nature of this irrelevant and prejudicial

testimony in his concurrence: "Here, however, Dr. Crawford's testimony was offered only to bolster the solicitor's decision that this case warranted a death sentence. Unlike the majority, I do not see how the curative instruction negates the prejudice from Dr. Crawford's irrelevant yet prejudicial testimony." *Williams* at 73. The majority noted Dr. Crawford was the State's "primary witness". *Id* at 64.

Furthermore, the defense was on notice that she was potentially going to testify about the irrelevant and prejudicial decision making process of the solicitor. In a pre-trial hearing, Dr. Crawford and the solicitor both explained that was her number one responsibility. The solicitor asked Dr. Crawfrord about their working relationship in cases and what he was looking for, and she answered, "information about mitigating issues that may lead you to decide, in fact, not to seek the death penalty." And the solicitor continued, "So that the information that you would provide me in these various cases may be relevant as to whether or not, number one, I would seek the death penalty in a particular case." ROA 2696 – 2697.

This was not the only arbitrary factor the Solicitor injected in the case: In petitioner's case, the solicitor told the jury that prison would not make the defendant suffer and that it was simply a change of address for the defendant:

> "So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day,

because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.

Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, Restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.

Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't."

ROA 2378, Line 1.

Attorney Nettles testified that he believed this argument was so ridiculous that he decided to mock Solicitor Arial for making these comments, instead of objecting to them. PCR 111. Attorney Nettles was one of the attorneys that represented Troy Burkhart, where this error was specifically addressed by our Supreme Court. He also acknowledged he had prior warnings about this behavior and to be prepared to object to it. PCR 110-115. Attorney Nettles also testified that he objected to everything he thought was objectionable. PCR 117.

I. THE SOLICITOR CONTINUOUSLY STRAYED FROM THE RECORD AND FAILED TO HEED THE SUPREME COURT'S MANDATE THAT DEATH PENALTY ARGUMENTS MUST BE FOCUSED ON THE CIRCUMSTANCES OF THE CRIME AND CHARACTER OF THE DEFENDANT.

Our Supreme Court has been clear and adamant about the scope of sentencing hearings and prosecutors' argument. It should be focused on the nature of the crime and the character of the defendant. Whenever a solicitor strays from these factors, he jeopardizes the jury relying on arbitrary factors when determining death. *State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Bowman,* 366 S.C. 485, 623 S.E.2d 378 (2005). The solicitor's argument must stay within the record, or reasonable inferences to it, and when a solicitor strays from the record, the Court must look at the entire record to determine the impropriety of the argument. *State v. Woomer*, 277 S.C. 170, 284. S.E.2d 357 (1981). The argument must be evaluated in light of S.C.Code Ann. § 16-3-25(C)(1) (2003) to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007).

A. THE SOLICITOR IMPROPERLY INJECTED HIS PERSONAL OPINION AND HIS DECISION TO SEEK THE DEATH PENALTY INTO THE JURY DELIBERATIONS.

In *Woomer*, Our Supreme Court held it was reversible error for a solicitor to discuss his decision making process during sentencing. They repeated that ruling in in *State v. Butler,*277 S.C. 543, 290 S.E.2d 420 (1982) and *State v. Smart*:

> "In vacating these sentences we are governed by our holding in *State v. Woomer, S.C.,* 284 S.E.2d 357, that injection of the solicitor's personal opinion into jury deliberations on the death sentence is impermissible and requires reversal. In his closing argument at the sentencing trial, the solicitor three times made reference to his decision to seek the death penalty. Such reference could divert the attention of jurors from the evidence before them to an improper consideration of the solicitor's personal views."

State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982).

The Supreme Court recently analyzed Solicitor Arial's closing argument in another capital case. *Sigmon v. State*, Op. No. 27233 (S.C. Sup. Ct. filed March 20, 2013) Advance Sheet 13, page 14. The Supreme Court compared the *Sigmon* arguments to the permissible arguments in *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990): "We held that these statements [in *Bell*] were easily distinguishable from the statements in *Woomer*, noting they did not lessen the role of the jury in sentencing death by mentioning the solicitor's role in the process and did not contain the solicitor's personal opinions." *Sigmon* at 21. The Supreme Court also repeatedly noted that the key in *Sigmon* was that Arial did "not go so far as to compare his undertaking

in requesting the death penalty to the jury's decision to ultimately impose a death sentence." *Sigmon* at 20. In petitioner's case, Solicitor Arial not only repeatedly discussed the decision making process, he compared his decision to the jury's and he also blatantly gave the jury his personal opinion.

Solicitor Arial's argument in *Sigmon* was as follows:

> "Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Arial, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
> ....
> And there are people, there are people who will argue that the death penalty is not a deterent. But *my response as the solicitor of this circuit is, it is a deterent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you. [Emphasis in Supreme Court opinion]."

Sigmon at 19. The above references are indirect references to the Solicitor's decision making process at best. In Petitioner's case, Solicitor Arial directly referenced his decision, but more importantly, he did exactly what the Supreme Court said he did not do in *Sigmon* - inject his personal opinion and compare his decision with the jury's.

In petitioner's case, the solicitors continuously mention their role in the process by repeatedly telling the jury there were only limited circumstances wherein they could even ask for the death penalty. ROA 2112, Line 20; ROA 2113, Line 2; ROA 2113, Line 4; ROA 2366, Line 13 – 20. This decision making process was also injected into the proceedings by the testimony of Dr. Crawford that she was specifically there to help the Solicitor make his decision. Furthermore, Solicitor Arial specifically compares the difficulty of the jury's decision to his: "Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it." ROA 2367. Solicitor Arial continued by noting, "The process makes you responsible for this difficult decision; but we can't run and hide from *our* responsibilities. *The law places it on our shoulders*, the law entrusted it to you and *it means we'll do it*, just like any other tough *decision that we make*; [emphasis added]" ROA 2367. And a few pages later, "It's not enjoyable for me or us to ask for you to impose the death penalty... our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision." ROA 2369, Line 22. "The law limits the right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases." ROA 2371, Line 1.

Solicitor Arial's statements are far more similar and more prolific than a case our Supreme Court reversed more than 30 years ago, *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982):

> "...I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the death penalty.... So, you see, you are not alone in your decision. I have already made that decision....
> I made that decision some months ago.
> And if I can do it, you can [do]" [sic]

Solicitor Arial did specifically what the Supreme Court said he did not do in *Sigmon,* he repeatedly discussed his decision making process and repeatedly compared his decision to the jury's. Furthermore, as *Sigmon* also repeatedly noted, Solicitor Arial injected his explicit personal opinion in the proceedings.

The injection of a solicitor's personal opinion into closing arguments is a clear and independent error in sentencing phase. *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Smart,* 278 S.C. 515, 299 S.E.2d 686 (1982). Solicitor Arial blatantly injected his personal opinion into the process: "They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he is going to want the death penalty, and I do." ROA 2370, Line 16. "And the solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime." ROA 2374, Line 10. (See also the statements quoted above, "And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision." ROA 2370, Line 1.) These statements alone warrant reversal.

Our Supreme Court has repeatedly told solicitors they cannot interject their own personal opinion in sentencing. In *State v. Smart,* 278 S.C. 515, 299 S.E.2d 686 (1982) they reversed a death sentence because a solicitor drew attention to his decision to seek the death penalty and because he told the jury that other citizens, including himself, would disapprove of a life sentence. The Supreme Court reiterated this decision in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007):

> "The solicitor also repeatedly told the jury he "expects" the death penalty and, in doing so, ignored our precedent which rebukes such an imposition of the solicitor's personal belief. [Footnote: *See State v. Smart,* 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because of the same error by the same solicitor), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991) ; *Thompson v. Aiken,* 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where prosecutor's argument put his personal opinion before the jury regarding the death penalty in murder cases and requiring a new sentencing proceeding).]

Our Supreme Court has been clear that whenever a solicitor tells the jury that he expects the death penalty or he disapproves of a life sentence, it is reversible error. In the petitioner's case, the solicitor not only told the jury he would not be satisfied with a life sentence, he told them he wanted the death penalty, that he came before them as their elected prosecutor and deemed this case appropriate for the death penalty, and that he personally was telling the jury there was a reason for it. It is clear that the solicitor injected his personal opinion into the deliberations in a manner specifically ruled as warranting reversal by our Supreme Court.

While there were three alleged errors in the closing argument in *Northcutt*, the Supreme Court made it clear that, "Any one of these three miscues requires reversal of Appellant's sentence." And in the dissent, Chief Justice Toal specifically pointed out the fact that the solicitor's comments were minimal in comparison to the entire record:

> "Likewise, I disagree with the assertion that the solicitor's remark in which he expressed that he expected the death penalty requires reversal. The solicitor's closing argument fills thirty-five pages of the record. I seriously doubt that either of these two comments, each filling only one line on separate pages of the record, permeated the sentencing proceeding with any degree of unfairness."

Our Supreme Court has made it clear that whenever a solicitor explicitly puts his personal opinion or desires into a closing argument, the result is prejudicial to the defendant.

B. The Solicitors' Arguments Lessened the Jury's Responsibility and Injected Arbitrary Factors and Matters Outside the Record into the Jury's Deliberation Process.

The arguments above clearly mandate reversal, but when reviewing the argument as a whole it is clear that the solicitor had no compunction about violating the Supreme Court's mandate to focus on the circumstances of the crime and the characteristics of the defendant. The solicitor continuously exhibited a win at all costs attitude throughout the entire argument by repeatedly straying outside the record and by injecting arbitrary factors into the jury deliberations that the

Supreme Court has found prejudicial, including legislative determinations, appellate court oversight, and prison conditions. These arguments were part of a pattern to lessen the jury's sense of responsibility by suggesting the legislature had already limited the death penalty to the "worst of the worst", and the jury was simply part of that "government process", which the courts had approved. The message to the jury was clear: "You're not killing anyone."

Legislative Determinations

The most prevalent arbitrary factor the solicitor injected was the legislative limitations on the death penalty. ROA 2112, Line 20; ROA 2113, Line 2; ROA 2113, Line 4; ROA 2366, Line 13 – 20. The solicitor not only continually introduced this arbitrary factor into the jury deliberations, he also continuously strayed outside the record and misstated facts about the process to the jury. These arguments are clearly outside the record, "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010). The undersigned has attached every Greenville Indictment and sentence sheet where a person has been sentenced for murder in 2003 and 2005.[2] Of the 15 murder cases in Greenville in 2003 and 2005, 14 had at least one clearly identifiable aggravating circumstance:

[2] I mistakenly received the 2005 indictments upon my first request so I have included that information as well. Furthermore, Solicitor Arial made these comments in 2005 so they seem relevant to his statement.

3 received the death penalty (Williams, Evans, Motts)

3 Committed Double Murders (Bell, Ervin, Mattison)

6 Committed Armed Robbery or Larceny (Lindsey, Mills, Hawkins, Sarratt, Campbell, Gaines)

1 Committed CSC (Harper)

1 Committed Murder while in commission of drug trafficking (Rice)

The remaining defendant, Robinson, shot at his victim 5-6 times, hitting him 3 times, in an apartment where other individuals were in the immediate vicinity. Even assuming this was not physical torture or placing others in risk in a public place, that means that despite the solicitors repeatedly telling the jury they were "very limited" circumstances wherein they could even seek the death penalty, in reality they could have sought death in 14 out of 15 cases. Going outside the record to misinform a jury is clearly improper argument.

Our Supreme Court has repeatedly held that legislative considerations of any type are inappropriate in the jury room; "[L]egislative determinations are wholly beyond the proper concern of a jury as it weighs the sentence of death." *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982). (Solicitor argued if the jury failed to return death sentence, legislature might repeal death penalty statute). Our Supreme Court also held that a solicitor attempted to minimize the jury's sense of

responsibility by stressing that many others, including the legislature, had already made the decision he was asking them to make.

> "... Some people have done that. The legislature did it when they passed the death penalty law. The governor did it when he signed it into being. The officers did it when they signed the arrest warrant. The grand jury did it when they signed this indictment. I did it when I signed my name on the Notice informing them the State would seek the death penalty. And you're being called on now ... The people before you have signed their names ... Would you do like others and sign your name...?"

State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). Repeatedly referencing the fact that the legislature had already restricted the death penalty to very limited circumstances could only have lessened the jury's sense of responsibility. When you combine this with the statements that the solicitor had already made the decision and approved the death penalty, as well as this system had been "approved by the courts"[3], it could clearly lessen the jury's sense of responsibility regarding the ultimate decision; there is simply no other explanation for the solicitor to tell the jury, "You're not killing anyone."

Prison Conditions

The Supreme Court relied on the same logic – that legislative considerations had no place in the jury room – when it held prison conditions had no place in jury deliberations:

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[3] While the statement is not as egregious as the arguments in *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890 (1979), it shows a continuous pattern to suggest others, including himself, had already approved these decisions.

> "We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. *State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982) . The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. *State v. Johnson,* 293 S.C. 321, 360 S.E.2d 317 (1987) ."

State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). There was simply no reason for Solicitor Arial to suggest that the death penalty was appropriate because life in prison would not make the petitioner "suffer". Suggesting to the jury that it was their duty to make the petitioner suffer, could only have injected an arbitrary factor into the jury deliberations.

This is particularly egregious here because the defense did not introduce conditions of prison, and the solicitor was speaking entirely outside the record when he told the jury that prisons "allow[ed] all things of life. Places, restaurant, places to exercise, recreation when he wants."

The Supreme Court continued in *Burkhart*:

> "This case was tried before our decision in *Bowman* [366 S.C. 485, 623 S.E.2d 378 (2005)]; however, we apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible,[2] and this restriction on the admission of evidence regarding prison life *in general.* We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions."

State v. Burkhart,371 S.C. 482, 640 S.E.2d 450 (2007). Trial counsel attempted to negate the solicitor's discussion of prison conditions by asking the jury if they truly believed prison had restaurants. ROA 2380. Whether or not petitioner's trial counsel believed this was an effective strategy, this argument was clearly irrelevant and prejudicial, and allowed the jury to consider arbitrary factors, such as whether or not the petitioner would be allowed to watch TV, play games and cards, exercise and visit loved ones.

> "Here, unlike *Bowman,* appellant objected to the State's evidence regarding general prison conditions. Although appellant attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life, this entire subject matter injected an arbitrary factor into the jury's sentencing considerations. A capital jury may not impose a death sentence under the influence of any arbitrary [371 S.C. 489] factor. S.C.Code Ann. § 16-3-25(C)(1) (2003) . When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated. *State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982) . Accordingly, we reverse appellant's death sentence and remand for resentencing."

Id. Petitioner's case is similar in the fact that trial counsel attempted to counter the argument of the solicitor that there were restaurants in prison; however, there was never any counter of the remaining prison conditions the solicitor injected inappropriately nor the statement that prison would not make the petitioner suffer.

Furthermore, our Supreme Court has noted that based on the evident impropriety of a solicitor's argument, it may be incumbent to object to the argument, regardless of an attorney's trial strategy:

> "In view of this improper argument, we agree with the PCR judge that it was incumbent upon Brown's trial counsel to object to the solicitor's closing remarks. Furthermore, although we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this "strategy" cannot be construed as a valid one given the evident impropriety of the solicitor's remarks."

Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). Regardless of trial counsels response to the argument, the argument was highly prejudicial, furthermore, it is an example, looking at the closing argument as a whole, of the solicitor's continued willingness to go outside of the record and introduce irrelevant and prejudicial material in front of the jury.

Finally, counsel should have been prepared well in advance for this argument. They were warned by Jeff Bloom and numerous cases suggested this was improper. *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998) (Per Curiam). *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997). Furthermore, attorney Nettles represented Troy Burkhart and was aware that the identical issue was on appeal in that case.

PREJUDICIAL ANALYSIS

Our Supreme Court has repeatedly reversed cases when the solicitor injects arbitrary factors into the proceedings. In light of S.C.Code Ann. § 16-3-25(C)(1) (2003) it is arguably mandatory to reverse once an arbitrary factor is introduced. See *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007). More importantly, there is a long history of acknowledging that once improper arguments are made in the sentencing phase of a capital trial, the probability of prejudice is great and it is impossible to actually determine their effect on the jury.

> "We note the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all. *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990); *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979). *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998)."

State v. Mclure, 342 S.C. 403, 537 S.E.2d 273 (2000). "In view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict." *Northcutt* at 882. Our Supreme Court has also noted that in cases where the jury has absolute discretion in sentencing and the solicitor introduces improper argument, the probability of prejudice is great. *State v. Simmons*, 331 S.C. 333, 503 S.E.2d 164 (1998). (*Simmons* was a burglary case where the jury had to decide whether to recommend mercy.)

The combined effect of these comments was to limit the jury's sense of responsibility in the decision making process, by convincing them that the legislature had already limited these cases to the worst of the worst, that it was not an easy decision for him either, but they were simply part of a government process approved by the courts, and not to worry, because "You're not killing anyone."

II. THE SOUTH CAROLINA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER *FURMAN VERSUS GEORGIA*.

In *Furman v. Georgia*, 408 U.S. 238 (1972) the United States Supreme Court found that Georgia's death penalty statute was cruel and unusual based on the fact that it was imposed in an arbitrary and capricious manner:

> "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Id. at 309-310 (STEWART, J., concurring). Four years later, quoting the same language above, the Court approved Georgia's new death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), and relied on three factors: (A) The new statute ensured that the death penalty could only be given under narrow circumstances; (B) The jury had to consider the particular circumstances of the crime and the defendant; and (C) the Georgia supreme court reviewed the sentence to ensure it was appropriate under the circumstances.

The petitioner asserts that South Carolina's death penalty statute does not restrict the circumstances wherein a jury may impose death for a murder. Specifically, because the legislature has increased circumstances wherein the death penalty may be imposed, and because the South Carolina Supreme Court has

defined those circumstances in the broadest terms, every murder in this state is eligible for the death penalty. Furthermore, the United States Supreme Court was particularly concerned that the state supreme court in *Gregg* exercised discretionary review of death verdicts thereby mandating sentences were only given for the most egregious cases. While the South Carolina Supreme Court has acknowledged the importance of this proportionality review in *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982), it has never declared a death sentence arbitrary or out of proportion. To the contrary, it has upheld every death sentence regardless of the facts and circumstances of the crime or the nature of the defendant.

The United States Supreme Court re-iterated the requirement that state systems must narrow the circumstances where the death penalty can be sought in *Kansas v. Marsh*, 548 U.S. 163, 173-174, 126 S.Ct. 2516 (2006); Justice Thomas, writing for the majority, noted that *Furman* and *Gregg* "establish that a state capital sentencing system must: '(1) rationally narrow the class of death-eligible defendants[.]'" As discussed above, the solicitor's opening and closing arguments exacerbate the failure of any legitimate narrowing circumstances, by repeatedly asserting the legislature had restricted the death penalty to a very limited number of circumstances when in fact it does not.

THE UNITED STATES SUPREME COURT FACTORS A and C

A. UNDER SOUTH CAROLINA'S STATUTE VIRTUALLY EVERY MURDER CASE CAN QUALIFY FOR THE DEATH PENALTY RESULTING IN A COMPLETE FAILURE TO NARROW THE CIRCUMSTANCES UNDER WHICH A JURY MAY SENTENCE THE DEFENDANT TO DEATH.

The death penalty is supposed to be reserved for the "worst of the worst". *Roper v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005): ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution' " (quoting *Atkins v. Virginia,* 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002))). To the contrary, it is almost impossible to conceive of a murder case in this state where the defendant is not eligible for the death penalty; two aggravating circumstances, kidnapping and physical torture (S.C. Code Ann. § 16-3-20(c)(a)(1)(b) and (i) respectively), have been defined so broadly, that every defendant charged with intentional murder qualifies for the death penalty.

Almost all murder cases also involve a "kidnapping". While the traditional view of kidnapping might be an abduction in order to make some type of monetary or personal gain, South Carolina has defined kidnapping far more broadly:

> "South Carolina does not have different levels of crimes involving deprivation of freedom. Instead, the crime of kidnapping in South Carolina is broad in scope. Under our statute, a person is guilty of kidnapping if he should " unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law."

> S.C.Code Ann. § 16-3-910 (2010). Furthermore, we have interpreted this statute to encompass restraint regardless of duration or whether the victim was moved. *See State v. Tucker*, 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999) (noting that the offense of kidnapping " commences when one is wrongfully deprived of freedom and continues until the freedom is restored" and further finding that proof of kidnapping existed where defendant had bound victim with duct tape in her home)."

Lozada v. South Carolina Law Enforcement Div., 395 S.C. 509, 719 S.E.2d 258 (S.C. 2011). In the *Tucker* case cited above in *Lozada*, the defendant argued he duct-taped the victim to the bed in order to search for things to steal and not to kidnap the victim, and therefore he did not have the *mens rea* to establish kidnapping. The Supreme Court rejected that argument and held, "Further, we have held restraint constitutes kidnapping within the meaning of section 16-3-910, [footnote eliminated] regardless of the fact that the purpose of this seizure was to facilitate the commission of a sexual battery." *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 105 (1998).

If kidnapping can be completed with the above requisite intent and for any duration, no matter how slight, it would obviously encompass the vast majority of murder cases. Any time a defendant aimed a weapon at a victim, the victim would be immediately kidnapped unless the victim somehow believed they could walk or run away without being shot. Even if the defendant physically assaulted a victim, the victim would be considered "kidnapped" unless the victim was able to leave or believed they were able to leave during the assault.

The only time a victim would not be "kidnapped" is if the victim was unaware of the physical injury of the murder while it took place; however, even that circumstance may constitute kidnapping, because the definition does not require conscious knowledge of the kidnapping based on the definitions of fraud, inveigle and decoy. Petitioner avers that it is almost impossible to commit murder without committing the offense of kidnapping under these definitions. Therefore, South Carolina Code Ann. § 16-3-20 fails to narrow the circumstances wherein one can be subject to the death penalty for murder.

The United States Supreme Court reiterated its position that death should only be available in limited circumstances in *Kennedy v. Louisiana*, 554 U.S. 407, 437, 128 S.Ct. 2641 (2008):

> "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg, supra,* at 187, 184, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.) (because "death as a punishment is unique in its severity and irrevocability," capital punishment must be reserved for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death" (citing in part *Furman,* 408 U.S., at 286-291, 92 S.Ct. 2726 (Brennan, J., concurring); *id.,* at 306, 92 S.Ct. 2726 (Stewart, J., concurring))); see also *Roper,* 543 U.S., at 569, 125 S.Ct. 1183 (the Eighth Amendment requires that "the death penalty is reserved for a narrow category of crimes and offenders")."

Even if it is possible to envision a murder case that would not also include kidnapping, it is impossible to define a murder that does not involve physical torture as described in South Carolina. Physical torture is an undefined aggravator

in the code. The South Carolina Supreme Court has defined physical torture as "serious physical abuse before death" or "an aggravated battery". *State v. Elmore*, 308 S.E.2d 781, 785 (S.C. 1983). Aggravated battery has been defined as a violent injury accompanied by circumstances of aggravation, "such as the use of a dangerous, or deadly, object; the infliction of serious bodily injury with intent to commit a felony; a great disparity between the ages and physical condition of the parties; a difference in the sexes." *State v. Davis*, 422 S.E. 2d 133 (S.C. 1992). Every murder is committed by a dangerous or deadly object and is the cause of serious bodily injury.

The South Carolina Supreme Court has also held the victim need not be conscious of the torture:

> "[Defendant] contends that conscious awareness of pain is a necessary component of physical torture. We disagree. Physical torture is not predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture;"

State v. Johnson, 525 S.E.2d 519 (S.C. 2000). It would seem clear, that any deadly injury would fall into multiple categories of this definition of physical torture. Therefore, any murder would be death eligible. (This was one of the aggravators in *Weik, infra* – the evidence showed the victim was shot and then shot again a few minutes later.)

Furthermore, the State cannot argue that the petitioner's conduct so plainly falls within the definition of the aggravator that the jury's decision is appropriate. The United States Supreme Court addressed this argument in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), and in an unanimous opinion held that such an analysis was not sufficient to make sure the jury was adequately informed what they must consider in deciding a death sentence. *Maynard* at 361-362.

Trial counsel requested an additional charge relating to kidnapping and requested a question regarding the kidnapping. ROA 2067. Trial counsel's request for additional information or charge may have resolved the problem of having such a broad definition of kidnapping, but the trial judge rejected such a charge based on South Carolina case law and refused to have a question regarding kidnapping answered by the jury. ROA 2067. Instead, the Court charged,

> "The Defendant is charged with kidnapping. The state must prove beyond a reasonable doubt that the defendant knowingly, unlawfully, seized, confined, enveigled, decoyed, kidnapped, abducted, or carried away another person without authority of law. Kidnap is a continuous offense that commences when one is wrongfully deprived of freedom and continues until the freedom is restored. The gravamen of the offense of kidnapping is some form of compulsion.
>
> The law says the requisite force or compulsion need not consist of use of physical force or violence or express threats. Knowingly means with knowledge, consciously, not accidentally. Seize means to hold suddenly or forcefully. Confine means to limit, restrict, or enclose within bounds, imprison, or shut or keep in. Enveigle means to entice or to acquire by ingenuity or flattery. Decoy means to lure

by; or if by decoy, a decoy is something to entice a person to a trap. Kidnap is to remove a person against his will by unlawful force or by fraud. Induce means to carry off secretly or by force for an illegal purpose. Carry away means to remove.

The State does not have to prove the defendant did all of these things. Instead, if you find beyond a reasonable doubt the defendant did any of these things, you may find the defendant guilty of kidnapping. Something done without authority of law is something which the law does not sanction, permit, allow, condone, or provide justification for.

Kidnapping does not have to be for any personal monetary gain or any legal purpose, but may be for any reason whatsoever."

ROA 2056. The judge did not define kidnapping in the penalty phase, but only charged that the jury had to find that the murder was committed "while in the commission of the crime, act, kidnapping." ROA 2400, Line 11. (See also ROA 2399-2400 for the charge that an aggravating circumstance, kidnapping, must be found.)

Such a broad definition fails to limit the circumstances wherein a jury can sentence a defendant to death, and indeed, in the solicitor's trial phase closing argument, she equated murder to kidnapping.

"[Kidnapping] does not require ransom. That's what a lot of people think. That's what we see on TV. Kidnapping, someone is taken somewhere. They're hidden out in some shed and we start seeing ransom notes. That is a form of kidnapping, it's not the only one. If you confine someone against their will without the authority of law, it is kidnapping. And his honor will tell you that kidnapping begins when the person's freedom has been taken away. Kidnapping ends when the freedom has been restored. And that's key."

ROA 2022. The State continued,

"Ladies and Gentlemen, as I told you, kidnapping starts when a person's freedom has been taken away. And it ends when the freedom has been restored. Mandy's freedom was never restored. Her kidnapping was the ultimate kidnapping. She never again was free to move, because when she did, when she started fighting for her life, when she began to run away from the defendant, what does he do? What does he do?

Does he say, 'Oh, let me let her go, because I'm going to let her go out anyway?'

They get up here and try to argue to you that he was going to let her go. He told the negotiator he was going to let her go. I submit to you he was lying to the negotiator when he said he was going to let her go. He never intended to let her go. Because if he had, when she started running, all you do is let her run slap out the front door. But that's not what he did.

What does he do?

(Mrs. Strom pumps shotgun four times.)

Her freedom is permanently taken away."

ROA 2024, Line 3. Under the State's argument, anyone who is killed would be guilty of kidnapping, because their "freedom is permanently taken away" and every murder is "the ultimate kidnapping."

C. WHETHER THE SOUTH CAROLINA SUPREME COURT REVIEWED THE SENTENCE TO ENSURE IT WAS APPROPRIATE UNDER THE CIRCUMSTANCES, AND WHETHER THE REVIEW PROCEDURE IS ADEQUATE UNDER *GREGG V. GEORGIA*?

The third factor the United States Supreme Court relied on in upholding the Georgia death penalty, was that the state supreme court reviewed the case to make sure it was appropriate under the circumstances.[4] South Carolina has adopted the

[4] The United States Supreme Court reaffirmed proportionality in Kennedy v. Louisiana, 554 U.S. 407 (2008); petitioner's appellate counsel admitted he did not raise this issue. PCR 214.

same proportionality analysis. *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982).

In the petitioner's case the Supreme Court's analysis consisted of two sentences:

> "Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)."[5]

State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (S.C. 2010). This is virtually the identical language used in every death penalty "proportionality review" in South Carolina. See *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless, Capital Sentencing Regime of the Pre-Furman Era*, Blume, JH, *et al.* 4 Charleston L. Rev. 479 (2010).

It is impossible to judge the adequacy of this analysis, and regardless, this fails to inform defendants and their counsel what factors may be considered relevant in such a review. Still, Petitioner has attempted to show that his case is not proportional when compared to the case cited, *Tucker*, nor when compared to those actually executed in this state, nor is it proportional to those actually given the death penalty in Greenville County. Finally, petitioner hopes to analyze murder

[5] *Tucker* is the identical case discussed above that held any restraint constitutes kidnapping.

cases in Greenville County in the last ten years in an attempt to show that there is no logical reason his case was noticed as a death penalty case under the statute.

Comparision to *Tucker*

To begin with, the Supreme Court's proportionality analysis in petitioner's case is inevitably brief and uninformative. As noted above, it consists of a standard two sentence analysis and a citation to *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). The South Carolina Supreme Court proportionality review consists of comparing the death sentence with similar cases:

> The United States Constitution requires the death penalty to be imposed only if the sentence is "neither excessive nor disproportionate in light of the crime and the defendant." *State v. Copeland,* 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, this court searches for "similar cases" where the death sentence has been upheld. *Id.*"

State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002).

There is no indication in petitioner's case why the Supreme Court cited *Tucker* as a similar case; in most death penalty cases, at least two cases are cited as examples why the defendant's case is proportional. In *Tucker*, the South Carolina Supreme Court described the facts as follows:

> On June 25, 1992, Rosa Lee Dolly Oakley ("Victim") was in her yard when Appellant pulled his car into her driveway. He talked to Victim long enough to make sure she was alone, then pulled out a gun and forced her into the house and her **[324 S.C. 161]** bedroom. He was preparing to tape Victim up when Joe Black rang the doorbell. Black and James Howard (outside in the car) were looking for Victim's husband. Both appellant and Victim went out into the driveway after Black. Victim began screaming, "Don't leave me,

> he's going to kill me," holding on to Black's arm as he sat in Howard's car. Howard panicked and left. Appellant pulled Victim away from the retreating car, dragged her back into the house, took fourteen dollars from her purse, and shot her twice in the head at close range. He testified he shot her the first time when she tried to grab the gun. As he was leaving, he shot her again to "put her out of her misery."
>
> On the run from police, Appellant broke into the Christian Fellowship Church on June 26-27, 1992, and into Kenneth Parker's mobile home between June 27-29, 1992. Appellant then hitched rides under trucks until he got to Calhoun County, where he killed another person while attempting to get a car and money to escape police looking for him on the Oakley murder. Appellant was tried, convicted, and sentenced to death for this subsequent murder ("Mellon murder") before going on trial for the present offenses. Appellant was caught July 10, 1992 in Maggie Valley, North Carolina and gave a detailed confession to police.

Id. at 263. Furthermore, the jury found three aggravating factors in *Tucker*: kidnapping, burglary and robbery. *Id.* at 271.

There is no explanation why petitioner's case is similar to *Tucker* nor why *Tucker* shows the petitioner's case is not "excessive or disproportionate"; however, it seems relevant to point out the dissimilarities. Tucker killed two individuals after he robbed them. He was on the run from police when he committed the second murder. While he was on the run, he broke into two other establishments. Tucker had an extensive criminal record including rape. *Id.* at 269. Evidently, he had previously been convicted of raping an 8 year old boy and an 83 year old woman. http://en.wikipedia.org/wiki/James_Neil_Tucker . The jury found not one, but three aggravating factors in Tucker's case. There is no reference to any evidence that Tucker was mentally ill, and of course the Supreme Court was unable to

include in their analysis, Mr. Williams' inability to conform his actions due to his fetal alcohol syndrome.

While counsel does not make the argument that the murder and kidnapping of an ex-girlfriend is incapable of being a death penalty case, undersigned does argue that an in depth proportionality review has not been done on this case, and if one is done, it is clear that the death penalty is inappropriate in petitioner's case; petitioners case simply does not compare to that of a rapist of children and matrons who murders one woman, runs from the law, burglarizes multiple dwellings, murders another individual in the process, and flees the state; furthermore, when one factors in the petitioners inability to control his behavior, because of brain damage induced *in utero*, it would be cruel and unusual to uphold the death penalty.

The Review is uninformative and plagued by the fact that it continuously relies on multiple cases that do not result in executions.

In the second place, the proportionality review is so undefined it is impossible to determine what factors the Supreme Court has relied on in the past and it is impossible for defendants to be on notice what factors make their cases disproportionate. For example, the South Carolina Supreme Court refused to find the death penalty disproportionate for a defendant who was found Guilty But Mentally Ill (GBMI) - who because of mental disease or defect could not control his actions. *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992). In *Wilson*, the

Court agreed Wilson could not control his actions and was operating under an "irresistible impulse" when he committed the murder, however, the Court declined to declare the death penalty disproportionate.

The Supreme Court reiterated this view in *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002). Weik was a mentally ill defendant who had a child in common with the victim. When the victim told Weik he was no longer going to be able to see his 10 year old son, Weik went out to his truck to get a shotgun and then entered the victim's house and killed her. The Supreme Court held,

> "Further, the death penalty here is proportionate to other cases where the murder resulted from domestic problems. *E.g., State v. Kelly, supra;State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998). Finally, while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the imposition of such a sentence upon a mentally ill person is not disproportionate. *State v. Wilson,* 306 S.C. 498, 413 S.E.2d 19 (1992)."

Part of the problem with this review process is that it bears little resemblance to people who are actually executed. For example, while Jamie Wilson committed his murders in 1988 and the Supreme Court issued its ruling in 1992, Wilson is currently incompetent and will most likely never be executed. Similiarly *Ard*, 332 S.C. 370 and *Kelly*, 331 S.C. 132, have been overturned - Ard was originally sentenced to death for killing his girlfriend and her unborn fetus. He was later convicted of involuntary manslaughter and sentenced to time served. http://www.wltx.com/news/story.aspx?storyid=196072 . Kelly murdered his

estranged wife and his daughter's fiancé and shot his step daughter. He was later granted post conviction relief and is parole eligible in 2014.

http://www.goupstate.com/article/20120503/articles/120509864.

Recently, the South Carolina Supreme Court discussed its current proportionality review in *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (S.C. 2011):

> Before the circuit court, Dickerson argued that our current proportionality review is deficient because it fails to examine cases where death was not imposed and cases where death was not even sought. *See State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). He primarily relied upon Justice Stevens's statement regarding the denial of certiorari in *Walker v. Georgia*, 129 S. Ct. 453 (2008) (memorandum opinion), in which he wrote that examining similar cases "assume[s] that the court would consider whether there were 'similarly situated defendants' who had *not* been put to the death because that inquiry is an essential part of any meaningful proportionality review." *Id.* at 454. In his view, this analysis is "judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Id.* Justice Stevens noted,
>
> > Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment. If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. Cases in both of these categories are eminently relevant to the question of whether a death sentence in a given case is proportionate to the offense. The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced

> to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.
>
> *Id.* at 455-56 (citations omitted). This issue is not before us on appeal, and it would require us to overrule our prior decision in *Copeland.* However, we note our concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional."

On the one hand, *Copeland* would seem to suggest that only review of sentences where death was imposed are appropriate for comparison, while *Dickerson* suggests life sentence cases might also be considered. *Copeland* is currently the law of the land, and it is therefore logical to start with death penalty cases. In the case of Williams, no similar death penalty case exists where an individual was actually executed for killing his ex-girlfriend. This would seem to be doubly more important when the defendant is under extreme mental duress.

Comparision to Actual Executions

The following is a list of every execution performed in this state since *Furman* and *Gregg* according to the South Carolina Department of Corrections website:

Joseph Carl Shaw – Raped and killed one woman; kidnapped and killed a teenage couple (17&14) and raped the girl over several days after she was dead.

James Terry Roach – Co-Defendant of Joseph Carl Shaw

Ronald Woomer – Robbed and killed 4 people

Donald Henry Gaskins – Murdered numerous people.

Sylvester Adams – Robbed and murdered 16 year old neighbor

Robert South – Drive by slaying of a police officer. The defendant waived his rights and consented to being executed.

Fred Kornahrens – Killed his ex-wife, her father and her 10 year old stepson

Michael Torrence –Killed two men in a robbery (stabbed one and strangled the other) and killed his girlfriend a month later. The defendant waived his rights and consented to being executed.

Larry Gene Bell – Kidnapped, raped and killed 17 year old and 14 year old girls; also taunted the victims' family on the phone.

Doyle Cecil Lucas – Robbed and killed 65 year old couple at their home. The defendant waived his rights and consented to being executed.

Frank Middleton – Kidnapped, raped and suffocated two women days after escaping from prison work crew (originally sentenced for stabbing a 13 year old boy).

Michael Elkins – Robbed and murdered 59 year old lady (stabbed). The defendant waived his rights and consented to being executed. He was dying from liver disease and helped guards find a vein for the needle.

Earl Matthews – Robbed teenage couple and shot both of them. The girl died.

John Arnold – Raped and strangled a black woman, then carved KKK on her forehead.

John Plath – Co-Defendant of John Arnold.

Sammy David Roberts – Robbed and murdered 3 people.

J.D. Gleaton – Robbed and stabbed gas station owner

Larry Gilbert – Co-Defendant of J.D. Gleaton (shot victim)

Louis Truesdale – Raped and murdered an 18 year old girl.

Andy Lavern Smith – Stabbed 86 year old man 27 times and his wife, 82, 17 times. Both died.

Ronnie Howard – While on parole for bank robbery, carjacked and killed woman and then admitted to killing another woman. He ultimately confessed to over 70 robberies.

Joseph Atkins – He murdered his father and 13 year old neighbor, 5 years after being paroled for murdering his brother.

Leroy Drayton – He kidnapped and murdered a 19 year old girl/gas station attendant.

David Rocheville – He robbed a theater and killed the 19 and 24 year old employees. He kidnapped one.

Kevin Dean Young – He robbed, shot and killed 35 year old school principle. He had a long criminal history and was on parole at the time.

Richard Johnson – He shot and killed a man who picked him up hitchhiking, then shot a trooper who pulled him over.

Anthony Green – He robbed and killed a woman at a mall by shooting her in the face. Green had a long history of robberies and had previously robbed and shot another woman in the face, and had shot another woman in the back at a mall, who still had the bullet in her head.

Michael Passaro – He doused his car with gasoline with his 2 year old daughter inside. The defendant waived his rights and consented to being executed.

David Clayton Hill – Murdered a police officer on duty.

Jerry McWee – Robbed, shot and killed store clerk and then killed his boss a week later.

Jason Byram – Robbed and stabbed a mother with a butcher knife in her own home with husband and children in the house.

James N. Tucker – Killed two women. Had been sentenced to prison before for raping 83 and 8 year old and had escaped.

Richard Longworth – He robbed a theater and killed the 19 and 24 year old employees. He kidnapped one. Co-Defendant of Rocheville.

Arthur Hastings Wise – Ex-Con. Killed 4 co-workers out of revenge. The defendant waived his rights and consented to being executed.

Shawn Humphries – Robbed and killed store clerk. Had several prior convictions.

William Downs, Jr. – Raped and killed 6 year old boy. Had previously raped and killed 10 year old boy. He pled guilty and waived his rights and consented to being executed.

Calvin Alphonso Shuler – Shuler planned the robbery of an armored car weeks in advance after working for the same company. He laid in wait with a pistol and automatic rifle, removed the driver and passenger and shot the guard in the back numerous times before driving off with the victim.

David Mark Hill – He killed 3 DSS workers. The defendant waived his rights and consented to being executed.

James Reed – Killed parents of his ex-girlfriend after being released from prison for assault on officer trying to help his girlfriend.

Joseph Gardner – Tortured, raped, and shot woman in face 5 times. Was AWOL from army.

Luke Williams, III – Killed his wife and 12 year old son to collect insurance.

Thomas Ivey – Ivey escaped from jail in Alabama for murder; he then kidnapped and murdered a businessman in SC and shot a police officer 5 times killing him.

Jeffrey Motts – While already serving life for 2 murders, Motts killed his cellmate. The defendant waived his rights and consented to being executed.

Of the 43 executions above, 25 of them killed more than one person. Of the remaining 18, 2 killed police officers and 2 waived their rights to appeal. Of the remaining, 3 raped their victims, and the remaining robbed their victims which

would obviously necessitate committing kidnapping as well. There was no execution involving kidnapping as a sole aggravator.

It would be impossible for the undersigned counsel to review every death penalty case in the state, however, the undersigned has asked the Clerk of Court for every death noticed murder case since 1997. If we consider these cases, no other defendant in Greenville County in the past two decades has received the death penalty for killing his ex-girlfriend. The following list is every case that was served with notice to seek the death penalty in the County of Greenville:

Vincent Raymond Allen – 2004; One victim; 30 year sentence

Raymond Lewis Carter – 1998; murder; armed robbery; kidnapping; LWOP

Benjamin Erik Case – 2006; murder; armed robbery; LWOP. (Also sentenced to ABWIK; Burglary 1st; GL; Burg 1st; Burg 1st; ABWIK).

David Edens – 2004; murder; kidnapping; Sentenced to LWOP by jury.

Britney Emanuel Ervin – 2003; 2 murders; ABWIK; GL. 30 years + 5 years consecutive GL; (Co-Defendant – Mattison).

Kamell Evans – 2003; Double murder. Kidnapping, Burglary First, Law Enforcement Officer.

Dwayne Lamar Farmer – Accessory after fact murder; 15 + 15 consecutive.

Steven Andra Golden – 1997; manslaughter; armed robbery; 28 years; (co-defendant Freddie Eugene Owens).

William Looper Hunter, Jr. – 1987; Murdered Ronald Tyner by shooting him in the head during burglary; Also Burglary Mike Watkins; also murdered John Gutman after breaking into his house; Life with aggravating circ; sentence to run consecutive to burglary and consecutive to armed robbery.

Troy Lee Kilgore – 2001; Murdered Jeanne Anne Kilgore; ABWIK Sylvia Anne Wright; 30 years.

Amos Lamont Mattison – 2003; Two murders; withdrew DP notice 2006; GL; ABWIK; (co-defendant Ervin). Also had priors: Burg First; Burg First; Burg First.

Michael Torlando Robinson – 2001; Two murders; Life consecutive to burglary; The notice to seek the death penalty lists burglary; 2 murders; prior criminal history; character of Defendant and circumstances of crime and future dangerousness as aggravators.

Jeffrey Brian Motts – 2005; Death Penalty. Killed his cell mate. Was currently serving LWOP for murder and armed robbery of his aunt and uncle.

Patrick Nicole Scott – 1993; robbed Western Family Steak House and Pizza Hut.

Joseph R. Sheppard – 1996; Murdered a police officer; Jury sentenced him to LWOP.

Brad Sigmon – 2001; Two murders with baseball bat (parents of his girlfriend, who he also tried to find and kill); Burglary; Sentenced to death.

James William Spoone – 2004; Murder of ex-girlfriend; Burglary; LWOP.

Dana Ricardo Weldon – 1985; murder and armed robbery of a lady on the highway; had previously robbed Taco Cid twice in Jan and July, Pizza Hut and Mazzio's Pizza Twice (once in Aug once in September).

John Richard Wood – 2000; Murdered a police officer; Sentenced to death.

Many of the above murders include double homicides, additional assault and batteries with intent to kill, armed robberies, burglaries, kidnappings and lengthy prior records. Only two of them received the death penalty and many of them

received sentences of less than life without parole. Considering petitioner's case, there is no logical reason his case was proportionally worse than the above.[6]

III. TRIAL COUNSEL COMMITTED PREJUDICIAL ERROR IN ITS FAILURE TO IDENTIFY AND PRESENT EVIDENCE OF FETAL ALCOHOL SYNDROME.

A. RELEVANT LEGAL PRINCIPLES.

Penalty phase claims of ineffective assistance of counsel are reviewed under the familiar two-prong test established by *Strickland*, 466 U.S. 668, 687 (1984), which requires a petitioner to show that: (1) trial counsel's performance was deficient; and, (2) the deficiency resulted in prejudice. *See also, Porter v. McCollum*, 130 S.Ct. 447, 452 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Whether an attorney's performance was deficient is determined by a standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into "*all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 524 (emphasis in original); *see also*, *Porter*, 130 S.Ct. at 452 ("It is unquestioned that under the prevailing professional norms . . . counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).[7] It is well-established that

[6] Undersigned counsel would also note the 15 murder cases mentioned in argument I, including the cases resulting in multiple murders and armed robberies, which by definition would include the aggravator kidnapping.

[7] The topics trial counsel should investigate and consider presenting include, among other things, "medical history, educational history, employment and training history, family and social

trial counsel should be particularly diligent to investigate evidence of mental impairments, such as organic brain damage, because of its powerful mitigating effect. *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010) (holding evidence of brain damage was "significant mitigating evidence a constitutionally adequate investigation would have uncovered"); *Porter*, 130 S.Ct. at 454 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of "'the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'") (quoting *Wiggins*, 539 U.S. at 535); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage caused by fetal alcohol syndrome); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (stating that a competent attorney, aware of the defendant's history of diminished mental capacities, among other things, would have introduced it in the capital sentencing proceeding).[8] (See also, *Trevino v.*

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history, prior adult and juvenile correctional experiences, and religious and cultural influences." *Wiggins*, 539 U.S. at 524.

[8] Numerous lower courts have likewise recognized that brain damage is uniquely mitigating. *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) ("the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action."); *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (stating mental conditions "associated with abnormalities of the brain" are "likely to [be] regarded by a jury as more mitigating than generalized personality disorders."); *Bryan v. Mullin*, 335 F.3d 1207, 1244 (10th Cir. 2003) (Henry, J.,

Thaler, ____ U.S. _____ (2013) Opinion No. 11-10189, May 28, 2013 wherein the Supreme Court of the United States remanded a denial of Habeas when the allegation was trial counsel failed to investigate and present FAS.)

Moreover, trial counsel must not "ignore[] pertinent avenues for investigation of which he should have been aware." *Porter*, 130 S.Ct. at 453. Where trial counsel fail to conduct a thorough mitigation investigation, they necessarily lack the information required to make reasonable strategic judgments concerning the selection and presentation of evidence, and deference to decisions made under such conditions is inappropriate. *See e.g., Sears*, 130 S.Ct. at 3265 ("We reject[] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . [can be] justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

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concurring in part and dissenting in part) ("[Counsel's] performance left the jury no reason even to consider as a possibility that [the defendant] might not be morally culpable enough, as a result of his involuntarily adduced organic brain disorder, for the death penalty."); *Blystone v. Horn*, 664 F.3d 397 (3rd Cir. 2011) (trial counsel's deficient performance was prejudicial where counsel failed to investigate and present evidence that petitioner suffers from "untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse."); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007) (prejudice found where trial counsel failed to present evidence that, among other things, petitioner suffered a serious brain injury and functional brain impairment, which caused problems with impulsivity, judgment and problem solving); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) ("By explaining that [defendant's] behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.").

In *Ard v. Catoe*, 642 S.E.2d 590, 372 S.C. 318 (S.C. 2007), our Supreme Court stated:

> "In *Strickland,* the United States Supreme Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining" whether counsel's performance is reasonable. *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. 2052. More recently, the Supreme Court again clearly enunciated that the reasonableness of counsel's conduct may be measured by the ABA's guidelines for capital defense. *Wiggins v.Smith,* 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) . Additionally, "[t]he ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984." *Hamblin v. Mitchell,* 354 F.3d 482, 487 (6th Cir.2003).

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [ABA Guidelines], which our Supreme Court references in *Ard*, specifically warn attorneys that investigation into the client's life begins at conception; but the guidelines do not stop there, they specifically cite Fetal Alcohol Syndrome at least three times. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L.Rev. Pages 956, 1022, 1061 (2003).

> "Because the sentencer in a capital case must consider in mitigation, anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. [Quotations and Footnotes omitted]. At least in the case of the client,

> this begins with the moment of conception." 211 [Footnote 211 - "Mitigation begins with the onset of the defendant's life because many defendants' problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy."[Quotations omitted]].

Id at 1022.

To establish prejudice, a PCR applicant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter*, 130 S.Ct. at 453 (quoting *Strickland*, 466 U.S. at 694). The test is not whether a capital defendant would have received a life sentence absent trial counsel's deficient performance. As the United States Supreme Court recently reiterated in *Porter*:

> [w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.

130 S.Ct. at 455-56 (quoting *Strickland*, 466 U.S. at 693-94). The question is whether "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [a defendant's] culpability." *Rompilla*, 545 U.S. at 393. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

B. FACTS AND ARGUMENT RELEVANT TO FETAL ALCOHOL SYNDROME

Petitioner's attorneys were aware that he was exposed to alcohol during pregnancy. Plaintiff's Exhibits 7, 8, and 10; PCR 32-35, 91, 119-120,156-157,192.[9] The attorneys could not explain why fetal alcohol syndrome was not investigated or why it was not ruled out. PCR 97; 174. They were also familiar with the ABA guidelines for capital defense which specifically cites fetal alcohol syndrome in a number of places. PCR 93.

It would be impossible to adequately condense the massive amounts of research and publications done on this subject; modern investigation into the effects of Fetal Alcohol Syndrome (FAS) began in the 1970s. Plaintiff's Exhibit 23; Appendix, page 1. The United States Congress mandated that the Institute of Medicine (IOM) of the National Academy of Sciences conduct a study of FAS and related birth defects in Section 705 of Public Law 102-321, the ADAMHA Reorganization Act. Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors). Page 1. National Academy Press. (1996). (Plaintiffs Exhibit 31, cited as NAP).

While society often uses the term Fetal Alcohol Syndrome (FAS) to encompass any *in utero* damage due to alcohol, it would be more correct in using

[9] The trial transcript is replete with indications that the mother was an alcoholic and was intoxicated before and after petitioner was born. ROA 1769; 2180, 1877, 1978, 2179, 2214, 2236, 2237, 2252, 2262, 2331, 2336.

the term, fetal alcohol spectrum disorder (FASD) to encompass all of the diagnoses possible due to maternal ingestion of alcohol. South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan, State Fiscal Years 2011-2013. Plaintiff's Exhibit 23, Appendix, page 73. Confusing this even more is the fact that numerous authors and studies initialy used the term Fetal Alcohol Effects to describe conditions that met all FAS diagnostic criteria except for the full array of facial abnormalities. NAP, page 63. Indeed, the IOM publication consistently references simply FAS. To be precise, the IOM set forth criteria for five diagnoses: Fetal Alcohol Syndrome confirmed with maternal alcohol exposure, Fetal Alcohol Syndrome without confirmed maternal alcohol exposure, Partial Fetal Alcohol Syndrome with maternal alcohol exposure, Alcohol Related Birth Defects, and Alcohol Related Nuerodevelopmental Disorder. NAP, page 76.

One reason FAS is often used to describe all FASD diagnoses is the fact that they all have the same signs and symptoms except for the face, which develops during a very small window of time in early pregnancy and may not be as affected as the brain, which develops throughout the pregnancy. NAP, page 78. The IOM committee also had concerns about the other labels being seen as somehow less serious than an FAS diagnosis, and specifically the IOM had reservations about the term Partial Fetal Alcohol Syndrome because, "'Partial' denotes, to some people, that the condition might not be as severe, which the committee did not wish to

imply." NAP, page 78. "This diagnosis could be particularly useful, for example, for some patients who present for diagnosis as an adult. The natural history of FAS is such that some of the 'hallmark' indicators used in infancy or childhood are not maintained into adolescence or adulthood." NAP, page 75. In other words, while we typically think of people with Fetal Alcohol Syndrome as displaying facial features that make it apparent something is wrong with the individual, the vast majority of people suffering from some type of Fetal Alcohol Spectrum Disorder, especially adults, do not look dramatically different than the rest of us.

While petitioner has been diagnosed with Partial Fetal Alcohol Syndrome (PFAS), (PCR 544) it is likely the term FASD will be used as well to describe his condition as well as to describe all of the conditions related to problems resulting from maternal ingestion of alcohol during pregnancy. Furthermore, it is important to realize that PFAS does not suggest the petitioner's condition is less severe than FAS; in fact, in some circumstances, PFAS can put an individual at much higher risk for adverse life course outcomes (e.g. criminal conduct) due to his condition not being recognized and his ability to mask his cognitive deficits. PCR 533.

After Congress mandated the IOM to establish official FASD diagnostic categories, Congress continued to appropriate resources to further research and assistance; in 2002, they mandated that the Centers for Disease Control and Prevention (CDC), acting through the National Center on Birth Defects and

Developmental Disabilities Fetal Alcohol Syndrome Prevention Team and in coordination with the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect, develop guidelines for the diagnosis of FAS and other negative birth outcomes from prenatal exposure to alcohol. Appendix, page 17.

The CDC published *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* (CDC) in July of 2004 and as part of that publication noted, "We now recognize that FAS represents the tip of the iceberg and there is a continuum of outcomes associated with prenatal exposure to alcohol." CDC, page V; Appendix 15. While the CDC did not complete the congressional mandate to define all FASD disorders, it more specifically defined the criteria and symptoms the IOM relied on in its diagnostic criteria for all FASD conditions. Figure 1 is an outline taken directly from the CDC manual, page 20 (Appendix, page 40).

Petitioner actually meets all the criteria of the CDC diagnosis described above, except small palpebral features, which is only one of the three facial dysmorphia noted. Furthermore, these dysmorphia are formed in a narrow window of 6-8 weeks during the gestational period and are known to disappear into adulthood. NAP, page 75.

Regardless of the specific diagnosis, organizations and agencies have been clear that prenatal exposure to alcohol creates a destructive condition that puts children and adults into a high risk category of not being able to conform to

society's norms due to significant cognitive deficits that impair executive and adaptive functioning; the South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan for State Fiscal Years 2011-2013, page 2, notes the problems associated with individuals with FASD: "Resulting impairments may include, but are not limited to, intellectual disability; learning disabilities; attention deficits; hyperactivity; and problems with impulse control, language, memory and social skills." Appendix 74. They also note it is the leading cause of intellectual disability and,

> "Individuals (especially youth) with FASD are at high risk of engaging in criminal activity. They face many challenges that make them vulnerable, such as being easily influenced by peer pressure; lacking impulse control; not understanding cause and effect; not learning from mistakes; making poor decisions; having memory problems; and having difficulty understanding future consequences. Researchers at the University of Washington estimate that 35% of individuals with an FASD have been in jail or prison, and more than half of the individuals diagnosed with an FASD have been in trouble with the law."

Id.

FASD explains several factors in this death penalty case, including the petitioner's poor impulse control, his inability to learn from mistakes, his inability to conform to societal norms and complete failure to logically deal with the end of a romantic relationship, resulting in this horrendous crime. All of the Appendix publications [Except the article on morphometrics, Appendix 283] note these conditions are caused by FASD. Appendix 5, 9, 35-37, 74, 81-82, 83, 88, 109-110, 115-119, 141-144, 153-156, 184, 212-213, 248-257, 259-260, 308-318. Reviewing

the attached publications, there can be no doubt that organic brain damage from prenatal exposure to alcohol is incredibly damaging to an individual's brain and therefore is powerful mitigating evidence in explaining why this individual committed such a terrible crime.

Petitioner presented his evidence through three experts who all have expertise in Fetal Alcohol Spectrum Disorders. Paul Connor, A neuropsychologist who conducted testing on the petitioner and determined he was deficient in 8 of 11 domains tested regarding his cognitive abilities. Richard Adler, a forensic psychiatrist, who diagnosed the petitioner with partial fetal alcohol syndrome (PFAS), and Natalie Novick Brown, a forensic psychologist who reviewed his entire life history, as well as the other experts' investigations and conclusions, and determined the petitioner's PFAS impaired his ability to such an extent that he could not conform his conduct to the requirements of the law.

Possibly the most profound evidence in the case came from the extensive testing by Dr. Connor that showed the abysmal adaptive functioning of the petitioner. These are the same cognitive deficits that would make the petitioner mentally retarded. PCR 272. Dr. Connor spent his early FASD work in research, and was actually part of the study cited in the quote from the South Carolina publication cited on the preceding page. PCR 276. He also worked with the CDC on the diagnostic criteria. PCR 280.

Dr. Connor gave detailed testimony regarding alcohol's effect on the fetus. PCR 283. He noted that despite popular belief, alcohol is more harmful to the fetus than crack cocaine, heroin, marijuana and a host of other substances. PCR 309-310. It is a poison that kills brain cells, causes some brain cells to move to wrong places, and affects all parts of the brain and all the synapses. PCR 311. He compared it to Alzheimers in its ability to affect the entire brain and discussed how people with Alzheimers can become disinhibited and sexually inappropriate; they also can remember certain things but not others. PCR 312-313. As compared to a stroke which only affects a localized part of the brain, FAS is affecting every part, every synapse. PCR 320

Dr. Connor testified that FASD affects executive functioning most commonly associated with the frontal lobe but it also affects connections with the frontal lobe to all parts of the brain, bringing in all the different areas and putting it together and making appropriate decisions. PCR 320. He testified that his testing validates the cognitive deficits, PCR 324, and noted that his group of tests are standard tests that neurologists around the world would recognize as sensitive to the impacts of prenatal alcohol exposure. PCR 325-327. He also had a slide showing black/dead cell damage in the frontal area of the brain, and noted that this was where the facial features and frontal lobe would be formed. PCR 290. He also

re-iterated that facial features are formed in a very short window in the gestation period, specifically in week 6-8. PCR 290 - 293.

Just as was mentioned in the literature above, this is partially why someone with PFAS can have worse than expected outcomes, because the facial features are formed in such a tight window, they are not really an accurate indicator of the amount of damage done to the brain. PCR 294. He testified, "that there's really no difference between FAS, PFAS and ARND when it comes to the cognitive impacts." PCR 280. He also described why these cognitive impacts were far more important than IQ - that IQ is a structured test on paper, that it is not a good indication of how people can perform in the unstructured world of everyday life. PCR 297. The IQ test tends to overestimate their abilities; just because someone is a good speller, does not mean they you have good impulse control. PCR 298.

With FASD you see people that perform poorly despite their IQ. PCR 299. In fact he rarely expects to see an IQ below 70, and in PFAS cases it happens only 10% of the time; what he does see is large splits in the IQ scores along with the social and adaptive deficits. PCR 330. With FASD, IQ scores are not a reliable measure. PCR 335. Williams has the IQ, but he can't use it. PCR 337. For example, he reads a lot but he can't understand what he reads. PCR 342. Dr. Connor also confirmed that Williams was not malingering based on a test he gave measuring level of effort. PCR 331-332.

Dr. Connor also noted he uses the CDC criteria regarding deficits because they are much more restrictive than the IOM. PCR 308-309. The CDC requires 3 cognitive deficits out of 10; Williams had 8. PCR 343. He's particularly bad about processing information and figuring out what to do about it. PCR 346. He did fairly well in language tests, but that is part of the problem; that is why his deficits are not realized and he is expected to function normally. PCR 347. He talks a good game so people don't recognize his deficits; Dr. Connor described it as masking. PCR 348. Dr. Connor also discussed motor coordination tests and how they revealed that the two sides of Williams' brain were not communicating. PCR 349. The two parts of the brain are connected by the corpus colossum. PCR 350. He described executive functioning - planning, problem solving, putting it all together. PCR 350. He then gave very detailed information about his testing. PCR 353 – 365.

Dr. Connor also evaluates people for mental retardation with these same tests. PCR 364. Williams has similar deficits consistent with people that have MR; he cannot understand social cues or behave appropriately. PCR 365. Dr. Connor explained that people with FASD have consistently poor adaptive functioning. Williams shows abilities to perform in high structured environments, but with less structure in our normal day to day activities, he cannot perform. PCR 368 – 372.

Dr. Connor noted that people with FASD do much worse than you would expect from their IQ: "They're essentially functioning at a level of somebody who's mentally retarded, even though their IQ is in the average range. Their day to day functioning is so impaired." PCR 300. Their ability to manage day to day life, hold a job, being able to interact with people and interpret social cues, being able to cope with things if something happens to them and work around it is impaired. PCR 300. They cannot learn from mistakes and 95% of people with FAS have mental health problems. PCR 304.

Dr. Connor also testified that his testing was completely consistent with the QEEG which Dr. Adler would testify about. PCR 373 – 376 and completely consistent with Dr. Evan's testing done for the trial team in 2004. PCR 379. He referenced his power point where he had overlapped Dr. Evan's results with his own on his chart showing deficits in adaptive functioning, and there was almost a complete overlay. PCR 379.

Dr. Connor is just one part of this multi-disciplinary team. The actual diagnosis must be given by a medical doctor, which was performed by Dr. Richard Adler, whose role as part of the multi-disciplinary team is to diagnosis the petitioner. PCR 432, 439-440. Dr. Adler testified that he had some initial exposure to FASD as a fellow at Harvard with Dr. Biederman, a known expert on attention deficit disorder, which is commonly associated with FASD. PCR 434. Dr. Adler

does criminal and civil forensic work. PCR 431. He has spent a large part of his practice in child psychiatry and maintains an active clinical practice. PCR 430.

As the literature noted, Dr. Adler explained that PFAS is a medical diagnosis based on the IOM manual. The CDC and the IOM were mandated by congress to develop criteria for all aspects of FASD. The IOM has criteria for FAS, PFAS, and ARND, but the CDC has only published complete criteria for FAS. Because the CDC used more stringent measurements, the team uses the CDC whenever possible. PCR 441.

An outline of the CDC criteria for the diagnosis of FAS is reprinted as Figure 1 at the end of this brief. Williams meets all the criteria, except small palpebral features; however, the CDC did not complete their mandate to define all FASDs. Therefore, one must look to the IOM for the criteria of PFAS. In order for an individual to be diagnosed with PFAS, he must have A. Confirmed exposure to alcohol. B. Two of the three facial feature deformities (small palpebral features, thin vermillion, or smooth philtrum). In addition, the individual must have one of the following: C. Growth Retardation; D. Central Nervous System (CNS) Abnormalities; or E. Cognitive Abnormalities. In petitioner's case, Dr. Adler testified petitioner had A, B, C, D and E; although he only needed three of the criteria, Dr. Adler opined he had every one and the most criteria he had ever found in a case. PCR 458. Dr. Adler also testified Williams had certain additional signs

that were consistent with FASD or neurological impairments, including nystagmus, birth defects, and consistent QEEG readings.

A. Confirmed Exposure to Alcohol

Dr. Adler testified that the general consensus is that 14 drinks a week will produce a child with FASD. PCR 450. He noted that the strongest examples were mothers that confirmed they drank every night and had multiple binges during the month which was apparently what happened in Williams' case. PCR 451-453. He considered the amount of alcohol that Williams' mother drank significant, PCR 448, and he considered this confirmation. PCR 454.

B. At least Two Facial Features

Dr. Adler next explained that as far back as 1973, there were known facial features associated with FASD: small palpebral fissures – distance between the eyelids; smooth philtrum – the valley between the nose and middle of the mouth; thin vermillion border – thin upper lip. PCR 459. These are the same as printed on Figure 1 under "Facial Dysmorphia". CDC 20; Appendix 40. He explained that the CDC developed more stringent criteria than the IOM and that these standards are based on computer models where the examiner inputs the data. PCR 459-460. He also explained that the facial features had almost nothing to do with the negative trajectory or bad impact of FASD on the person's life, but it is helpful to explain how you know this is what caused his problems. PCR 461. Exhibit 33 was

introduced that was a computer printout of the facial feature report, indicating Williams had a thin vermillion and smooth philtrum even in adulthood. PCR 464 – 469.

C. Growth Retardation

Dr. Adler explained that Williams disproportion between height and weight would meet the criteria for growth retardation. He referenced a growth chart similar to all growth charts parents look at when they visit the pediatrician. Exhibit 5. The growth chart was from when Williams was 10 months old, where Williams was between 75 and 90th percentile in height but just above the 10th percentile in weight. This would fit the criteria under disproportional low weight to height found in the IOM manual, Exhibit 31, page 76. Exhibit 34 is a copy of page 76 and 77 of the IOM manual. See also Figure 1 – Growth Problems.

D. CNS Abnormalities

Dr. Adler explained that Part of the direct evidence of CNS abnormalities that is referenced by the IOM and CDC is "reduction in size, or change in shape of the corpus callosum, cerebellum, or basal ganglia". CDC at 14; Appendix page 34. Dr. Adler presented a normal MRI of a corpus callosum. Plaintiff's Exhibit 40; PCR 474. He also presented the MRI of petitioner's corpus callosum. Plaintiff's Exhibit 35. (Both are reproduced on Figure 2).

Dr. Adler testified that not only is Williams' corpus callosum abnormal, his cingulated gyrus directly above the corpus callosum is also abnormal. PCR 482. He also indicated he reviewed this information with Dr. Wendy Cohen, their neuroradiologic consultant at the University of Washington, who opined this was moderate thinning. PCR 486. Furthermore, the abnormality above the corpus callosum was a developmental abnormality, described also by Dr. Connor as migration, where the tissue is somewhere it is not supposed to be. PCR 492. Dr. Cohen described it as medium or kiwi sized, as opposed to small or pea size, or severe or grapefruit size. PCR 493. While the 2011 MRI report noted the corpus callosum had "mild" thinning, Dr. Adler testified that Dr. Harrington at MUSC later agreed it was more than mild thinning and Dr. Cohen did not believe it was mild thinning. PCR 613-620.

He also noted that the measurements he received from MUSC noted the corpus callosum thinned by more than 50%. PCR 486. He also noted that the trial investigator's interview notes with their expert, Dr. Jim Evans, noted that information did not appear to crossover from one side of Williams' brain to the other, "as tho[sic] no corpus callosum", Plaintiff's Exhibit 12, and Dr. Adler actually spoke to Dr. Evans about his tests and conclusions and noted it was a huge red flag. PCR 479-480. When shown the notes, the trial attorneys did not know

what the corpus callosum meant and had no explanation about the corpus callosum and brain damage references by Dr. Evans. PCR 41, 42, 98, 163.

Dr. Adler noted the additional slides the attorney general introduced, Slide 12 and 14, actually showed the corpus callosum as thinner than slide 13 (Figure 2). PCR 582-583. And while the original 2005 MRI indicated "Normal MRI", the physician normally indicates what they are looking for in the MRI, and in 2005 they indicated they were looking for Autism Spectrum Disorder, PCR 617, which has nothing to do with FASD or the corpus callosum. PCR 622. In 2011 when they were told they were testing for FASD, the radiologists did notice the thinning of the corpus callosum.

Dr. Adler also noted that the average neuroradiologist is looking for profound abnormalities, such as a tumor or stroke and doesn't focus on the corpus callosum, PCR 623-624, and that one study found the vast majority of neuroradiologists will not discern significant thinning in these cases, so the fact that this neuroradiologist called it mild thinning was meaningful. PCR 616. And regardless, due to the IOM criteria, even if there was no evidence of corpus callosum damage, because all the other criteria was met, he still fits the diagnosis of PFAS. PCR 624. (It should be noted here, that the CDC places MRI abnormalities and cognitive deficit abnormalities under the same category of "CNS Abnormalities", so like the IOM, you do not have to show all of the deficits listed

on page 20 of the CDC – For example the summation on page 20, "Criteria for FAS Diagnosis", requires Dysmorphia, Growth Deficits and CNS Abnormality.

Before we had MRIs, the main way to determine whether an individual had brain damage was by exam. That is why doctors (and police officers) examine nystagmus. It is a red flag showing something is not working right in the brain. PCR 493. He also noted Dr. Griesemer found nystagmus years before, and that others found mirror movement and Romberg sign; these are "soft signs" showing something is wrong with the brain. PCR 494. He also explained that their expectations were validated by the QEEG. The QEEG is similar to an EKG that simply registers inappropriate electrical activity. PCR 497. The QEEG was simply verifying problems where they believed they would find them; he explained that the brain should be working like a symphony, but when the QEEG registers "hot spots" it is like an instrument blaring out louder than the rest. PCR 510.

Dr. Brown later noted that they now suggest getting a QEEG first, because if it does not show problems, there is little likliehood the patient will have FASD. PCR 643. In this case, the QEEG verified Dr. Connor's and Dr. Evan's testing, that the frontal lobe was "essentially untethered, intermittently doing its own thing." PCR 518. He also noted there was consistent birth defects, misshapen fingers and an abnormal "hockey stick" crease on the petitioner's palm. PCR 530. Dr. Adler testified that it was an "embarrassment of riches in the field of medicine. This is all

additional, confirmatory, illuminating material that is not even really centrally necessary to make the diagnosis." PCR 519.

E. Cognitive Abnormalities

The cognitive abnormalities are shown by Dr. Connor's and Dr. Evan's testing; you need three, Connor found eight and Evans found five. PCR 529. Dr. Evans did not administer as many tests as Dr. Connor. PCR 379. This is all consistent with the cognitive abnormalities; you need three deficits in the cognitive abnormalities and Dr. Connor found 8 out of 11. PCR 529. Dr. Adler classified these cognitive disorders or neuropsychological abnormalities as severe. PCR 533. He also explained that the impacts of Partial Fetal Alcohol Syndrome are more serious than Fetal Alcohol Syndrome because as a general rule, people that have the full abnormal face and lower IQs get more help and more services. PCR 533.

Because petitioner is able to mask his disability he appears good on the surface and his problems are not identified. PCR 534. Therefore, even though he has an average IQ and talks a good game, he could not interpret simple proverbs like a rolling stone gathers no moss. PCR 535. Dr. Adler cited a journal article that speaks to the very negative life impacts of having PFAS, which is cited in our appendix at page 248. PCR 535. He noted that these individuals are totally different from normal individuals, having statistically significant differences in school achievement, intellectual ability, development, depression, family

problems, delinquency, withdrawal, anxiety, and psychosis. PCR 536. They have psychosis and attention problems at a much higher rate. PCR 537.

He then described the alarming rate that these individuals have depression and are psychotic, and notes that Williams was given an antipsychotic shortly after he was arrested, indicating the doctors did not know what was wrong, but they were concerned enough to give him that. PCR 539. He also noted it was common, just as in petitioner's case, that doctors will misdiagnose FASD, and that the state used that to its advantage in closing argument, when Solicitor Arial argued the defense experts could not even agree on a diagnosis. PCR 540-541. Mental Illness is simply a manifestation of FASD. PCR 542. FASD is a far more serious and the impairments are markedly greater than either expert's diagnosis of bipolar disorder or OCD. FASD implicates a host of different areas in life functioning and eclipses the others. PCR 543.

Dr. Adler confirmed what Dr. Connor said, that the trial attorneys had the cognitive deficit information through Dr. Evans. PCR 519. Unfortunately, the trial team's neurologist, Dr. David Griesemmer, indicated he was never given this information or any history of the patient and that he requested further neuropsychiatric evaluation, which had in part, unknown to him, already been done by Dr. Jim Evans. His affidavit is clear that if he had seen Dr. Evan's testing or had

history of the mother drinking alcohol while pregnant, he would have informed the team to investigate FAS or rule out fetal alcohol effects. Plaintiff's Exhibit 24.

Dr. Adler finished his testimony by reiterating his role in the multi-disciplinary team as simply to give the diagnosis, PFAS, but he has been involved in cases where that information has resulted in a life sentence.

Dr. Natalie Novick-Brown is the culmination of the multi-disciplinary team. She began work in the field with Dr. Streissguth, the godmother of FAS, in 1995. PCR 627. She has testified for the government as well as the defense and has 15 peer reviewed articles mostly dealing with FAS. PCR 629. While the attorney general repeatedly emphasized a power point slide from a 2009 conference in Canada that made a reference to "Hit or Miss before 2007", every team member testified that there were experts available in 2004 and 2005 to do an appropriate diagnosis.

Dr. Brown testified that while there was not a protocolized approach, like their approach, there were still people making appropriate diagnosis based on the 2004 CDC and 1996 IOM standards. PCR 636-637. Furthermore, Dr. Adler testified that as early as 2001 there was a Fetal Alcohol Syndrome legal resource center at the University of Washington where lawyers could be linked to experts and their website presumably existed before 2004. PCR 602. And Dr. Brown was

available to testify in 2004, as well as Sterling Clarren, MD, Ken Jones, the father of FAS who wrote the 1973 article in *The Lancet*, and Susan Rich.

Dr. Brown reviews all the work of the other team members, all of the petitioner's medical, school and other records, the trial transcript, and anything else in order to determine the exact impact the FASD has on the petitioner and its relevance to the crime. PCR 643-644. She explained how FASD effects executive functioning – self regulation, behavior control, thought and emotion control and how the frontal lobe takes in and controls information from all over the brain faster than a computer, using all our memories and senses to make decisions, reduce urges, and reduce the intensity of emotion; and when those executive functions are impaired you see real problematic behavioral difficulties. PCR 644.

We have urges all the time and we rely on executive functioning to hit the brakes all the time. PCR 645. Mr. Williams' executive functioning is significantly impaired – learning from experience, linking cause and effect and being able to understand and foresee consequences and take those into account when planning; all people with FASD plan, but their plans are impaired by the brain damage. They have real difficulty organizing thoughts and it showed in Williams as early as the first grade. PCR 646. They have a goal in mind but blinders on to everything else; they particularly cannot see the consequences of their plan, and she has seen that in

virtually every clinical patient she has evaluated; it is like having no warning system. PCR 651.

People with FASD have trouble self-monitoring and being aware of the impact of their actions; virtually everyone with FASD has impulse control problems - difficulty controlling strong feelings which overwhelm their ability to resist urges. PCR 647. This explains why Williams had the incessant reiteration with his journal - this war within his brain going back and forth, trying to control himself, but the stronger the emotion the harder it is. PCR 648. Williams damaged brain doesn't play out what might happen; it does not have the capacity to determine what is the worst thing that can happen and use that to resist his urges. PCR 649. Their executive functioning is damaged so that they cannot understand the significance of their behavior on others and ultimately control their behavior. PCR 650. Stress only exacerbates that problem. PCR 650. This is all backed up by Williams school records where you always see the word impulsive. PCR 652. These executive function deficits create the adaptive deficits that are noted in Dr. Connor's testing. PCR 653.

Dr. Brown has also performed *Atkins* evaluations before, and there is no doubt these were obviously life-long problems for Chris, and the adaptive functions would fit the criteria for that prong of *Atkins*; in fact, Dr. Brown testified that a number of experts and mental health professionals now believe the adaptive

functions are more important than his IQ – an IQ is measured in a structured environment, but the adaptive functioning is the real indication of how the individual is able to perform in the community on a day to day basis. PCR 654. His school history is a good example - he has an IQ that should be sufficient, but he is in special education early on, fails eighth grade, and eventually drops out of ninth. PCR 676.

In fact, Dr. Brown testified she had never seen a child repeat kindergarten and first grade and his disability was entirely consistent with FASD. PCR 691. He cannot use his intellect, his IQ. PCR 677. The adaptive deficits interfere with his ability to use the IQ, the intellect, in the real world. He can read well for example, or perform well in a routine environment without distractions. PCR 655. So for example, he could perform well at his work at Blockbuster if he was doing a routine repetitive task that he was familiar with, but if you mix it up and add new people, new environment or stress, there is deterioration in his performance. PCR 656, 675.

For example there are people with mental retardation that can pass the driver's test, but they have to take it multiple times; Williams also had to take it 5 or 6 times. PCR 658. There are a lot of similarities between MR and FASD; in the terms of their adaptive functioning and performance there is not a lot of difference. PCR 658. People with FASD might have better verbal skills so there is an

appearance of normalcy, so by the time mentally retarded people get to adulthood, they are not very adept at disguising their mental retardation; people with FASD are better at masking. PCR 659. But in reality, people with FASD have child-like coping skills; they are socially children, emotionally children, and there is research going back 30 years that their adaptive functioning is equivalent to children in elementary school. PCR 662. In fact, Dr. Brown testified that the standardized testing placed Williams at the skill level of a nine year old. PCR 663-664.

Dr. Brown also testified about secondary disabilities and explained that almost 100% of people with FASD have mental health problems. The bipolar diagnosis is just a symptom of the much larger problem caused by his brain damage. PCR 670. The research is clear that people with FASD have life-long impacts because their impairments get worse as they reach adulthood and as they are expected to mature; their childlike ability to self regulate and cope simply cannot manage adulthood. PCR 673. Dr. Brown would never have expected Williams to be able to live independently. PCR 675. He cannot function at school by getting to class on time; he cannot function at work; Dr. Connor's testing is important because it shows Williams cannot function in these unstructured environments. PCR 678. Prison is structured and Williams has no problem there, but our day to day life is not structured and that is where he had problems. PCR 679.

Dr. Brown also testified and verified what the other experts had said, that FASD impacts the entire brain and being able to see what is around you. Williams had these plans but could not follow them and in this unstructured environment, he is unable to quickly comprehend and respond appropriately. PCR 684-685. This behavior is consistent with Dr. Connor's testing and his school performance, specifically the history from his first grade teacher. PCR 693. Impulsivity is NOT normal in non-brain damaged children. PCR 694. The first grade teacher's comments are entirely consistent: impulsivity, physically aggressive, easily frustrated, blames others for mistakes. PCR 697.

Dr. Brown explained how these child like behaviors led to his inability to handle the break up with the victim and his suicide attempt. PCR 702-703. The child like thinking that somehow this plan was going to work and the victim was going to admit her mistakes and they would get back together. PCR 705-706. The lack of sophistication in his plan, such as "get cigarettes" or running out of gas in front of the store which caused him to believe he could not leave even though he wanted to. PCR 708-709. There was never an indication that Williams ever considered trying to plan a way to do this in such a manner so he would not get caught. PCR 710.

He walks around the store and bends down with the victim behind her. He has never contemplated the one thing that happened – that there would be a

struggle. PCR 711. While he writes in his journal he wants to kill her, he indicates to negotiators he just wants her attention and wants to talk to her. PCR 712. He never contemplates a struggle and when it happens, he reverts to fight or flight reaction and because of his brain damage he reacts aggressively. PCR 714. He cannot deal with it appropriately, and then he runs away and hides, despite knowing the SWAT team is right outside. PCR 715. Dr. Brown continued to describe the childlike planning, inability to see contingencies or consequences and link cause and effect. PCR 717.

She also explained why Dr. Crawford's interview was so damaging. Dr. Crawford was very skilled at questioning Williams to lead him away from what he originally said to the other police investigators and in the end to take complete responsibility for planning the entire episode. PCR 713. Dr. Brown explained that research shows FASD people are particularly open to suggestion. In fact, there is a known and validated test for suggestibility known as the Gudjonsson Test. PCR 718. The testing revealed that Williams was very suggestible. PCR 722. Dr. Crawford's interview was very manipulative. PCR 718. Dr. Brown showed through her powerpoint slides the multiple statements that Williams made during the immediate interview with police officers and specifically how he was unsure about what he was going to do when he went to the store, and how those statements changed with skilled questioning by Dr. Crawford; and while Williams

continued to vacillate, Dr. Crawford manipulated him into agreeing he premeditated the murder. PCR 723-724.

Dr. Brown testified that the situation overwhelmed his capacity to come out with the right behavior. PCR 725. She said PFAS explains why he did this unthinkable act and if he would have been born with a normal brain, she would not have expected this result. PCR 726. Dr. Brown ultimately opined that Williams met the definition of Guilty But Mentally Ill in that he lacked sufficient capacity to conform his conduct to the requirements of the law. PCR 727.

Both attorneys acknowledged that not only did they simply miss this evidence, but that they would have liked to have had it before the jury. PCR 136-137, 159, 187. In fact, Mr. Mauldin was clearly beside himself that they missed it: "I just don't know ... I surely didn't do it intentionally. I will assure you, I did not do that intentionally. I think that would be horrible." PCR 207, Line 6. "And why in the world I didn't, with these memos being provided me, why didn't I further take the course of action that I described to Mr. Zelenka about a neurological evaluation as to that specific issue, I just – I don't know." PCR 208, Line 3.

But perhaps the clearest indication of how the absence of this information impacted the trial and the jury's decision is how the solicitor emphasized the fact that the defense's theories were inconsistent and did not provide an explanation worthy to save the petitioner's life. Solicitor Arial specifically told the jury that,

> "The defense presented to you evidence of mental disorders through the testimony of a couple of psychiatrists. By the way, the psychiatrists didn't agree on the diagnosis. One talked about bipolarity. Other didn't say he had bipolar. Had different opinions from the two psychiatrists; but they argued to you why he did it.

ROA 2374.

> "His mental issues may have existed at the same time as this killing, but they're not the why. They just existed concurrently with it. Because he knew right from wrong. And he could conform his behavior to the requirements of the law. No one has said the mental issues cause him to kill Mandy. The reason they haven't said they caused him to kill Mandy is because they didn't. They may have affected the way he thought about things. But didn't cause him to kill Mandy, because he knew what was right, he knew what was wrong, and he knew how to conform his behavior."

ROA 2375.

Perhaps the most compelling part of this evidence is the teams analysis that Williams is emotionally on the level of a nine year old. The massive amounts of research combined with Dr. Connor's extensive testing make it clear that Williams was functioning like a child on the days and weeks leading up to the murder. The culmination of this child like behavior is Williams attempt to run and hide from the police after knowing that countless police officers, including SWAT and helicopters has surrounded the building and were immediately coming to find him.

The state has introduced no evidence suggesting petitioner does not suffer devastating organic impairments due to fetal alcohol syndrome. The State of South Carolina, the American Bar Association and these experts, and the multitude of

publications we have submitted note the devastating impacts of FASD. These publications also consistently acknowledge that FASD can cause a person to make poor decisions, including criminal behavior. While Solicitor Arial made good use of the fact that the trial experts could not say mental illness caused this to happen, it is clear that Williams' poor decisions and the resulting horrendous conduct was caused by brain damage caused by in utero ingestion of alcohol. This is compelling evidence that easily could have led to one jury member making a different decision and therefore the petitioner is entitled to a new trial.

IV. RIGHT TO PLEA GUILTY

Petitioner desired to plea guilty to the murder charge in order to show acceptance of responsibility. Our Supreme Court has held that a defendant does not have a right to plea guilty and still receive a sentencing hearing by a jury: "See *State v. Allen,* 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied,* --- U.S. ----, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16-3-20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments; noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429

(2005) (adhering to *Downs* and rejecting claims that section 16-3-20(B) was unconstitutional); *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004) (citing *Downs* and concluding section 16-3-20(B) was constitutional); *Downs,* 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of section 16-3-20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing)." *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011). Petitioner believes this issue was preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel and petitioner desires to preserve this issue for further review, despite the overwhelming case law in South Carolina against the petitioner.

V. AGGRAVATORS IN THE INDICTMENT

In its return, the State noted that trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment and that the trial court ruled on this issue. State's Return to the First Amended Application, Page 83. Petitioner also agrees that the South Carolina Supreme Court has previously ruled on this issue. *State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006); *State v. Downs*, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-381 (2004). Petitioner believes this issue was preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel and petitioner desires to preserve

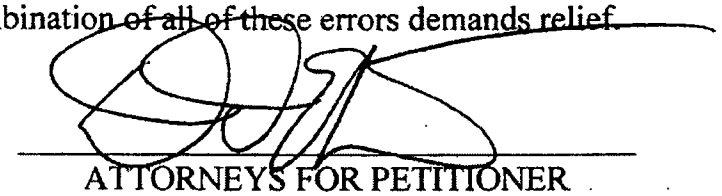
this issue for further review, despite the overwhelming case law in South Carolina against the petitioner.

VI. FAILURE TO RECOGNIZE PETITIONER WAS A GERMAN CITIZEN

While petitioner relies on the German government's pre-trial brief to fully address this topic, it is clear petitioner's attorneys never investigated this matter. PCR 107 – 108, 126, 150 – 153. The International Court of Justice (ICJ) has held that the United States violated Article 36(l)(b) of the Vienna Convention in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, 2004 I.C.J. 12 (March 31). Whether or not there is an obligation on the states to subordinate their postconviction review procedures to the ICJ ruling mentioned above, states are still free to do so. For example, both Nevada and Oklahoma have "unhesitatingly assumed" the burden of complying with *Avena*, describing the burden as minimal "when balanced against the United States plainly compelling interests in ensuring the reciprocal observance of the Vienna convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law". *Guiterrez v. State,* Supreme Court of Nevada, Opinion 53506 (September 19, 2012). When considering the enormous goodwill and economic impact German companies and citizens have in this state, our courts should strive to follow the international rule of law and be mindful of the importance of good foreign relations.

CONCLUSION

Petitioner believes that many of these errors standing alone entitle him to relief and the combination of all of these errors demands relief.



ATTORNEYS FOR PETITIONER

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FIGURE 1

Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis **Table 3: Brief Outline of Diagnostic criteria for Fetal Alcohol Syndrome**

Facial dysmorphia

Based on racial norms, individual exhibits all three characteristic facial features:

- Smooth philtrum (University of Washington Lip-Philtrum Guide rank 4 or 5)
- Thin vermillion border (University of Washington Lip-Philtrum Guide rank 4 or 5)
- Small palpebral fissures (at or below 10th percentile)

Growth problems

Confirmed prenatal or postnatal height or weight, or both, at or below the 10th percentile, documented at any one point in time (adjusted for age, sex, gestational age, and race or ethnicity).

Central Nervous System Abnormalities

I. Structural

1) Head circumference (OFC) at or below the 10th percentile adjusted for age and sex. 2) Clinically significant brain abnormalities observable through imaging.

II. Neurological

Neurological problems not due to a postnatal insult or fever, or other soft neurological signs outside normal limits.

III. Functional

Performance substantially below that expected for an individual's age, schooling, or circumstances, as evidenced by:

1. *Global cognitive or intellectual deficits representing multiple domains of deficit (or significant developmental delay in younger children) with performance below the 3rd percentile (2 standard deviations below the mean for standardized testing) or*
2. *Functional deficits below the 16th percentile (1 standard deviation below the mean for standardized testing) in at least three of the following domains:*

a) cognitive or developmental deficits or discrepancies b) executive functioning deficits c) motor functioning delays d) problems with attention or hyperactivity e) social skills f) other, such as sensory problems, pragmatic language problems, memory deficits, etc.

Maternal Alcohol Exposure

I. Confirmed prenatal alcohol exposure
II. Unknown prenatal alcohol exposure

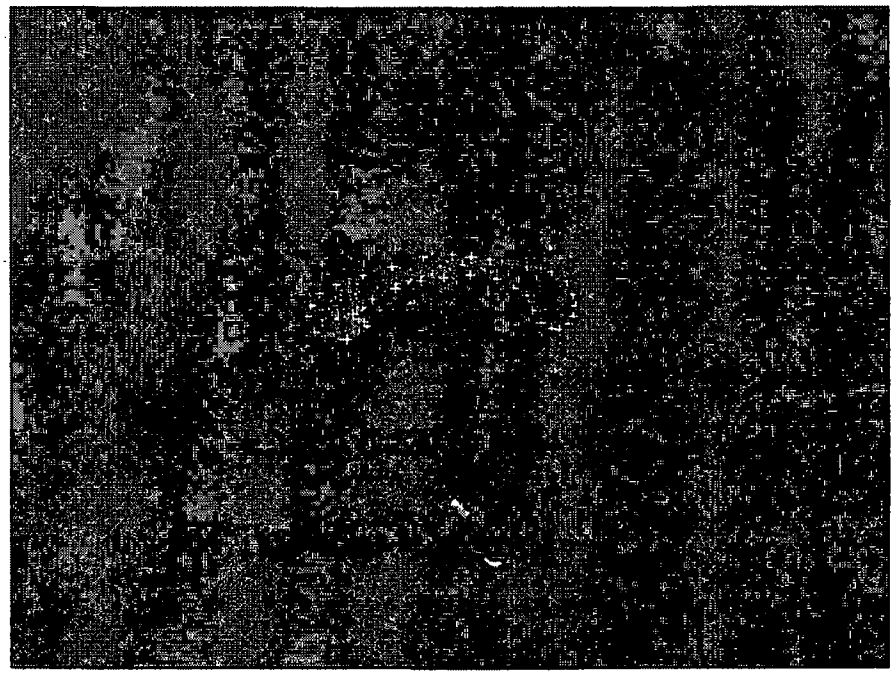
Criteria for FAS Diagnosis

Requires all three of the following findings: 1 Documentation of all three facial abnormalities (smooth philtrum, thin vermillion border, and small palpebral fissures);

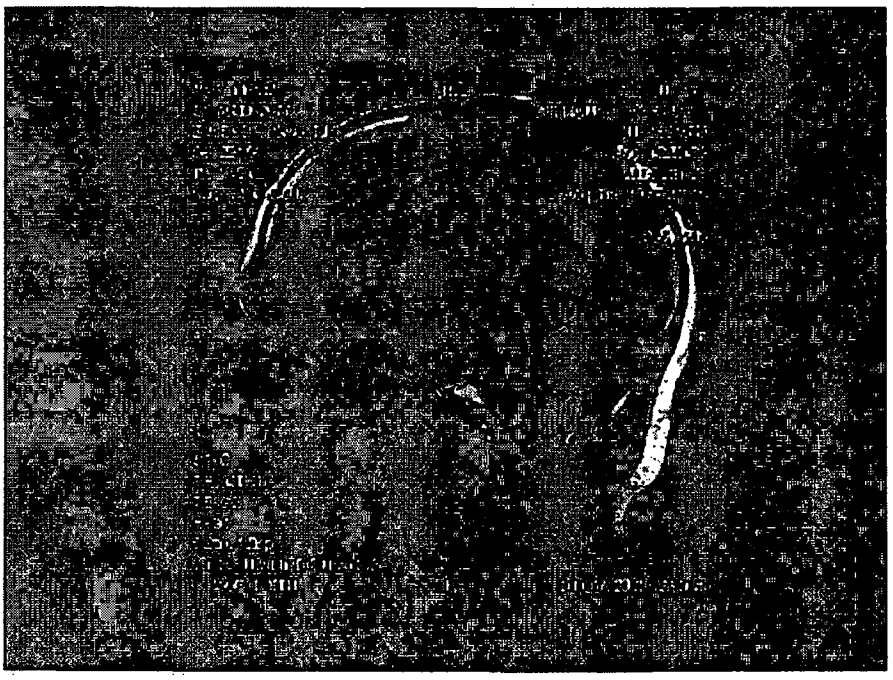
1. Documentation of growth deficits
2. Documentation of CNS abnormality

FIGURE 2

Plaintiff's Exhibit 40 – MRI of a person with a normal Corpus Callosum



Plaintiff's Exhibit 35 – 2005 MRI of Petitioner showing thinning of Corpus Callosum



STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
William Bell)
AKA:)
Race: W Sex: M Age: 21)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
2003GS2308780
A/W#: H359666
Date of Offense: 04-21-2003
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS
TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.
ATTEST: 30 yrs

Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: E7E0, E781 + E7E0
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. April 21, '03 – (456 days)

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, IB TP (Law Enforce. Funding	$25	$ 25
§ 33.7, IB TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Paul B. Culbertson
Clerk of Court/ Deputy Clerk
Court Reporter: Hewson

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE
Judge Code: 2, 1, 17
Sentence Date: 7-22-04

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE-MURDER
COUNT TWO-POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on DECEMBER 16, 2003 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That WILLIAM MICHAEL BELL did in Greenville County, on or about the 21st day of April, 2003, unlawfully and with malice aforethought kill Anthony [redacted] by means of shooting him, and that Anthony [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That WILLIAM MICHAEL BELL did in Greenville County, on or about the 21st day of April, 2003, possess or visibly display a pistol during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

L. Mark Hayes
SOLICITOR

WITNESSES

WESLEY SMITH /S

GCSO

04/21/03

ARREST WARRANT NUMBER

H 359666 ✓

H 359669 ✓

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury Date:

DOCKET NO. 2003-GS-23- LMM 098780

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

DECEMBER TERM 2003

THE STATE

vs.

PLEAD GUILTY

WILLIAM MICHAEL BELL

Abdalla.

✓ Indictment for

0116 MURDER
VIOLATION § 16-3-10

0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

2

4101

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE)
VS.)
William Bell)
AKA:)
Race: W Sex: M Age: 21)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
2003GS2308782
A/W#: H359667
Date of Offense: 04-21-2003
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.
ATTEST:

Solicitor: J. Mark Hayes Defendant: William Bell Attorney for Defendant: John McDaniel

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: E760, E761
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 455 days

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100
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3% to County (if paid in installments		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
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Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE: [signature]
Judge Code: 211 77
Sentence Date: 7-22-04

Clerk of Court/ Deputy Clerk: Paul B. Wickensimer
Court Reporter: Herron

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE-MURDER
COUNT TWO-POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on DECEMBER 16, 2003 the Grand Jurors of Greenville County present upon their oath:

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Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. Mark Hayes
SOLICITOR

WITNESSES

WESLEY SMITH /S

GCSO

04/21/03

ARREST WARRANT NUMBER

H 359667 ✓

DIRECT PRESENTMENT ✓

ACTION OF GRAND JURY

TRUE BILL

JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2003-GS-23- LMM 008782

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

DECEMBER TERM 2003

PLEAD GUILTY

THE STATE

vs.

WILLIAM MICHAEL BELL

✓

Indictment for

0116 MURDER
VIOLATION § 16-3-10

✓ 0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

1

4104

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Britney Ervin)
AKA:)
Race: B Sex: M Age: 20)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2004GS2301743
A/W#: H360505
Date of Offense: 08-21-2003
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116

☐ **CASE RESTORED**

SENTENCE

☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: MURDER (GS)

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor: Britney Ervin Defendant John L Mauldin Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9-28-06

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 1134 days

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

Paul B. Wickes
Clerk of Court/ Deputy Clerk
Court Reporter: Tony Holst

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE
Judge Code: 2 0 1 5 1 5
Sentence Date: 9/29/06

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE –MURDER
COUNT TWO-POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on MARCH 23, 2004 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That BRITNEY EMANUEL ERVIN did in Greenville County, on or about the 21st day of August, 2003, while aiding, abetting and/or assisting Amos Lamont Mattison, unlawfully and with malice aforethought kill [redacted] by means of shooting him, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO -POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That BRITNEY EMANUEL ERVIN did in Greenville County, on or about the 21st day of August, 2003, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

A.L. BAILEY S. Ivey

GCSO

08/21/03

ARREST WARRANT NUMBER

H 360505

H 360638

ACTION OF GRAND JURY

TRUE BILL

Ricky G Sorrells

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2004-GS-23-01743

BCS

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MARCH TERM 2004

THE STATE

PLEAD GUILTY

VS.

BRITNEY EMANUEL ERVIN

Indictment for

0116 MURDER
VIOLATION § 16-3-10
0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

4107

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE)
VS.)
Britney Ervin)
AKA:)
Race: B Sex: M Age: 20)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2004GS2301744
A/W#: H360511
Date of Offense: 08-21-2003
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116
☐ **CASE RESTORED**
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor: Britney Ervin Defendant: John McLaughlin Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 30 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9-28-06
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 1134 days

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

Clerk of Court/ Deputy Clerk
Court Reporter: Jay Holston

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE _____
Judge Code: 2915
Sentence Date: 9/28/06

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE-MURDER
COUNT TWO -POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on MARCH 23, 2004 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That BRITNEY EMANUEL ERVIN did in Greenville County, on or about the 21st day of August, 2003, while aiding, abetting and/or assisting Amos Lamont Mattison, unlawfully and with malice aforethought kill [redacted] by means of shooting him, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO -POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That BRITNEY EMANUEL ERVIN did in Greenville County, on or about the 21st day of August, 2003, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

A.L. BAILEY S. Traggis/S

GCSO

08/21/03

ARREST WARRANT NUMBER

H 360511

DIRECT PRESENTMENT

ACTION OF GRAND JURY

TRUE BILL

Foreman G Spradling

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2004-GS-23- 001744
BCS

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MARCH TERM 2004

Jay Stone Jr
Jay Stone SC 09-28-04

PLEA GUILTY THE STATE

VS.

BRITNEY EMANUEL ERVIN

Indictment for

0116 MURDER
VIOLATION § 16-3-10
0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

87

4110

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Amos Mattison)
AKA:)
Race: B Sex: M Age: 35)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2004GS2301748
A/W#: H360506
Date of Offense: 08-21-2003
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116
☐ **CASE RESTORED**
SDR **SENTENCE**
~~☐ PLEA~~ ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ~~☐ PLEADS~~ SDR
TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:
John Jared Rowell
Solicitor:

Defendant

Thomas T. Greene
Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of Life days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $; provided that upon the service of days/months/years and/or payment of $; plus costs and assessments as applicable*; the balance is suspended with **probation** for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐RESTITUTION: ☐Heard, ☐Waived, ☐Ordered
Total: $ plus 20% fee: $
Payment Terms:
☐ set by SCDPPPS

Recipient:
*Fine: $

§ 14-1-206 (Assessments 107.5 %)		$	
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$	100.00
§ 14-1-211(A)(2) (DUI Surcharg	$100	$	
§ 56-5-2995 (DUI Assessment)	$12	$	
§ 35.13 (Public Def/Prob)	$500	$	
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$	25.00
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$	
§ 50-21-114(BUI Breath Test Fee)	$50	$	
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
3% to County (if paid in installments)		$	
TOTAL		$	

Paul B. Wilkinson
Clerk of Court/ Deputy Clerk
Court Reporter: T. Johnson

PTUP
days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ beginning
$ paid to Public Defender Fund
Other: Sentence is life without parole per notice by the State.

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE C. Victor Pyatt
Judge Code: 2 10 17 10
Sentence Date: 6-15-06

SCCA/217 (2/2006)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE-MURDER
COUNT TWO -POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on MARCH 23, 2004 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That AMOS LAMONT MATTISON did in Greenville County, on or about the 21st day of August, 2003, while aiding, abetting, and/or assisting Britney Emanuel Ervin, unlawfully and with malice aforethought kill [redacted] by means of shooting him, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

- COUNT TWO -POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That AMOS LAMONT MATTISON did in Greenville County, on or about the 21st day of August, 2003, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2004-GS-23-001748
BCS

WITNESSES

A.L. BAILEY Silvaggio 15

GCSO

08/21/03

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MARCH TERM 2004

THE STATE

GUILTY

vs.

AMOS LAMONT MATTISON

ARREST WARRANT NUMBER

H 360506

DIRECT PRESENTMENT

ACTION OF GRAND JURY

TRUE BILL

Ricky G Saunders

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Count one: Guilty

Count two: Guilty

Ramona Bleeho

Foreperson of Petit Jury

June 15, 06

Date

Indictment for

0116 MURDER
VIOLATION § 16-3-10

0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

83

4113

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE –MURDER
COUNT TWO-POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on MARCH 23, 2004 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That AMOS LAMONT MATTISON did in Greenville County, on or about the 21st day of August, 2003, while aiding, abetting, and/or assisting Britney Emanuel Ervin, unlawfully and with malice aforethought kill [redacted] by means of shooting him, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO -POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That AMOS LAMONT MATTISON did in Greenville County, on or about the 21st day of August, 2003, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

A.L. BAILEY Silvaggio 15

GCSO

08/22/03

ARREST WARRANT NUMBER

H 360507

H 360639

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

FOREMAN GRAND JURY

VERDICT

Foreperson of Petit Jury Date:

DOCKET NO. 2004-GS-23-001742

BCS

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MARCH TERM 2004

THE STATE

vs.

AMOS LAMONT MATTISON

Indictment for

0116 MURDER
VIOLATION § 16-3-10
0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

87

4115

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Rico Lindsey)
AKA:)
Race: ____ Sex: M Age: 30)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#: ____)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2004GS2300669
A/W#: H390466
Date of Offense: 07-09-2003
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116

☐ **CASE RESTORED**
SENTENCE
☒ **PLEA** ☐ **TRIAL**

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor: Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed ____ years and/or to pay a fine of $ ____; provided that upon the service of ____ days/months/years and/or payment of $____; plus costs and assessments as applicable*; the balance is suspended with **probation** for ____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ ____ plus 20% fee: $ ____
Payment Terms: ____
☐ set by SCDPPPS ____
Recipient: ____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Paul B. Dickerson
Clerk of Court/ Deputy Clerk
Court Reporter: Koffey

PTUP ____
____ days/hours Public Service Employment
Obtain GED ____
Attend Voc. Rehab. or Job Corp. ____
May serve W/E begining ____
Substance Abuse Counseling ____
Random Drug/Alcohol testing ____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ ____ beginning ____
$ ____ paid to Public Defender Fund
Other: This sentence to be served first. (AP)

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE Manning
Judge Code: 2 1 3 1 8
Sentence Date: 4/8/05

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE-MURDER
COUNT TWO-POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on FEBRUARY 17, 2004 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That RICO LINDSEY did in Greenville County, on or about the 9th day of July, 2003, unlawfully and with malice aforethought kill [redacted] by means of shooting her, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO-POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That RICO LINDSEY did in Greenville County, on or about the 9th day of July, 2003, possess or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

G.R. BOBO Threlkeld IS

SIMPSONVILLE PD

07/15/03

ARREST WARRANT NUMBER

H 390466

H 390480

ACTION OF GRAND JURY

TRUE BILL

Ricky G Spradley

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2004-GS-23- 000669

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

4/8/05 FEBRUARY TERM 2004

THE STATE

PLEAD GUILTY

vs.

RICO LINDSEY

Indictment for

0116 MURDER
VIOLATION § 16-3-10
0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

183

4118

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE)
VS.)
Rico Lindsey)
AKA:)
Race: B Sex: M Age: 30)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
2004GS2300671
A/W#: H390479
Date of Offense: 07-09-2003
S.C. Code § : 16-13-0030(B)(1)
CDR Code #: 0478
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: GRAND LARCENY $1000 OR MORE
in violation of § 16-13-0030(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0478
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor: Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: April 8, 2005
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 107.5
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Paul B. Wick
Clerk of Court/ Deputy Clerk
Court Reporter: Kelly

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: This sentence To be served 1st, after the sentence on docket No. 04-GS-23-669. (LP)
☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE Marion
Judge Code: 211218
Sentence Date: 4/8/05

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
GRAND LARCENY

At a Court of General Sessions, convened on FEBRUARY 17, 2004 the Grand Jurors of Greenville County present upon their oath:

That RICO T. LINDSEY did in Greenville County, on or about the 9th day of July, 2003, feloniously take and carry away the personal property of [redacted] of the value of more than One Thousand dollars, described as follows: 1994 Ford Ranger pickup, with intent to deprive the owner permanently of such property. This is in violation of §16-13-30 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

G.R. BOBO

SIMPSONVILLE PD

07/16/03

ARREST WARRANT NUMBER

H 390479

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2004-GS-23-00671

LMM

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

4/8/05 FEBRUARY TERM 2004

THE STATE

PLEAD GUILTY

vs.

RICO T. LINDSEY

Indictment for

0478

GRAND LARCENY

VIOLATION § 16-13-30

4121

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
John Mills)
AKA:)
Race: B Sex: M Age: 34)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2005GS2304646
A/W#: H916089
Date of Offense: 03-18-2005
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murder / Murder

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☒ §17-25-45 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor: HLS Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of LIFE ~~days/months/years~~ or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and/or payment of $_____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §7-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Paul B. Wickensimer
Clerk of Court/ Deputy Clerk

Court Reporter: T. Johnson

PRESIDING JUDGE
Judge Code: 21 / 1 / 11 / 21 / 13
Sentence Date: 1/19/07

SCCA/217 (9/2006)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on June 21, 2005 the Grand Jurors of Greenville County present upon their oath:

That JOHN LEWIS MILLS did in Greenville County, on or about the 18th day of March, 2005, unlawfully and with malice aforethought kill [redacted] by means of shooting him with a firearm, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2005-GS-23-HLS 004646

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

June TERM 2005

1-19-07

GUILTY THE STATE

vs.

JOHN LEWIS MILLS

Indictment for

0116

MURDER

VIOLATION § 16-03-0010, 0020

427

WITNESSES

Wes Smith W.S.M.

Greenville County Sheriffs Office

3/29/2005

ARREST WARRANT NUMBER

H916089

ACTION OF GRAND JURY

TRUE BILL

F. Daniel Jackson

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty.

Cancina Feeling 1/19/07

Foreperson of Petit Jury *Date:*

4124

5031

Entered On NCIC

ARREST WARRANT 916089 5.6.05

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
Greenville Code 8

THE STATE
against
1-2005-038796

John Lewis Mills
Address: [redacted]

Phone: SSN: [redacted]
Sex: m Race: b Height: 5-8 Weight: 133
DL State: DL #:
DOB: [redacted] Agency ORI#: SC0230000
Prosecuting Agency: GCSO/VCU
Prosecuting Officer: Wesley Smith
Offense: Murder
Offense Code:
Code/Ordinance Sec. 16-3-10,20

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of . The accused is to be arrested and brought before me to be dealt with according to law.

(L.S.)
Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant John Lewis Mills on 3-29-05

J. Mosteller 529 #797
Signature of Constable/Law Enforcement Officer

RECEIVED 2005 MAY 31 PM 5:02

RETURN WARRANT TO:

Hudson

Greenville County Sheriff's Office

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
Greenville)

AFFIDAVIT

Personally appeared before me the affiant Inv. Wesley Smith, GCSO/VCU who being duly sworn deposes and says that defendant John Lewis Mills did within this county and state on March 18, 2005 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of) in the following particulars:

DESCRIPTION OF OFFENSE: MURDER

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On the incident date, this defendant and an as yet unidentified defendant attempted to rob [redacted] of personal property at gun point while they were seated in a car in a parking area of [redacted] in Greenville County. During the incident, the defendant discharged a handgun into the vehicle, the projectile from which struck the [redacted]'s fourteen year old son, [redacted] in the chest, causing a fatal wound, from which he later died at Greenville Memorial Hospital. The defendant has been identifed by a witness to the incident, and also identified by [redacted] from a photographic line-up The affaint also has written statements from the witness and the Whitakers regarding the incident.

Signature of Affiant

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
Greenville)

Affiant's Address 4 McGee Street
Greenville, SC 29601
Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on March 18, 2005 defendant John Lewis Mills did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of) as set forth below:

DESCRIPTION OF OFFENSE: MURDER

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me on 3/19/05

Signature of Issuing Judge (L.S.)
Judge Code: 5079

Judge's Address 22 McGee Street
Greenville, SC 29601
Judge's Telephone

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

4125

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Allan Hawkins)
AKA:)
Race: W Sex: M Age: 27)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS2303511
A/W#: 1341744
Date of Offense: 11/22/2005
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO: Murder

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor: Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and/or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 06-GS-32-3512

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ plus 20% fee: $
Payment Terms:
☐ set by SCDPPPS

Recipient:

*Fine:		$	
§ 14-1-206 (Assessments 107.5 %)		$	
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$	100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$	
§ 56-5-2995 (DUI Assessment)	$12	$	
§ 35.13 (Public Def/Prob)	$500	$	
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$	25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$	
§ 50-21-114(BUI Breath Test Fee)	$50	$	
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
3% to County (if paid in installments)		$	
TOTAL		$	

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ beginning
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel. §35.13 TP
Requires $500 be paid to Clerk during probation.

Paul B. Wickensamer
Clerk of Court/ Deputy Clerk

Court Reporter: A. Herron

PRESIDING JUDGE A. L. Toffel
Judge Code: 211128
Sentence Date: 1/17/08

SCCA/217 (10/2007)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on April 18, 2006 the Grand Jurors of Greenville County present upon their oath:

That ALLAN LEE HAWKINS did in Greenville County, on or about the 22nd day of November, 2005, unlawfully and with malice aforethought kill [redacted] by means of shooting him, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2006-GS-23- 003511
LMM

WITNESSES

Paul Silvaggio

Greenville County Sheriffs Office

11/29/2005

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2006

1-17-08

THE STATE

GUILTY vs.

ALLAN LEE HAWKINS

ARREST WARRANT NUMBER

I341744

4128

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

0116

Indictment for

MURDER

VIOLATION § 16-03-0010

Craig A. Martin
Foreperson of Petit Jury

1-17-08
Date:

752

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Allan Hawkins)
AKA:)
Race: W Sex: M Age: 27)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS2303512
A/W#: 1341750
Date of Offense: 11/22/2005
S.C. Code § : 16-11-0330(A)
CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO: Armed Robbery

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor: J. Mark Hayes II Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 10 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and/or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services' standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 06-GS-23-3512, 3511

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: $ plus 20% fee: $

Payment Terms:
☐ set by SCDPPPS

Recipient:

*Fine:		$	
§ 14-1-206 (Assessments 107.5 %)		$	
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$	100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$	
§ 56-5-2995 (DUI Assessment)	$12	$	
§ 35.13 (Public Def/Prob)	$500	$	
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$	25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$	
§ 50-21-114(BUI Breath Test Fee)	$50	$	
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
3% to County (if paid in installments)		$	
TOTAL		$	

_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires $500 be paid to Clerk during probation.

Paul B. Wickensamer
Clerk of Court/ Deputy Clerk

Court Reporter: Q. Herrin

PRESIDING JUDGE A. Lee Jeffcoat 9218
Judge Code: 2
Sentence Date: 1/17/08

SCCA/217 (10/2007)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ARMED ROBBERY AND POSSESSION OF WEAPON DURING THE COMMISSION OF OR THE ATTMEPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on April 18, 2006 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE – ARMED ROBBERY

That ALLAN LEE HAWKINS did in Greenville County, on or about the 22nd day of November, 2005, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: U.S. Currency and/or wallet from the person or presence of [redacted]. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That ALLAN LEE HAWKINS did in Greenville County, on or about the 22nd day of November, 2005, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Armed Robbery. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2006-GS-23- 003512
LMM

WITNESSES

Paul Silvaggio /Maxwell/S

Greenville County Sheriffs Office

11/29/2005

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

1-17-08 April TERM 2006

THE STATE

GUILTY vs. GUILTY

ALLAN LEE HAWKINS

ARREST WARRANT NUMBER

I341745, I341750

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

0139 - Guilty

0549 - Guilty

Craig A. Martin
Foreperson of Petit Jury

1/17/08
Date:

Indictment for

0139
0549

ARMED ROBBERY AND POSSESSION OF WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

VIOLATION § 16-11-330
§ 16-23-049

754

4131

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Michael Anthony Sarratt)
AKA:)
Race: W Sex: M Age: 29)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2005GS2304108
A/W#: 1467590
Date of Offense: 01-03-2005
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDER

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____
Solicitor: Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 50 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $; provided that upon the service of _____ days/months/years and/or payment of $; plus costs and assessments as applicable*; the balance is suspended with **probation** for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ plus 20% fee: $
Payment Terms:
☐ set by SCDPPPS

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ beginning
$ _____ paid to Public Defender Fund
Other:

Recipient:

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Paul B. Wickensimer
Clerk of Court/ Deputy Clerk

Court Reporter: S. Hogan

PRESIDING JUDGE E. C. Wilkes
Judge Code: 2 1 1 3 1 0
Sentence Date: 6-14-07

SCCA/217 (9/2006)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on MAY 24, 2005 the Grand Jurors of Greenville County present upon their oath:

That MICHAEL ANTHONY SARRATT (aka LEROY EUGENE FREY, JR.) did in Greenville County, on or about the 3rd day of January, 2005, unlawfully and with malice aforethought kill [redacted] by means of stabbing the victim multiple times, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2005-GS-23-KBH 004108

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MAY TERM 2005

THE STATE

GUILTY

vs.

MICHAEL ANTHONY SARRATT
(aka LEROY EUGENE FREY, JR.)

WITNESSES

Wesley Smith

Greenville County Sheriffs Office

2/23/2005

ARREST WARRANT NUMBER

I467590

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY 6/19/07

Foreperson of Petit Jury *Date:*

0116

Indictment for

MURDER

VIOLATION § 16-03-0010

2007

4134

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	CASE NO. 2005-GS-23-004106
	)	CASE NO. 2005-GS-23-004108
v.	)	
	)	
Michael Anthony Sarratt,	)	**VERDICT**
(a/k/a Leroy Eugene Frey, Jr.,)	)	
	)	
DEFENDANT.	)	
	)	

As to the charge of **MURDER**, we the Jury find the Defendant:

_____ Not Guilty X Guilty.

As to the charge of **CARJACKING**, we the Jury find the Defendant:

_____ Not Guilty X Guilty.

As to the charge of **POSSESSION OF A WEAPON DURING THE COMMISSION OF A CRIME**, we the Jury find the Defendant:

_____ Not Guilty X Guilty.

Dated: 6/14/07

FOREPERSON

Please let the Bailiff know when you have completed this form.

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Michael Anthony Sarratt)
AKA:)
Race: W Sex: M Age: 29)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2005GS2304106
A/W#: 1467591
Date of Offense: 01-03-2005
S.C. Code § : 16-03-1075(B)(2)
CDR Code #: 2600

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: CARJACKING WITH GREAT BODILY INJURY in violation of § 16-03-1075(B)(2) of the S.C. Code of Laws, bearing CDR Code # 2600 ☐§17-25-45

☐ NON-VIOLENT ☒VIOLENT ☐SERIOUS ☒MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury._____(Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____ _____ _____
Solicitor: Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 30 ~~days/months~~hs/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine: $ _____

§ 14-1-206 (Assessments 107.5 %)		$ 107
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐Appointed PD or appointed other counsel,§35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE _____
Judge Code: 21 1 3 10
Sentence Date: 6-14-07

Paul B Wickensimer
Clerk of Court/ Deputy Clerk

Court Reporter: S Hodges

SCCA/217 (9/2006)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
CARJACKING AND POSSESSION OF WEAPON DURING THE COMMISSION OF A CRIME

At a Court of General Sessions, convened on MAY 24, 2005 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE- CARJACKING

That MICHAEL ANTHONY SARRATT (aka LEROY EUGENE FREY, JR.) did in Greenville County, on or about the 3rd day of January, 2005, take or attempt to take a motor vehicle, to wit: 1991 Plymouth Acclaim from [redacted] by force, and violence or by intimidation while [redacted], was operating and/or was in the said vehicle. This is in violation of §16-3-1075 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO- POSSESSION OF WEAPON DURING THE COMMISSION OF A CRIME

That MICHAEL ANTHONY SARRATT (aka LEROY EUGENE FREY, JR.) did in Greenville County, on or about the 3rd day of January, 2005, possess or visibly display a knife during the commission or attempted commission of a violent crime, to wit: Carjacking. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2005-GS-23- KBH 004106

WITNESSES

Wesley Smith

Greenville County Sheriffs Office

2/23/2005

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MAY TERM 2005

THE STATE

GUILTY Both Counts

VS.

MICHAEL ANTHONY SARRATT
(aka LEROY EUGENE FREY, JR.)

ARREST WARRANT NUMBER

I467591, I467594

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY 6/14/07

Indictment for

2600

CARJACKING

VIOLATION § 16-03-1075

0549

POSSESSION OF WEAPON DURING THE COMMISSION OF A CRIME

VIOLATION § 16-23-0490

Foreperson of Petit Jury

Date:

4138

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Jonathan Millard Campbell)
AKA:)
Race: W Sex: M Age: 36)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
City,State,Z [redacted])
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS2300328
A/W#: 1468701
Date of Offense: 6/19/2005
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐PLEADS
TO: Murder / Murder

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☐ VIOLENT ☐SERIOUS ☐MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☐ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Weston, Jeff | 60047 SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 45 [redacted]/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐**RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
§ 47.12 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25
§ 14-1-213 (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§ 90.7 (SCCJA Surcharge)	$5	$ 5
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B. Wickensimer
Court Reporter: D Hudgins
Presiding Judge [signature]
Judge Code: 2130
Sentence Date: 1-14-2010

SCCA/217 (11/2009)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on January 6, 2006 the Grand Jurors of Greenville County present upon their oath:

That JONATHAN MILLARD CAMPBELL did in Greenville County, on or about the 19th day of June, 2005, unlawfully and with malice aforethought kill [redacted] by means of stabbing the victim repeatedly in the abdomen and chest and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2006-GS-23- WJW 020328

The State of South Carolina

County of Greenville ✓

COURT OF GENERAL SESSIONS

JANUARY TERM 2006

THE STATE

vs.

JONATHAN MILLARD CAMPBELL

Indictment for

0116

MURDER

VIOLATION § 16-03-0010

WITNESSES

Mary Fields / Marett / S

Greenville County Sheriffs Office

9/9/2005

ARREST WARRANT NUMBER

I468701

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Jessica Kemp 1/14/10

Foreperson of Petit Jury *Date:*

336

4141

ARREST WARRANT

5031 9-30-05

I-468701

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Greenville

THE STATE 1-05-083516
against
Jonathan Millard Campbell

Address: [redacted]

Phone: [redacted] SSN: [redacted]
Sex: M Race: W Height: 5 7 Weight: 140
DL State: SCLD DL #: Unknown
DOB: [redacted] Agency ORI #: SC0230000
Prosecuting Agency: Greenville County Sheriffs Office
Prosecuting Officer: M/ D M. L. Fields
Offense: MURDER

Offense Code: 0116
Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the
[ ] County/ [ ] Municipality of
. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)
Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Jonathan Millard Campbell on 9-9-05

C. Hanson #634 (273)
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
City Magistrate #2
4 Mc Gee Street Room 116-B
Greenville, SC 29601

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 519

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Greenville

Personally appeared before me the affiant M/ D M. L. Fields who being duly sworn deposes and says that defendant Jonathan Millard Campbell did within this county and state on 06/19/2005 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) in the following particulars:

DESCRIPTION OF OFFENSE: MURDER

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

The affiant has statements and Law Enforcement reports which implicate that the above defendant and co-defendant Carl Hershel Southerland on or about June 19, 2005 did knowingly, willingly and with malice aforethought, repeatedly stab the victim in the abdomen and chest causing the victim's death within Greenville County. After rendering the victim unconscious, the defendant and co-defendant concealed the victim's body within his vehicle, a silver Jeep Grand Cherokee SC/351SCX and fled the State of South Carolina in the victims vehicle. On 06-21-05, Law Enforcement Authorities in the State of Alabama did seize the victim's body, the victim's vehicle and the defendant(s) pursuant to a traffic stop on I-65 in Alabama.

Signature of Affiant Mary L Fields

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of
Greenville

Affiant's Address 4 Mcgee Street
Greenville 29601-
Affiant's Telephone (864)467-5219

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 6/19/2005 defendant Jonathan Millard Campbell did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) as set forth below:

DESCRIPTION OF OFFENSE: MURDER

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 06/22/2005

James E. Hudson (L.S.)
Signature of Issuing Judge

James E. Hudson
Judge Code: 5031

Judge's Address 4 Mcgee Street, Room 116-B
Greenville, SC 29601-
Judge's Telephone (864)467-5302

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Walter Gaines)
AKA:)
Race: B Sex: M Age: 0)
DOB: 00-00-0000 SS#: 000-00-0000 [redacted])
Address: [redacted])
DL#: [redacted])

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006-1369
A/W#: 1795915
Date of Offense: 11-9-05
S.C. Code § : 16-3-010
CDR Code #: 01116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDER
in violation of § 16-3-010 of the S.C. Code of Laws, bearing CDR Code # 01116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:
Solicitor: _____ Defendant _____ Attorney for Defendant _____

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of Life days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____
Total: $_____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Paul D Wakemani
Clerk of Court/ Deputy Clerk

Court Reporter: D. Garrison

PRESIDING JUDGE C. E. Watkins
Judge Code: 211 13
Sentence Date: 5/22/08

SCCA/217 (10/2007)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on FEBRUARY 21, 2006 the Grand Jurors of Greenville County present upon their oath:

That WALTER GAINES did in Greenville County, on or about the 9th day of November, 2005, unlawfully and with malice aforethought kill [redacted] by means of manual strangulation and/or blunt force trauma, and that [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

Mary Fields - MAXWELL 15

Greenville County Sheriffs Office

12/2/2005

ARREST WARRANT NUMBER

I795815

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

3/22/08
Date:

DOCKET NO. 2006-GS-23- 001369
KBH

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2006

3/22/08

GUILTY **THE STATE**

VS.

WALTER GAINES

✓ **Indictment for**

0116

MURDER

VIOLATION § 16-03-0010

697

4145

ARREST WARRANT 5231

I-795815 12-14-05

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Greenville

THE STATE 1-05-149195

against

Walter Gaines

Address: [redacted]

Phone: SSN: [redacted]

Sex: M Race: B Height: 6 2 Weight: 160

DL State: SC DL #:

DOB: [redacted] Agency ORI #: SC0230000

Prosecuting Agency: Greenville County Sheriffs Office

Prosecuting Officer: M/ D M. L. Fields

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

[ ] County/ [ ] Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant WALTER T. GAINES on 12/2/05

/S/ [illegible]

Signature of Constable/Law Enforcement Officer

(#307/410)

RETURN WARRANT TO:

City Magistrate #2
4 Mc Gee Street Room 116-B
Greenville, SC 29601

ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Greenville

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant M/ D M. L. Fields who being duly sworn deposes and says that defendant Walter Gaines did within this county and state on 11/09/2005 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Affiant has statements which implicate the above defendant in this case. Specifically the defendant was seen entering the victim's home wearing a hood and gloves during the relevant times, he has given false information, and the victim's vehicle was recovered in front of a relative of the defendant. On the above date [redacted] was willfully and knowingly with malice aforethought was killed within his residence located at [redacted] within Greenville. Autopsy revealed that he died as a contributing result of blunt force trauma; and is a homicide. The investigation shows that following the assault, which lead to his death, the victim's vehicle, wallet, and contents were stolen.

Signature of Affiant

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Greenville

Affiant's Address: 4 Mcgee Street
Greenville 29601-

Affiant's Telephone (864)467-5219

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 11/9/2005 defendant Walter Gaines did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) as set forth below:

COMPUTER ENTERED

DESCRIPTION OF OFFENSE: Murder / Murder

DEC 0 6 2005

Having found probable cause and the above affiant having sworn before me, you are commanded and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

GREENVILLE COUNTY SHERIFF'S OFFICE

Sworn to and subscribed before me on 12/01/2005 (L.S.)

Signature of Issuing Judge

Darrell Fisher

Judge Code: 5068

Judge's Address

Judge's Telephone

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL

4146

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Walter Gaines)
AKA:)
Race: B Sex: M Age: 31)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: 999999999 SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS2301368
A/W#: I795816
Date of Offense: 11/9/2005
S.C. Code § : 16-11-0330(A)
CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Armed Robbery, robbery while armed or al

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor: _____ Defendant _____ Attorney for Defendant _____

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 5/22/08

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: $ _____ plus 20% fee: $ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E begining _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____

$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Paul B Wickensimer
Clerk of Court/Deputy Clerk

Court Reporter: D. Garrison

PRESIDING JUDGE C. C. Walker
Judge Code: 24C 1317
Sentence Date: 5/22/08

SCCA/217 (10/2007)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ARMED ROBBERY

At a Court of General Sessions, convened on FEBRUARY 21, 2006 the Grand Jurors of Greenville County present upon their oath:

That WALTER GAINES did in Greenville County, on or about the 9th day of November, 2005, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon, that [redacted] reasonably believed to be a deadly weapon, attempted to and/or did take by means of force or intimidation, goods or monies described as: the victim's vehicle, wallet and contents from the person or presence of [redacted] This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2006-GS-23- 001368
KBH

WITNESSES

Mary Fields - MAXWELL /S

Greenville County Sheriffs Office

12/2/2005

ARREST WARRANT NUMBER

I795816

ACTION OF GRAND JURY

TRUE BILL

Brooks L. Register

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury 5/22/08 Date:

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

5/22/08 **FEBRUARY TERM 2006**

GUILTY **THE STATE**

VS.

WALTER GAINES

✓

0139 **Indictment for**

ARMED ROBBERY

VIOLATION § 16-11-0330

69

4149

ARREST WARRANT 5C231

I-795816 12-14-05

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Greenville

THE STATE 1-05-149195

against

Walter Gaines

Address: [redacted]

Phone: SSN: [redacted]

Sex: M Race: B Height: 6 2 Weight: 160

DL State: SC DL #:

DOB: [redacted] Agency ORI #: SC0230000

Prosecuting Agency: Greenville County Sheriffs Office

Prosecuting Officer: M/ D M. L. Fields

Offense: Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

Offense Code: 0139

Code/Ordinance Sec: 16-11-0330(A)

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of

. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant WALTER T. GAINES on 12/2/05

Signature of Constable or Enforcement Officer

RETURN WARRANT TO:

City Magistrate #2
4 Mc Gee Street Room 116-B
Greenville, SC 29601

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Greenville)

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant M/ D M. L. Fields who being duly sworn deposes and says that defendant Walter Gaines did within this county and state on 11/09/2005 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) in the following particulars:

DESCRIPTION OF OFFENSE: Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Affiant has statements which implicate the above defendant in this case. Specifically the defendant was seen entering the victim's home wearing a hood and gloves during the relevant times, he has given false information, and the victim's vehicle was recovered in front of a relative of the defendant. On the above date [redacted] was willfully and knowingly with malice aforethought was killed within his residence located at [redacted] within Greenville. Autopsy revealed that he died as a contributing result of blunt force trauma; and is a homicide. The investigation shows that following the assault, which lead to his death, the victim's vehicle, wallet, and contents were stolen.

Signature of Affiant

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Greenville)

Affiant's Address 4 Mcgee Street Greenville 29601-

Affiant's Telephone (864)467-5219

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 11/9/2005 defendant Walter Gaines did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) as set forth below:

COMPUTER ENTERED

DESCRIPTION OF OFFENSE: Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

Having found probable cause and the above affidavit sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

DEC 0 8 2005

GREENVILLE COUNTY SHERIFF'S OFFICE

Sworn to and subscribed before me on 12/01/2005 (L.S.)

Signature of Issuing Judge

Darrell Fisher

Judge Code: 5068

Judge's Address

Judge's Telephone

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

4150

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
James Harper)
AKA:)
Race: B Sex: M Age: 46)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
2003GS2306132
A/W#: H359014
Date of Offense: 02-15-2003
S.C. Code § : 16-03-0010. 0020
CDR Code #: 0116
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.
ATTEST:
Joyce K Monts Solicitor: x James W Harper Defendant Attorney for Defendant Chris Scarborough

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Time since Feb 26, 2003

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Paul B McDevitt
Clerk of Court/ Deputy Clerk
Court Reporter: [illegible]

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE [signature]
Judge Code: 21
Sentence Date: 5/3/05

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on AUGUST 19, 2003 the Grand Jurors of Greenville County present upon their oath:

That JAMES WILLIE HARPER did in Greenville County, on or about the 15th day of February, 2003, unlawfully and with malice aforethought kill [redacted] by means of strangulation, and that Mary Blassingame died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2003-GS-23-006132

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

AUGUST TERM 2003

PLEAD GUILTY

THE STATE

vs.

JAMES WILLIE HARPER

Indictment for

0116

MURDER

VIOLATION § 16-13-10

334

WITNESSES

BAILEY Smith

GCSO

02/26/03

ARREST WARRANT NUMBER

H359014

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

4153

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
James Harper)
AKA:)
Race: B Sex: M Age: 46)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2003GS2306133
A/W#: H359015
Date of Offense: 02-15-2003
S.C. Code § : 16-03-0652
CDR Code #: 0160
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: SEX. CRIM SEX CONDUCT, FIRST DEGREE (GS)
in violation of § 16-03-0652 of the S.C. Code of Laws, bearing CDR Code # 0160
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.
ATTEST:

Joyce K Moats / Solicitor: x James W Harper / Defendant: [signature] / Attorney for Defendant: CHIP SELLERS

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 03-GS-23-6132
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. TIME SINCE FEB. 26, 2003

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Clerk of Court/ Deputy Clerk
Court Reporter: [signature]

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE [signature]
Judge Code: 21
Sentence Date: 5/23/03

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT
FIRST DEGREE

At a Court of General Sessions, convened on AUGUST 19, 2003 the Grand Jurors of Greenville County present upon their oath:

That JAMES WILLIE HARPER did in Greenville County, on or about the 15th day of February, 2003, engage in sexual battery, with [redacted] and used aggravated force to accomplish this sexual battery and/or the victim submitted to this sexual battery under circumstances where the victim was also the victim of kidnapping, forcible confinement or any other similar offense or act. This is in violation of §16-3-652 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

BAILEY Smith

GCSO

02/26/03

ARREST WARRANT NUMBER

H359015

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2003-GS-23-

CC 006133

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

AUGUST TERM 2003

THE STATE

vs.

PLEAD GUILTY

JAMES WILLIE HARPER

✓ 0160

Indictment for

CRIMINAL SEXUAL CONDUCT
FIRST DEGREE

VIOLATION § 16-3-652

335

4156

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Russell Rice)
AKA:)
Race: W Sex: M Age: 47)
DOB: [redacted] SS#: 000-00-0000)
Address: [redacted])
DL#: [redacted] SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
2003GS2303615
A/W#: H306732
Date of Offense: 11-05-2002
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: MURDER (GS)
in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

J. Marshall Morgan
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ County Detention Center, for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Paul B. Wickensimer
Clerk of Court/ Deputy Clerk
Court Reporter: S. Hudgins

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE Clifton Graham
Judge Code: 0 1 0 1 2 1 0
Sentence Date: 4/15/04

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on MAY 27, 2003 the Grand Jurors of Greenville County present upon their oath:

That RUSSELL WILLIAMS RICE, JR. did in Greenville County, on or about the 5th day of November, 2002, unlawfully and with malice aforethought kill [redacted] Jr. by means of shooting him, and that [redacted] Jr. died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

D. Mackay
SOLICITOR

WITNESSES

D.C. FULLER Misc 5

GPD

12/31/02

ARREST WARRANT NUMBER

H 306732

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Warren Kleine 4/15/04

Foreperson of Petit Jury *Date:*

DOCKET NO. 2003-GS-23- LMM 003615

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MAY TERM 2003

4-15-04

GUILTY THE STATE

vs.

RUSSELL WILLIAMS RICE, JR.

Indictment for

0116

MURDER

VIOLATION § 16-3-10

236

4159

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Russell Rice)
AKA: _____)
Race: W Sex: M Age: 47)
DOB: [redacted] SS#: 000-00-0000)
Address: [redacted])
DL#: [redacted] SID#: _____)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:
2003GS2303612
A/W#: H306723
Date of Offense: 12-28-2002
S.C. Code § : 44-53-0370(E)(2)(
CDR Code #: 0278
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: DRUGS / TRAFFICKING IN COCAINE
in violation of § 44-53-0370(E)(2)(_____ of the S.C. Code of Laws, bearing CDR Code # ~~0278~~ 0880 (TRC)
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:
J. Markley
Solicitor: _____ Defendant _____ Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ 100000-- ; provided that upon the service of _____ days/months/years and/or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$ 100,000.00
§ 14-1-206 (Assessments 107.5 %)		$ 107,500.00
§ 14-1-211(A)(1) (Conv Surcharge	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding	$25	$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$ 100.00
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment	$40/ea	$
3% to County (if paid in installments		$
TOTAL		$

Paul B. Wickensimer
Clerk of Court/ Deputy Clerk
Court Reporter: S. Hudgins

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE C Victor Pyatt
Judge Code: 0 1 0 1 7 1 0
Sentence Date: 4/15/04

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
TRAFFICKING COCAINE

At a Court of General Sessions, convened on MAY 27, 2003 the Grand Jurors of Greenville County present upon their oath:

That RUSSELL WILLIAMS RICE, JR. did in Greenville County, on or about the 28th day of December, 2002, knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet or conspire to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 200 grams of Cocaine. This is in violation of §44-53-370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

WITNESSES

J.R. LONG MPD

GPD

12/28/02

ARREST WARRANT NUMBER

H 306723

ACTION OF GRAND JURY

TRUE BILL

Russell P. Thomas

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Warren Reams 4/14/04

Foreperson of Petit Jury *Date:*

DOCKET NO. 2003-GS-23-003612 LMM

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

4-15-04 MAY TERM 2003

THE STATE

GUILTY vs.

RUSSELL WILLIAMS RICE, JR.

/ 0288

Indictment for

TRAFFICKING COCAINE

VIOLATION § 44-53-370

289

4162

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Darian Robinson)
AKA:)
Race: B Sex: M Age: 30)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
DL#: 999999999 SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2005GS2305874
A/W#: H673853
Date of Offense: 01-27-2005
S.C. Code § : 16-03-0010, 0020
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MURDER

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☒ §17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury._____(Defendant initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:
Leigh B. Parrette
Solicitor:

Defendant

C Clay
Attorney for Defendant Seal/60

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ County Detention Center, for a determinate term of LIFE days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $; provided that upon the service of _____ days/months/years and/or payment of $; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ plus 20% fee: $
Payment Terms:
☐ set by SCDPPPS

Recipient:

*Fine:		$	
§ 14-1-206 (Assessments 107.5 %)		$	
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$	100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$	
§ 56-5-2995 (DUI Assessment)	$12	$	
§ 35.13 (Public Def/Prob)	$500	$	
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$	25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$	
§ 50-21-114(BUI Breath Test Fee)	$50	$	
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
3% to County (if paid in installments)		$	
TOTAL		$	

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ beginning
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires $500 be paid to Clerk during probation.

Paul B. Wickensamer
Clerk of Court/ Deputy Clerk

Court Reporter: T. Johnson

PRESIDING JUDGE
Judge Code: 2 1 1 2 13
Sentence Date: 7/19/2007

SCCA/217 (9/2006)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on July 26, 2005 the Grand Jurors of Greenville County present upon their oath:

That DARIAN KYLE ROBINSON did in Greenville County, on or about the 27th day of January, 2005, unlawfully and with malice aforethought kill WILLIAM [redacted] by means of shooting the victim with a handgun, and that WILLIAM [redacted] died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DOCKET NO. 2005-GS-23-5874 005874
DMR

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

7-19-07 JULY TERM 2005

THE STATE

GUILTY

vs.

DARIAN KYLE ROBINSON

WITNESSES

Michael Mcnamara

Greenville County Sheriffs Office

2/1/2005

ARREST WARRANT NUMBER

H673853

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

7/19/07
Date:

Indictment for

0116

MURDER

VIOLATION § 16-03-0010

854

4165

CODE 8 - 612 - 5031

543

ARREST WARRANT 2-18-05

H07 3853

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of Greenville

Ente MCN

THE STATE 05-16731

against

Darian Kyle Robinson

Address: [redacted]

Phone: _____ SSN: [redacted]

Sex: M Race: B Height: 5'8" Weight: 150

DL State: _____ DL#: _____

DOB: [redacted] Agency ORI#: 230000

Prosecuting Agency: GCSO

Prosecuting Officer: McNamara, M.J. *242

Offense: Murder

Offense Code: _____

Code/Ordinance Sec. 16-3-10

This warrant is **CERTIFIED FOR SERVICE** in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant DARIAN KYLE ROBINSON on 02/01/05

[signature] 612/1243
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

HUDSON

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Greenville)

AFFIDAVIT

Form Approved by S.C. Attorney General April 21, 2003 SCCA 618

Personally appeared before me the affiant Investigator M. J. McNamara who being duly sworn deposes and says that defendant Darian Kyle Robinson did within this county and state on January 27, 2005 violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

The affiant has sworn statements from two witnesses stating that the defendant did enter an apartment at [redacted] and did shoot the victim, William [redacted], with a handgun. Paramedics responded to the scene of the shooting and pronounced William [redacted] dead from gunshot wounds inflicted by the defendant. This offense occurred in Greenville County.

Signature of Affiant [signature] McNamara *242/612

Affiant's Address 4 McGee Street
Greenville, SC 29601

Affiant's Telephone 467-5271

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Greenville)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on January 27, 2005 defendant Darian Kyle Robinson did violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____) as set forth below.

DESCRIPTION OF OFFENSE: Murder

COMPUTER ENTERED

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

JAN 27 2005

GREENVILLE COUNTY
CLERK'S OFFICE

Sworn to and subscribed before me on Jan. 27, 2005

SBKeaton (L.S.)
Signature of Issuing Judge
Judge Code: 5761

Judge's Address 20 McGee Street
Greenville, SC 29601

Judge's Telephone 467-2402

Issuing Court: [ ] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Charles Christopher Williams,	)	C.A. No. 2010-CP-23-9792
	)	
Petitioner,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

ENTERED COMPUTER

2013 JUL 24 P 4:38

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Before the Court is Petitioner's Application for Post-Conviction Relief. Petitioner was convicted of murder, kidnapping, and possession of a weapon during the commission of a violent crime, and was sentenced to death. On November 17, 2010, the South Carolina Supreme Court granted a stay of execution and assigned jurisdiction over the matter to this Court. Having carefully considered the evidence and testimony presented, the record before the Court, and the erudite arguments and briefs of counsel, and for the reasons set forth below, this Court denies the Petitioner's request for relief and dismisses this application with prejudice.

FACTS

This matter arises from the murder of Maranda Williams ("Victim") by Charles Christopher Williams ("Petitioner"). On the morning of September 3, 2003, the Petitioner, armed with a shotgun, entered the Bi-Lo grocery store where his former girlfriend, the Victim, was working. Petitioner accosted the Victim and forced her into an office in the bakery/deli area. The Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Petitioner to release the Victim. When the Victim attempted to

escape, Petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Petitioner. Shortly after his arrest, Petitioner gave a statement in which he confessed to the crimes for which he was later charged.

PROCEDURAL HISTORY

The Petitioner was indicted on March 23, 2004, for murder, possession of a weapon during the commission of a violent crime, and kidnapping. A jury trial was held before the Honorable J.C. "Buddy" Nicholson beginning on February 7, 2005. Thirteenth Judicial Circuit Solicitor Robert Ariail and Deputy Solicitor Betty Strom prosecuted the case for the State. The Petitioner was represented by Attorneys John Mauldin and William Nettles of the South Carolina Bar and Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld. On February 15, 2005, the jury found the Petitioner guilty of murder, kidnapping, and possession of a firearm during a violent crime.

The penalty phase of the trial began on February 17, 2005. The jury was charged to consider the existence of one aggravating factor: "Murder was committed while in the commission of kidnapping." Record on Appeal ("ROA") at 2399. The jury was also charged to consider two statutory mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. The age or mentality of the defendant at the time of the crime.

ROA at 2403. The jury was also charged to consider five non-statutory mitigating circumstances:

1. Any testimony regarding the defendant's mental illness is treatable with medication.
2. Any testimony regarding the defendant's adaptability to prison.
3. Any testimony regarding the defendant's future violence in prison.

4. Any testimony the defendant is loved and supported by his sister, Maureen, and her family that have and will continue to encourage, sustain, and assist him in the future.
5. Any other testimony or any other reason or reasons which the jury may consider.

ROA at 2404-05.

On February 19, 2005, the jury returned a verdict finding the existence of the statutory aggravating circumstance "murder was committed while in the commission of kidnapping." ROA at 2417. The jury recommended a sentence of death. Judge Nicholson then sentenced the Petitioner to death.

The Petitioner filed an appeal and was represented by Attorney Robert M. Dudek of the South Carolina Office of Indigent Defense. The South Carolina Supreme Court affirmed the convictions and sentence on February 8, 2010. *See State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010) (petition for rehearing denied, Mar. 25, 2010). On October 4, 2010, the United States Supreme Court denied the Petitioner's request for a writ of certiorari. *Williams v. South Carolina*, 131 S.Ct. 230 (2010). On November 17, 2010, the South Carolina Supreme Court granted the Petitioner's request for a stay of execution so that he could pursue state post-conviction relief.

Petitioner filed his Application for Post-Conviction Relief on November 30, 2010, arguing that both trial counsel and appellate counsel were ineffective. On September 30, 2011, the Petitioner filed his First Addendum to Application for Post-Conviction Relief. On November 20, 2012, the Petitioner filed his Second Addendum to Application for Post-Conviction Relief. The State filed a Return to Application for Post-Conviction Relief on January 13, 2011, and a Return to Amended Application for Post-Conviction Relief on November 20, 2011. A hearing was held before this Court from January 28, to January 31, 2013, at the Greenville County Courthouse. The Petitioner was present at the hearing and was represented by Attorneys Derek

J. Enderlin and Richard W. Vieth. Attorney Donald Zalenka of the South Carolina Office of the Attorney General represented the Respondent, State of South Carolina.

The following testified at the PCR hearing: Petitioner's trial counsel and defense team members, Attorney John Mauldin, Attorney Bill Nettles, and Jan Vogelsang; Petitioner's appellate counsel, Attorney Robert Dudek; Petitioner's mother, Daisy Huckaby, and father, Dwight Williams; Petitioner's experts, Dr. Paul D. Connor, Dr. Richard S. Adler, and Dr. Natalie Novick Brown. The Court had before it the record on appeal from the guilt and penalty phases of Petitioner's trial ("ROA"), the Greenville County Clerk of Court records, the PCR application and addenda, the State's return, the parties' briefs, and the parties' exhibits.

STANDARD OF REVIEW – INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief by a preponderance of the evidence. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008); *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). In order to prevail on a claim for ineffective assistance of counsel, a PCR applicant must satisfy a two prong test. The applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland, supra*; *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The PCR applicant

must satisfy both the deficiency prong and the prejudice prong of this test. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001).

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). "The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application." *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004). "'[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.' *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). . . . Counsel's strategy will be reviewed under 'an objective standard of reasonableness.' *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)." *Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007).

Furthermore, a defendant is constitutionally entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999); *Evitts v. Lucey*, 469 U.S. 387 (1985) (to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair). Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit; appellate counsel is presumed to have decided which issues were most likely to afford relief on appeal. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every nonfrivolous issue presented by the record). "For judges to second-guess reasonable professional judgments and

impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citations omitted).

The standard established by *Strickland* is that the defendant must establish by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480, 481 (1992); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting "defendant who contends appellate counsel rendered ineffective assistance, e.g., by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner raised fifteen issues in his Application for Post-Conviction Relief and subsequent Addenda. This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented by counsel at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Dr. Crawford's Testimony

In Petitioner's first three grounds for relief, he alleges that trial counsel failed to properly respond to testimony offered during the penalty phase of the trial by State's witness, Dr. Pamela Crawford. Petitioner alleges that trial counsel was ineffective (1) for waiving various objections

to the confession given by the Petitioner to Dr. Pamela Crawford, (2) for waiving the objection to Dr. Crawford being allowed to testify before the jury, and (3) for failing to effectively move for a mistrial based on Dr. Crawford's cumulative testimony.

Dr. Crawford was employed as a forensic psychiatrist with the South Carolina Department of Health and as a consultant for the South Carolina Law Enforcement Division. ROA at 2150-51. Soon after the Petitioner was taken into custody, Dr. Crawford interviewed the Petitioner at the Solicitor's request to help assess the case. ROA at 2153. During the penalty phase of the trial, the Solicitor called Dr. Crawford as a lay fact witness. Defense counsel moved to suppress Dr. Crawford's testimony and Petitioner's confession to her, made numerous objections during her testimony, requested curative instructions, and moved for a mistrial. ROA at 2694-2756, 2103-09, 2153-69, 2861-63. The trial court instructed the Solicitor to treat Dr. Crawford "as if she was an investigating officer that took a confession" and to limit questioning of the witness to those permitted by Rule 701, SCRE. ROA at 2165.

Petitioner has failed to demonstrate that trial counsel was ineffective in handling Dr. Crawford's testimony. At his PCR hearing, Petitioner did not provide further evidence to support the allegations in his PCR application related to Dr. Crawford's testimony. To the contrary, at the PCR hearing, Attorney Nettles stated "we tried everything we could to keep [Dr. Crawford's testimony] out[, b]ut given the fact that it came in, I felt the best we could do is utilize [it]." PCR Transcript of Record at 123. The trial transcript supports Attorney Nettles' assertion. Trial counsel made pre-trial motions to exclude Dr. Crawford's testimony; trial counsel strenuously objected numerous times[1] during Dr. Crawford's testimony; trial counsel requested curative

[1] Mr. Nettles objected to Dr. Crawford's testimony, emphatically stating "[m]y legal objection is that this testimony has been ruled on repeatedly," and noted people "mocked John Mauldin for how many times he stands up and gets this clear." ROA at 2152-53. Mr. Mauldin later affirmed this, stating "we done everything . . . pretrial motions, hearings, I been reserving it until I'm blue in the face." ROA at 2163.

instructions and drafted a charge that the judge read to the jury; trial counsel moved for a mistrial; and, during a post-verdict motions hearing, trial counsel moved for a new sentence, based on the previous objections to Dr. Crawford's testimony.[2] ROA at 2150-87. Petitioner has not met his burden of showing that trial counsel's performance fell below an objective standard of reasonableness.

Furthermore, even if trial counsel's handling of Dr. Crawford's testimony was in some way defective, Petitioner has not shown prejudice. The admissibility of Dr. Crawford's testimony was one of Petitioner's key arguments on appeal. The Supreme Court addressed the merits of that argument and found no error:

> We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury. ... There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford. Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction.

State v. Willliams, 386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner has failed to show either deficient performance or prejudice regarding his claims for ineffective assistance of counsel related to Dr. Crawford's testimony.

Mitigation Evidence

Petitioner alleges that trial counsel failed to present available mitigation evidence regarding Petitioner's extremely troubled childhood. Petitioner has failed to support these

[2] The Supreme Court analyzed trial counsel's performance, to determine whether the matter was properly preserved for appeal, and noted: "Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted." *Williams*, 386 S.C. at 516, FN 8, 690 S.E.2d at 68, FN 8.

allegations with any evidence. Furthermore, a review of the record shows that, contrary to Petitioner's allegations, trial counsel presented an array of mitigation evidence at Petitioner's trial.

For example, Attorney Nettles developed mitigation testimony regarding Petitioner's troubled childhood in his cross-examination of Dr. Crawford, who testified that Petitioner had difficulty with his parent's divorce, feeling like he was an "evil child" after the divorce; that his mother's multiple failed marriages had a negative impact on him; that his mother was an alcoholic for 30 years and was intoxicated for much of his childhood; that he had difficulty in school; that he had ADD, but was never medicated for it; among other difficulties. ROA at 2173-86. Dwight Williams, Petitioner's father, testified about the impact of the divorce on Petitioner, the violence and disturbances within the home, Daisy's drinking problem, and his own (Dwight's) mental health issues. ROA at 2208-17. Ann Wilson, a teacher at Taylors Elementary School, testified that Petitioner was very weak academically and that he was referred to special education classes, but his mother had negative attitudes towards helping him. ROA at 2220-2232. Rebecca Owens, who worked with Petitioner's mother, testified that Daisy drank heavily and had a volatile relationship with Petitioner. ROA at 2234-40. Additionally, trial counsel called numerous other experts and family members, who provided strong mitigation evidence: Professor Margorie Hammock, a clinical social worker, who testified as an expert in sociology; James Tollison, a retired Mauldin police officer who testified concerning domestic violence calls involving Petitioner's mother; Dr. Eric Elbogen, an assistant professor in clinical forensic psychology who testified as an expert in the field of violence risk assessment; James Aiken, a former warden in the South Carolina correctional system, who testified as an expert regarding Petitioner's prison adaptability; Dr. Seymour Halleck, a forensic psychiatrist, who testified

extensively about his findings regarding Petitioner's troubled childhood; and Maureen Bangcuyo, the Petitioner's sister, who gave a first-hand account about Petitioner's troubled childhood. ROA at 2241-2351.

Notably absent from Petitioner's list of mitigation witnesses was Petitioner's mother, Daisy Huckaby. At the PCR hearing, Attorney Nettles testified that the reason for not calling Daisy Huckaby to testify was trial counsel's "concerns about her willingness to tell the truth." PCR Transcript at 130. Trial counsel concluded that "as a matter of strategy, based upon those concerns . . . we felt the best thing to do is not call her." *Id.* Here, trial counsel articulated a valid strategic reason for not calling Petitioner's mother. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Furthermore, any information that Daisy Huckaby could have offered regarding mitigation had already been elicited through the testimony of other witnesses, including Petitioner's father and sister.

Finally, trial counsel hired Jan Vogelsang, a well-respected clinical social worker, to work as the defense team's mitigation expert. Ms. Vogelsang testified at the PCR hearing regarding the thoroughness of her investigation and the collection of mitigation evidence. PCR Transcript of Record at 12-84. Further, Attorney Mauldin testified that he had full confidence in Ms. Vogelsang's expertise, noting "[s]he's an extraordinary investigator." PCR Transcript of Record at 153.

Accordingly, Petitioner has not shown that trial counsel was ineffective in failing to present mitigation evidence of Petitioner's troubled childhood. Inasmuch as this claim for relief also relates to mitigation testimony regarding Fetal Alcohol Syndrome, that issue will be discussed in detail below.

Jury Disclosure of Vote Division

Petitioner alleges that trial counsel was ineffective for failing to move for a mistrial and request a life sentence on the ground that the trial judge introduced an arbitrary factor when he distinguished between a judge inquiring into a jury's division and a jury's reporting its division on its own. During deliberations in the penalty phase of Petitioner's trial, the jury sent a note to the judge explaining that it was divided nine to three in favor of death. ROA at 2410. Trial counsel moved for a mistrial and asked that the judge impose a life sentence on the grounds that the jury had revealed its split.[3] The judge explained that the jury revealed the split on its own and that the court did not ask for it; the judge further noted the jury requested "instruction about what procedure to follow in resolve." ROA at 2411. The judge denied the motion for a mistrial and instead concluded the proper "procedure is to give an *Allen* charge and let them continue deliberation." ROA at 2411. Trial counsel then objected to the *Allen* charge. ROA at 2416.

Petitioner contends that trial counsel made the wrong argument and should have argued that the trial judge's distinction injected arbitrariness into the jury deliberations. This assertion is without merit. During Petitioner's direct appeal, the South Carolina Supreme Court reviewed the *Allen* charge issue and concluded that "the trial judge's issuance of an *Allen* charge was not improper" and held that "the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death." *Williams*, 386 S.C. at 510, 690 S.E.2d at 65. Additionally, the Supreme Court reviewed the applicable case law and confirmed that the judge's distinction was ***not*** improper:

> Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. [Citations omitted.] However, these decisions are inapplicable in the instant case because the jury here voluntarily

[3] Counselor Mauldin explained: "We believe the disclosure . . . does now require that this court end deliberations and impose a life without parole sentence. We believe that the law requires that." ROA at 2411.

> disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an Allen charge. Unlike other cases, the trial judge did not inquire about the specifics of the jury's impasse. Therefore, we hold the trial judge committed no error.

Williams, 386 S.C. at 510, 690 S.E.2d at 65. Furthermore, the Supreme Court conducted a proportionality review and concluded that "the death sentence was not the result of passion, prejudice, or ***any other arbitrary factor***." *Id.* (emphasis added). Accordingly, the Petitioner's contention that the judge introduced an arbitrary factor is without merit. Petitioner has failed to show either deficient performance or prejudice by trial or appellate counsel.

Admissibility of Petitioner's Journal

Petitioner alleges that trial counsel was ineffective in failing to argue that certain portions of Petitioner's journal should have been excluded under Rule 403, SCRE. Petitioner has failed to support this allegation with any evidence. Furthermore, a review of the record shows that trial counsel moved to suppress the journal, which the trial judge denied. ROA at 6. Additionally, during the course of the trial, trial counsel used the journal in Petitioner's defense. ROA at 1878-88. Importantly, defense expert Dr. Robert Richards relied, in part, on the journal in making his diagnosis that Petitioner had bipolar disorder, a diagnosis Petitioner used in his mitigation argument. ROA at 1971-77. Accordingly, Petitioner has not shown that counsel was ineffective.

Death Penalty Not Appropriate/ Arbitrary Manner

Petitioner alleges trial counsel and appellate counsel failed to argue that the death penalty was not appropriate and that the death penalty was used in an arbitrary manner. Petitioner asserts that South Carolina's death penalty statute is unconstitutional under *Furman v. Georgia*,

408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). Specifically, Petitioner argues that the death penalty statute does not narrow the circumstances for which a person can be subject to the death penalty for murder. Petitioner contends that in South Carolina, "virtually every murder case can qualify for the death penalty," due to South Carolina's broad statutory definitions of kidnapping and physical torture. Petitioner's Post-Trial Brief at 25-27. Petitioner asserts that "it is almost impossible to commit murder without committing the offense of kidnapping under these definitions," violating the principle that the death penalty should only be available in limited circumstances. *Id.* at 27 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

Contrary to Petitioner's argument, trial counsel and appellate counsel were not ineffective for failing to argue that South Carolina's death penalty statute is unconstitutional. The Eighth Amendment to the United States Constitution requires capital punishment to be limited to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); U.S. Const. Amend. VIII; S.C. Const. Art. I, § 15. The South Carolina Supreme Court has ruled that our State's current death penalty sentencing scheme is constitutional pursuant to the limitations mandated by *Furman* and *Gregg*. *See State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979). Our Supreme Court has consistently upheld the death penalty statute as constitutional. *See, e.g., State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981); *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), cert. denied, 449 U.S. 1037 (1981); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982).

In South Carolina, a murder is death-eligible if it occurs during the commission of a kidnapping. S.C. Code Ann. § 16-3-20(C)(a)(1)(b). South Carolina's kidnapping statute provides that "[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry

away any other person by any means whatsoever without authority of law" is guilty of kidnapping. S.C. Code Ann. § 16-3-910. The South Carolina Supreme Court has consistently held the kidnapping statute is constitutional, and not overbroad or ambiguous. *See, e.g., State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) (holding the statute's terms were not unconstitutionally vague and defendant's conduct fell squarely within the language of the statute); *State v. Plath,* 277 S.C. 126, 284 S.E.2d 221 (1981); *State v. Copeland*, 278 S.C. 572, 577, 300 S.E.2d 63, 66 (1982). In *State v. Tucker,* our Supreme Court affirmed the statutory definition of kidnapping when used as an aggravating circumstance of murder. *State v. Tucker,* 334 S.C. 1, 8, 13, 512 S.E.2d 99, 102, 105 (1999) (citing *State v. Hall*, 280 S.C. 74, 310 S.E.2d 429 (1983)). The Supreme Court has repeatedly upheld cases where kidnapping was used as an aggravating circumstance for a death-eligible murder. *See, e.g., State v. Vasquez*, 364 S.C. 293, 613 S.E.2d 359 (2005); *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001), *reversed on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002); *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001). Likewise, the Supreme Court has consistently upheld kidnapping as an aggravating circumstance in capital cases against constitutional challenges. *See, e.g., State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), *overruled on other grounds by State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), (kidnapping statute in death penalty case was not unconstitutionally vague or overbroad); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) (death sentence for murder in the commission of a kidnapping does not violate the Eighth Amendment; the statutory definition of kidnapping is not overbroad or ambiguous); *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982) (kidnapping statute, as used in defining statutory aggravating circumstance, is not so overly broad that it virtually encompasses all cases of murder); *State v. Davis*, 309 S.C. 326, 348, 422 S.E.2d 133, 147 (1992); *State v. Ray*, 310 S.C.

431, 437, 427 S.E.2d 171, 174 (1993). Based on all the foregoing, Petitioner's argument that South Carolina's death penalty statute is unconstitutional is without merit.

Additionally, the facts of this case clearly support the jury's finding of the aggravating circumstance of kidnapping. The State provided overwhelming evidence that Petitioner kidnapped his Victim. *See, e.g.*, ROA at 1565, 1579-81, 1597-1602, 1669, 1748-49, 1914-20. Petitioner held Victim at gunpoint against her will for over ninety minutes. Petitioner confined the Victim primarily to the bakery/deli office area of the Bi-Lo store, although they did at certain times move to other parts of the store. The Victim, as well as hostage negotiators, pleaded with Petitioner to let her go. When the Victim attempted to escape, Petitioner chased her and shot her in the back.

Furthermore, the record shows that trial counsel objected to the judge's kidnapping charge and requested additional instruction. During the guilt phase of trial, the trial judge instructed the jury with the standard jury charge on the law of kidnapping. *See* ROA at 2056. Petitioner's trial counsel requested an additional charge relating to kidnapping and requested a question regarding the kidnapping, which the judge denied. ROA at 2067. During the penalty phase, while the trial judge did not redefine kidnapping, he instructed the jury that an aggravating circumstance, kidnapping, must be found. ROA at 2399-2400. Accordingly, Petitioner has not shown that trial counsel's performance was deficient.

Similarly, Petitioner's argument that the Supreme Court's proportionality review was inadequate is without merit. South Carolina's death penalty statute mandates that the South Carolina Supreme Court review all death sentences to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.C. Code Ann. § 16-3-25(C)(3). This review is intended to serve as

"[a]n additional check against the random imposition of the death penalty." *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (1979); *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). The Supreme Court conducted a proportionality review in Petitioner's case:

> Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

State v. Williams, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). This review was consistent with the Supreme Court's mandates regarding its death sentence proportionality reviews. *See State v. Harrison*, 402 S.C. 288, 741 S.E.2d 727 (2013); *State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective.

Solicitor's Improper Argument

Petitioner alleges that trial counsel was ineffective in failing to object to various comments made by the Solicitor during the opening and closing statements of the penalty phase of his trial. Petitioner contends that the Solicitor strayed from the record and failed to limit his arguments to the circumstances of the crime and character of the defendant, thereby lessening the jury's responsibility and injecting arbitrary factors into the jury's deliberation process. Specifically, Petitioner alleges that the Solicitor improperly referred to his personal decision to seek the death penalty, told the jury that the legislature had limited the times when the State could seek the death penalty, and commented on prison conditions.

Law

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices." *State v. Cooper*, 334 S.C. 540, 514

S.E.2d 584 (1999). The State's closing arguments must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. *State v. Copeland,* 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). "[The] evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. . . . The jury's sole function is to make a sentencing determination based on these factors." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State,* 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, a solicitor is bound to rules of fairness; a closing argument must therefore be "carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

This Court must "view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State,* 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The relevant question is whether, in light of the context of the entire record, the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Smith v. State,* 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007); *State v. Hornsby,* 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

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The Petitioner has the burden of proving he did not receive a fair trial because of the alleged inappropriate comments. *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166. "To establish prejudice, Petitioner must show a reasonable probability the result of the proceeding would have been different but for trial counsel's deficiency. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Therefore, to demonstrate prejudice . . . Petitioner must prove a reasonable probability exists that a jury would not have sentenced him to death if trial counsel had objected to the solicitor's comments." *Vasquez*, 388 S.C. at 466-67, 698 S.E.2d at 571.

Solicitor's Personal Opinion and Legislative Determinations/Limitations

Petitioner contends that trial counsel failed to object when the Solicitor improperly injected his personal opinion and his decision to seek the death penalty into the jury deliberations. He argues that the Solicitor repeatedly told the jury that the legislature had limited the cases where the solicitor could seek the death penalty and that he also had made the difficult decision to seek the death penalty. *See* Petitioner's Post-Trial Brief at 3. He further alleges that the Solicitor improperly invoked Dr. Crawford's opinion in arguing for the death penalty.

The Solicitor made the following statements in his closing argument during the penalty phase of Petitioner's trial:

> They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.
>
> The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst.

ROA at 2370. Petitioner argues that the Solicitor's comments are similar to those made in *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981). However, this Court finds that the Solicitor's comments are distinguishable from those made in *Woomer*. Instead, the Solicitor's comments in the instant case are nearly identical to the comments made by Solicitor Ariail in a different trial that the Supreme Court recently reviewed and upheld in *Sigmon v. State*:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
>
> ....
>
> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

Sigmon v. State, 403 S.C. 120, 128-29, 742 S.E.2d 394, 399 (2013) (emphasis by the Supreme Court). In *Sigmon*, the Court concluded that the solicitor's comments were distinguishable from those in *Woomer*[4] because the comments did not diminish the role of the jury in sentencing Sigmon to death. *See Sigmon*, 403 S.C. at 130, 742 S.E.2d at 399 ("Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in

[4] In *Woomer*, the Court concluded the solicitor's statements were improper because he repeatedly stated that he himself had undertaken the same difficult process of deciding to impose the death penalty: "[T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy." *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359.

requesting the death penalty to the jury's decision to ultimately impose a death sentence."). Similarly, in the instant case, the Solicitor's comments did not diminish the role of the jury in determining the appropriate sentence, even though the Solicitor referenced his role in choosing to request the death penalty.

Furthermore, throughout his closing argument, the Solicitor emphasized the important role the jury played in determining the appropriate sentence:

> So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government *carried out by you*, the citizens. . . . *This is a function of you as citizens* carrying out part of our government process. *You are shaping* a lawful punishment to an unlawful act. So, *the responsibility is given to you* to decide what the appropriate punishment is.
> . . .
>
> *[Y]ou are the judge*. The judge does not sentence, *you sentence*. And that's what this process is about. And it is a process which *we have entrusted to you* as our citizens to carry it out fairly . . . .
> . . .
>
> *The process makes you responsible* for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law *entrusted it to you* and it means we'll do it, just like any other tough decision that we make; that is, you will apply common sense, you will consider the facts and you will consider the alternative solution, just like you do when you make your decisions on your jobs, with your family, otherwise. If you imagine yourself making a tough decision and handling it in the same way you would handle it with your job or with your family, we trust you would make the right decision.

ROA at 2366-68 (emphasis added). Similarly, the trial judge carefully instructed the jury regarding its role in determining the appropriate sentence. ROA at 2397-2405.

The Solicitor did not inject his own personal opinion concerning the death penalty into the proceedings, and he did not diminish the role of the jury in determining the appropriate sentence. Instead, the Solicitor merely explained his involvement in the State's decision to seek the death penalty and explained that the State does not choose to pursue the death penalty for every murder charge. The Solicitor's comments, without more, were not improper. *See State v.*

Bell, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990); *Sigmon*, 403 S.C. at 130, 742 S.E.2d at 400 ("[T]he solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury."); *Williams v. Ozmint*, 380 S.C. 473, 479, 671 S.E.2d 600, 602 (2008) (a solicitor's comments are not improper where he states that he is asking for the death penalty or even expecting the death penalty, as long as he does not attempt to minimize the jurors' own sense of responsibility). Accordingly, Petitioner has not shown deficient performance.

Conditions of Prison

Petitioner also alleges trial counsel was ineffective for failing to object to the Solicitor's improper statements about prison conditions, which allowed the jury to return a death sentence based on arbitrary factors. *See* Petitioner's Post-Trial Brief at 6. In particular, Petitioner claims the following statements by the Solicitor were improper:

> So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.
>
> Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.
>
> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't.

ROA at 2377-78.

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It is well-settled that "evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," and that "[t]he jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment." *State v. Burkhart*, 371 S.C. 482, 487-88, 640 S.E.2d 450, 453 (2007); *see also State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). Furthermore, "[s]uch determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury." *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). In *State v. Bowman*, our Supreme Court cautioned that evidence regarding general prison conditions is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005).[5]

However, our Supreme Court has recognized a "tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*." *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007). The Supreme Court has emphasized that "evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *Id.* When considering whether a solicitor's arguments were improper, a reviewing court must examine the comments in light of the entire record, including the overwhelming evidence of the defendant's guilt. *Vasquez v. State*, 388 S.C.

[5] "[T]he evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant." *State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005) *abrogated by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).

447, 698 S.E.2d 561 (2010); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). A solicitor's comments are grounds for reversal only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Here, given the context of the entire closing argument, even if the Solicitor's statements were improper, the improper statements do not warrant reversal. While the Solicitor did briefly address prison conditions, he did so in the context of whether a prison sentence would be appropriate for the Petitioner under the facts of this particular case. The Solicitor noted

> It's not really much more than a serious change of address. [Chris Williams] will have his family to visit him. But Mandy's family won't, and her daughter won't. The death penalty is the appropriate punishment.

ROA at 2378. The Solicitor went on to contrast the grievous nature and "extent of ***this crime*** and the culpability of ***this defendant***" with a life versus a death sentence. ROA at 2378 (emphasis added).

> Maybe one shot, maybe one shot we could say he deserved life; but not three, not three shots to her back as she was running away. Maybe one, but three? The extent of the culpability after she had begged for her life, "Please, please, please don't kill me."

ROA at 2378-79. The Solicitor also highlighted the following facts as demonstrated by the evidence at trial: Petitioner stole a work schedule and meticulously planned the killing; he drew a diagram of the scene and planned what clothes he would wear; he kidnapped and emotionally and mentally tortured the Victim for nearly two hours; he ordered her to call her mother to tell her she was going to die; he made the Victim choose how she was going to die; he carried out the crime in a public supermarket where he endangered the safety of others; the hostage negotiator begged for the Victim's life; after firing the first non-fatal shot that paralyzed the Victim,

Petitioner walked up to her and shot her two more times in the back at point blank range. ROA at 2372-80.

Furthermore, based on a reading of the trial transcript and in considering trial counsel's testimony at the PCR hearing, this Court finds that trial counsel's failure to object to the Solicitor's improper comments was a valid strategic decision. At the PCR hearing, Attorney Nettles stated that he objected to everything in the Solicitor's statements that he thought was objectionable. PCR Transcript of Record at 117. He stated that at the time of the trial, he felt the Solicitor's statements were improper, irresponsible, and prejudicial to his client. *Id.* at 112-13, 128. However, he explained that he believed the Solicitor's comments were "so improper and so irresponsible that by mocking him" he could "begin to undermine [the Solicitor's] credibility." *Id.* at 125. Attorney Nettles further explained that the jury responded to the Solicitor's improper comments by snickering because it was so irresponsible and ridiculous. *Id.* at 109. Ultimately, Attorney Nettles believed that while the Solicitor's comments were improper, it would be "more powerful" to mock the Solicitor, erode his credibility, and explain away his comments. *Id.* at 110. Thus, Attorney Nettles began his closing statement with the following rebuttal:

> Did he say restaurants? Did he say Chris Williams is going to a place in prison with restaurants there? Because I didn't hear anything about restaurants. What I heard about where Chris Williams is going at the end of this trial is a place where it's men and he's in a cell by himself. What I heard Jim Aiken talk about was a place where if you don't do what they tell you to do, they'll kill you.
>
> He said restaurants. Restaurants in prison? Do any of you all really believe your tax dollars are paying for restaurants in prison? They're not. Prison is a very serious place. And what you are being asked is to decide between whether Chris Williams dies on God's time or your time.
>
> What you're being asked to decide is whether Chris Williams spends the rest of his life until he's dead in prison or whether that, however they want to word it to try to make it seem okay, whether the government either electrocutes him or straps him to a gurney and kills him. That's where we are. Let's make no doubt about that. Let's not try to do anything to make that seem less severe. That's what we're talking about.

ROA at 2380-81. Failing to make an objection does not render trial counsel ineffective where counsel articulates a valid trial strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (counsel's conduct not ineffective where counsel articulates a valid reason for employing certain strategy); *Whitehead v. State*. 308 S.C. 119, 417 S.E.2d 529 (1992). Here, trial counsel articulated a legitimate trial strategy—rather than objecting to the Solicitor's improper statements, he responded by emphasizing to the jury the absurdity and ridiculousness of those statements. Accordingly, trial counsel was not deficient.

Finally, even if trial counsel's performance was deficient, Petitioner has not proven prejudice. The allegedly improper statements were only a small part of the Solicitor's closing argument. *See State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) (noting solicitor's improper comment "was one isolated event in the entire argument"). Also, the trial judge gave clear instructions to the jury that they were to decide what verdict to return and that they were not required to return a death sentence. *See* ROA at 2397-2405. Therefore, considering the closing statement in its entirety within the context of the full record and the careful instructions by the trial judge, and given the overwhelming evidence of guilt and the egregious circumstances of the crime, Petitioner has failed to prove that there is a reasonable probability that the jury would have returned a different verdict had the Solicitor not made these comments.

Furthermore, the South Carolina Supreme Court conducted a review of the trial record pursuant to S.C. Code Ann. § 16-3-25 and concluded that "the death sentence was not the result of passion, prejudice, or any other arbitrary factor." *See State v. Williams*, 386 S.C. 503, 517, 690 S.E.2d 62, 69 (2010). Accordingly, Petitioner's argument that he was prejudiced by counsel's failure to object to the solicitor's improper statements and injection of arbitrary factors into the jury's deliberation is without merit.

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Recommendation Instruction

Petitioner alleges that trial and appellate counsel were ineffective in failing to object to or argue that the trial judge erred in his instructions to the jury that their decision concerning the sentence was a recommendation. At a pretrial motions hearing on January 13, 2005, trial counsel raised the issue of the judge using the term "recommendation" in his jury charge, after which the following exchange took place:

> The Court: Well, in my charge, I say it is a recommendation. It says it in the statute; however, it is mandatory on the court. And I tell them that in my charge.
>
> Mr. Mauldin: All right, sir. So you say the word, but you tell them that you're going to do what they say?
>
> The Court: Right. It doesn't mean what it says. It means that I am obligated to follow what the jury does, okay, and I do that in my charge.

ROA at 2607-08. Again, at the beginning of the sentencing phase of Petitioner's trial, Attorney Mauldin objected to the use of the term "recommendation." ROA at 2085. Judge Nicholson overruled the objection, explaining:

> It's the state law. The form was provided by the state law. I got to go into it and I will explain it to the jury. I will explain to the jury it is not a recommendation, the court is obligated to follow – the statute needs to be amended, the word recommendation needs to be taken out.

ROA at 2085. Judge Nicholson gave the following charge to the jury:

> Mr. Foreman, members of the Jury, it now becomes your duty to decide what sentence you recommend this Court impose upon the Defendant. . . . Please understand your sentence recommendation will be followed by this Court. . . . And even though the form says "recommendation," I charge you that the Court is obligated to follow that recommendation.

ROA at 2397-99. *See also* ROA at 26-27.

At the PCR hearing, appellate counsel, Robert Dudek, testified that based on his understanding of the law and his prior experience with the issue, "as long as the jury was made

known that their sentence would be binding, that that solved any problem." PCR Transcript of Record at 223. He further testified that he did not believe he could prevail on this issue because the trial judge clearly instructed the jury "that this is not a recommendation. Whatever verdict you come back with, death or life, that's going to be the verdict and that's going to be the sentence that I'm going to impose." *Id.* at 222. Citing Justice Toal's book, Mr. Dudek also stated that standard appellate practice is to raise only those issues most likely to succeed, not every possible issue. *Id.* at 221-22. Petitioner has not shown that trial or appellate counsel were deficient.

Further, Petitioner has not shown prejudice. Notwithstanding the imprecise use of the word "recommendation" in the statute, the case law in this state is well-settled that there is no error where a judge uses the word "recommendation" in his jury charge, if he also explains the binding nature of the jury's decision. "The idea should be conveyed to the jury that its sentencing recommendation will be followed. *See State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981)." *State v. Bellamy*, 293 S.C. 103, 107, 359 S.E.2d 63, 65 (1987) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Smith*, 286 S.C. 406, 409, 334 S.E.2d 277, 279 (1985) (approving "the judge's sentencing phase charge concerning the jury's responsibility to recommend a sentence and the finality of their recommendation"). Here, the trial judge properly instructed the jury that its sentencing recommendation would be followed. Accordingly, Petitioner's allegations are without merit.

Adequacy of Voir Dire/ Exclusion of Jurors/ Venue Preservation

Petitioner alleges that trial counsel was ineffective for failing to conduct an adequate jury voir dire, exclude certain jurors, and request a change of venue. At a pretrial motions hearing on

January 13, 2005, trial counsel made a motion for ten additional peremptory challenges, which the trial judge denied. ROA at 2564-66. Similarly, at the same hearing, trial counsel moved for a change of venue, stating that the "case is a highly publicized, very well-known case." ROA at 2570, 18-20. The trial judge took this matter under advisement stating that they could revisit the issue, if necessary, during the jury voir dire process. Trial counsel made numerous other motions related to jury selection, some of which the trial judge granted and others he denied. ROA at 28-39, 2570-2606.

"[T]he process of jury selection inherently falls within the expertise and experience of trial counsel. *Palacio v. State,* 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). . . . [J]ury selection is within the ambit of trial strategy. . . . '[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.' *Id.* at 516, 511 S.E.2d at 68." *Magazine v. State,* 361 S.C. 610, 617, 606 S.E.2d 761, 764-65 (2004). "A motion to change venue is addressed to the sound discretion of the trial judge . . . *Sheppard v. State,* 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). . . . A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Tucker,* 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999)." *State v. Stanko,* 402 S.C. 252, 741 S.E.2d 708 (2013).

Petitioner has not provided any explanation or put forward any evidence to support his bald assertions regarding ineffective assistance on the issues of jury selection and change of venue. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington,* 466 U.S. 668, 690 (1984); *Morris v. State,* 371 S.C. 278, 639 S.E.2d 53 (2006); *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears

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the burden of establishing that he is entitled to relief. *Edwards v. State,* 372 S.C. 493, 494, 642 S.E.2d 738, 739 (2007); *Caprood v. State,* 338 S.C. 103, 525 S.E.2d 514 (2000). In light of the foregoing, Petitioner has not met his burden of showing ineffective assistance of counsel.

Guilty Plea and Jury Sentencing

Petitioner alleges that trial counsel and appellate counsel were ineffective for failing to argue that Petitioner should have the right to plead guilty and still receive a jury trial for sentencing. Petitioner contends that he desired to plead guilty to the murder charge in order to show acceptance of responsibility, and that he wanted to be sentenced by a jury.

The law in this state is well-settled regarding the right to a jury sentencing after a guilty plea in a death penalty case. State statute mandates that in all capital cases in which the defendant pleads guilty, "the sentencing proceeding must be conducted before the judge." S.C. Code Ann. § 16-3-20(B). Our Supreme Court has repeatedly upheld this statute, finding that a defendant does not have a constitutional right to plead guilty and receive a sentencing hearing by a jury. *See State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Crisp*, 362 S.C. 412, 608 S.E. 2d 429 (2005); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011). Petitioner concedes that his position—that he should have the right to plead guilty and still receive a jury sentencing—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 76-77.

Furthermore, at a pre-trial motions hearing, trial counsel moved to quash the death penalty, arguing that if Petitioner pled guilty to murder, he would be deprived of a jury sentencing and the ability of using his guilty plea as evidence of remorse. ROA at 2432. Trial counsel renewed this motion at the beginning of Petitioner's trial and again subsequent to the verdict and sentence.

ROA at 7-9, 2085, 2844-45. The trial judge appropriately denied these motions. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because the South Carolina Supreme Court has not shown "any interest" in the issue, and because he did not believe it would be a "winning" issue based on the applicable case law and his past experiences with this issue. PCR Transcript of Record at 212-14, 225-28; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Aggravators in the Indictment

Petitioner argues that trial counsel or appellate counsel failed to argue that the circumstances of aggravation should have been included in the indictment. The law in this state is well-settled regarding the inclusion of circumstances of aggravation in an indictment. Our Supreme Court has repeatedly affirmed that the State is not constitutionally required to allege aggravating circumstances in the indictment for capital murder cases. *See State v. Laney*, 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006); *State v. Crisp*, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005); *State v. Downs*, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004) ("aggravating circumstances need not be alleged in an indictment for murder"). Petitioner concedes that his position—that circumstances of aggravation should be included in the indictment—is contrary to the overwhelming case law in South Carolina. *See* Petitioner's Post-Trial Brief at 77-78.

Furthermore, at the beginning of Petitioner's trial, trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment. ROA at 9-12. Also, trial counsel made a motion to reconsider this issue subsequent to the verdict and sentence. ROA at 2845-49. The trial judge appropriately denied these motions. ROA at 12, 2849. At the PCR hearing, appellate counsel, Robert Dudek, testified that he did not raise this issue on appeal because he had raised the issue before and lost, and because he did not believe he would prevail on that issue based on the applicable case law and his past experiences with the issue. PCR Transcript of Record at 223-25; *see Lawrence v. Branker*, 517 F.3d 700, 713 (4th Cir. 2008) (noting appellate counsel has wide discretion in deciding which issues are most likely to afford relief on appeal and cannot be ineffective for failing to assign error to an issue that is without merit). Accordingly, Petitioner has not shown that trial counsel or appellate counsel were ineffective on this issue.

Foreign National

Petitioner alleges that his trial counsel was ineffective for failing to recognize that Petitioner was a German citizen and for failing to notify the Petitioner of his rights as a foreign national. The Federal Republic of Germany submitted an *amicus curiae* brief to this Court, making arguments on Petitioner's behalf. Also, representatives from the German Consulate were present throughout Petitioner's PCR hearing held before this Court.

The Petitioner's mother, Daisy Huckaby, is a German citizen; she was born in Germany and immigrated to the United States in 1978 after meeting and marrying the Petitioner's father, Dwight Williams. By virtue of his mother's German citizenship, Petitioner apparently is also a

German citizen.[6] *See* Plaintiff's Exhibit 26, Citizenship Certification. Petitioner contends that because of his German citizenship, he was entitled to consultation rights and protections as a foreign national as outlined in Article 36 of the Vienna Convention on Consular Relations.

Contrary to Petitioner's arguments, he is not a "foreign national." Instead, he is a United States citizen and was not entitled to any of the rights of consultation under the Vienna Convention. The Petitioner was born in Greenville, South Carolina, to an American father and is therefore a United States citizen by birth. *See* United States Const., Amend. XIV ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); 8 U.S.C. § 1401 ("[t]he following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof").

Evidently, Petitioner is a dual citizen of the United States and German. *See* Plaintiff's Exhibit 26, Citizenship Certification. However, this dual citizenship does not confer upon the Petitioner the status of a "foreign national" for purposes of consular protection in a criminal proceeding in South Carolina. *See, e.g., Commonwealth v. Baumhammers*, 599 Pa. 1, 63-4, 960 A.2d 59, 97-8 (2008) (finding a dual national detained by authorities in his own country and state is not a foreign national and is not entitled to consular protections); *Cauthern v. State*, 145 S.W.3d 571, 628 (Tenn. Crim. App. 2004) (finding a dual national born in the U.S. is not entitled to consular protections under the Vienna Convention and, furthermore, the Vienna Convention does not create a judicially enforceable individual right); *State v. Ahmed*, 103 Ohio St.3d 27 35-6, 813 N.E.2d 637, 651 (2004). The Code of Federal Regulation defines the term "foreign

[6] At Petitioner's PCR hearing, Gerrit Morking, a representative from the German consulate, posited that a person born to a German citizen is also a German citizen, regardless of place of birth. In fact, Mr. Morking suggested that German citizenship inherited by birth could be passed on from generation to generation such that "if my great, great, great, great grandfather was a German Citizen, I'm still a German Citizen also." *See* PCR Transcript of Record at 801-02.

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national" as "any individual *other than* a U.S. national," 31 C.F.R. § 800.215 (emphasis added); while a "national" means a "citizen of the United States," 22 C.F.R. § 50.1. Similarly, the U.S. Department of State's "Consular Notification and Access" instruction manual—which, incidentally, is cited in Germany's *amicus* brief—defines a foreign national as "any person who is not a U.S. citizen." *See* Consular Notification and Access, U.S. Department of State, at 12.[7] Additionally, the State Department manual explains that "consular notification is not required if the detainee has U.S. citizenship, regardless of whether he or she has another country's citizenship or nationality as well." *Id.* at 14.

While our courts have recognized the right of foreign nationals to receive consular protection during criminal proceedings in state courts, those cases presume that the person being charged with the crime is a foreign national and not a U.S. citizen. *See, e.g., State v. Banda*, 371 S.C. 245, 639 S.E.2d 36 (2006) (defendant was a citizen of Zimbabwe and was in the U.S. on a basketball scholarship); *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002) (defendant was a Mexican national residing legally in the U.S. as a resident alien). Here, Petitioner is a United States citizen, born in South Carolina, and is therefore not a foreign national. Accordingly, Petitioner has failed to show that he was entitled to the consular protections under the Vienna Convention, and has failed to meet his burden of showing that trial counsel was ineffective for failing to enlist the resources of the German consulate.[8]

Even assuming that the Petitioner was entitled to consular advice and that his trial counsel was deficient in failing to notify him of his rights, the Petitioner has not demonstrated that he suffered any prejudice. *State v. Lopez*, 352 S.C. 373, 574 S.E.2d 210 (2002). Petitioner

[7] The Consular Notification and Access manual is available at http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

[8] Additionally, this Court notes that courts disagree about whether trial counsel's failure to notify a criminal defendant of his rights to consular protection rise to the level of ineffective assistance.

argues that if the German consulate had become involved in the case prior to his trial, the German government would have provided financial and legal assistance and the outcome of the trial would have been different. Specifically, Petitioner asserts that the German consulate would have helped uncover the fetal alcohol syndrome issue and would have objected to the Solicitor's improper statements. However, beyond mere speculation, Petitioner has not shown any evidence that assistance from the German consulate would have changed the outcome of his trial. Trial counsel stated that while defense attorneys in death penalty cases always desire more time to prepare, in this particular case, the attorneys felt they were sufficiently prepared. PCR Transcript of Record at 148-49. Further, there is no evidence that the defense team lacked adequate resources. The defense team was composed of highly-qualified, experienced attorneys, including the Public Defender for the Thirteenth Judicial Circuit, John Mauldin, and attorney Bill Nettles, who now serves as United States Attorney for the District of South Carolina. Attorneys Mark MacDougall and Colleen Coyle of the Washington D.C. law firm Akin Gump Strauss Hauer & Feld also aided in the Petitioner's defense. The defense team relied on the skills and resources of its mitigation investigator, Jan Vogelsang, a well-respected and experienced social case worker who has worked with numerous capital defense teams,[9] and a team of highly-qualified experts who met with the Petitioner and his defense team on numerous occasions and testified at trial. Using the resources at its disposal, the defense team developed a comprehensive trial strategy, even though the Petitioner was ultimately convicted and sentenced to death.

Petitioner contends that the German consulate could have helped collect information about Daisy's family history, including mental health issues and alcohol consumption. PCR Transcript of Record at 67, 80-81. Jan Vogelsang testified that she felt that she could not

[9] Jan Vogelsang's expertise gained national attention in 2006 when she was enlisted by the defense team for September 11 conspirator, Zacarias Moussaoui.

provide a complete genogram without the opportunity to travel to Germany. *Id.* at 64-65, 67-68. However, in spite of the defense team's lack of ability to travel to Germany to investigate Daisy's family history, the team did in fact collect information and evidence regarding Daisy's family history, mental health history, and alcohol addiction.

While this Court understands the sentiments of trial counsel that additional time and resources are always desirable in a death penalty case, here, Petitioner has failed to show that he was prejudiced in not having the assistance of the German Consulate at his trial. Accordingly, trial counsel was not ineffective for failing to advise the Petitioner of his rights as a foreign national or failing to enlist the help of the German government in the Petitioner's defense.

Sex Offender Registry

Petitioner alleges that trial counsel was ineffective for failing to ask the judge to make a finding that he did not have to register as a sex offender.[10] In South Carolina, a person guilty of kidnapping is required to register as a sex offender unless the court "makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(15); *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 514, 719 S.E.2d 258, 260-61 (2011).

The trial record shows that Judge Nicholson sentenced the Petitioner to death after the jury found the existence of a statutory aggravating factor for murder; however, no sentence was given for the kidnapping conviction, consistent with S.C. Code Ann. § 16-3-910 (mandating

[10] This Court notes that Petitioner was not convicted of any kind of sexual offense. While investigators initially considered whether there was a sexual aspect to the crimes, due in part to the Petitioner's prior relationship with the victim and the fact that the victim's shirt had been torn from her during her struggle to get away from the Petitioner, there was no other evidence suggesting Petitioner had committed any crimes of a sexual nature.

imprisonment for a period not to exceed thirty years for kidnapping, *unless* sentenced for murder as provided in § 16-3-20). *See* ROA at 2420.

At the PCR hearing, attorney John Mauldin testified that he could not recall any discussions about Petitioner being required to register as a sex offender as a result of a kidnaping conviction. PCR Transcript of Record at 176. Notwithstanding trial counsel's concession, Petitioner has failed to show counsel's representation fell below an objective standard of reasonableness. *See Williams v. State*, 378 S.C. 511, 515-16, 662 S.E.2d 615, 617-18 (Ct. App. 2008) (finding defendant's trial counsel was not ineffective for failing to request the trial court to make a determination as to whether the kidnapping was sexual in nature).

Additionally, Petitioner has not shown that he was prejudiced by his trial counsel's failure to ask the judge to make a finding that the defendant did not have to register as a sex offender. Petitioner was convicted of murder and sentenced to death. Petitioner's death sentence essentially voids the practical effect and requirements of the sex offender registry act. Accordingly, the Petitioner has not suffered any prejudice as a result of trial counsel's failure to request a finding that the Petitioner did not have to register as a sex offender.

Fetal Alcohol Syndrome

Petitioner alleges trial counsel was ineffective in failing to adequately investigate Petitioner's prenatal exposure to alcohol and the resulting complications of that exposure, including a diagnosis of Fetal Alcohol Syndrome (FAS) or some other type of Alcohol Related Neurodevelopmental Disorder (ARND). Petitioner contends that evidence of prenatal exposure to alcohol and a diagnosis of FAS or ARND would have been powerful mitigation that a jury could have considered in determining an appropriate sentence. Petitioner also contends that such

evidence may have been used to prove Petitioner, because of mental disease or defect, lacked sufficient capacity to conform his conduct to the requirements of the law.

At the outset, this Court recognizes that we are just beginning to understand the role that Fetal Alcohol Syndrome (FAS) plays in human behavior in general and criminal activity in particular. As Petitioner's PCR counsel astutely noted, "we are just now at the tip of the iceberg of what we know about the brain."[11] PCR Transcript of Record at 10. With that understanding, this Court has fully considered the testimony of Petitioner's experts on the issue of FAS, has thoroughly studied the exhibits and information provided to the Court by Petitioner's counsel and experts, and has carefully reviewed the relevant cases involving FAS or comparable organic brain damage.

"Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Thus, '[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.' *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted). In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation '*was*

[11] It is noteworthy that each member of the FASD Experts team acknowledged that the state of the art for FASD forensic assessment was "hit or miss" and lacked "a protocolized structured assessment process in the forensic context" prior to 2007 when the FASD Experts team began working together, which was nearly two years after the Petitioner's trial in February 2005. *See* PCR Transcript of Record at 396 (Dr. Connor testifying that the team gave a presentation at a seminar in March 2009, during which they noted that the science of forensic assessment for FASD prior to 2007 was "hit or miss," and that the FASD Experts team developed the current structured, multi-disciplinary team approach in 2007 to better evaluate and assess FASD); 449-50 (Dr. Adler explaining the 2009 "presentation really was the first public scientific, professional presentation about our proposed model for the evaluation," prior to which "there was no . . . protocolized approach"); 636-37, 733-34 (Dr. Brown testifying that during the 1990s and up to 2005, there were people testifying in trials who were not qualified and did not know what they were doing, and thus, the "hit or miss" idea emphasized that "for the forensic context you needed a higher level of protocol and approach that would ensure that . . . the diagnostic criteria, were met and that the individuals working in the context were trained and experienced in the field").

itself reasonable.' *Wiggins v. Smith,* 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis in original) (citation omitted). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore,* 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)." *Taylor v. State,* 2009-123871, 2013 WL 3048636 (S.C. June 19, 2013); *see also Council v. State,* 380 S.C. 159, 171-72, 670 S.E.2d 356, 362-63 (2008) (noting our Supreme Court has adhered to the principles and analysis in *Wiggins* in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence).

Trial counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance. *Simpson v. Moore,* 367 S.C. 587, 605-06, 627 S.E.2d 701, 710-11 (2006) *citing Wiggins v. Smith,* 539 U.S. 510, 511 (2003) (finding counsel's review of a pre-sentence investigation report and DSS records did not constitute a reasonable investigation into defendant's background, and a more in-depth investigation would have revealed the defendant's "abuse in the first six years of his life while in the custody of his alcoholic, absentee mother" and his diminished mental capacity). Similarly, our Supreme Court has found counsel ineffective for failing to adequately investigate and prepare expert testimony about a defendant's mental condition. *Von Dohlen v. State,* 360 S.C. 598, 602 S.E.2d 738 (2004) (holding the absence of crucial medical records and related information which existed at the time of trial prevented experts from conveying an accurate diagnosis and explanation of defendant's mental condition); *see also, Ard v. Catoe,* 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); *Nance v. Ozmint,* 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006) (concluding defense counsel in capital murder case should have investigated and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness).

"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [the defendant's] culpability.' *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). . . . '[T]he likelihood of a different result if the [mitigation] evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.' *Rompilla*, 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694). Accordingly, if trial counsel's complete failure to present mitigation evidence undermines confidence in the outcome, then [Petitioner] suffered prejudice." *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009) (citations omitted).

The South Carolina Supreme Court has found prejudice where "there was very strong mitigating evidence to be weighed against the . . . aggravating circumstances presented by the State[, and such] . . . evidence may well have influenced the jury's assessment of [a defendant's] culpability." *Council v. State*, 380 S.C. 159, 176, 670 S.E.2d 356, 365 (2008) (granting new sentencing trial where only very limited mitigation testimony was presented and no medical evidence was presented); *see also*, *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir.2008) (concluding if a jury had been able to "place [mental disturbance] on the mitigating side of the scale," but was deprived of such evidence, "there is a reasonable probability that at least one juror would have struck a different balance" (quoting *Wiggins*, 539 U.S. at 537)).

In *Jones v. State*, our Supreme Court addressed a claim for ineffective assistance of counsel very similar to the one at issue here. *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). While the defendant in that case was not diagnosed with FASD, he did claim that trial counsel was ineffective in failing to present mitigating evidence that he had organic brain damage. The Court found that additional evidence about the defendant's mental impairment would not have revealed anything significantly different than what had been presented to the

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jury. *Id.*, 332 S.C. at 339, 504 S.E.2d at 826. The Court noted that the jury had been presented with several mitigating factors regarding the mental condition of the defendant, but that they were also presented with overwhelming evidence of the defendant's guilt along with aggravating factors surrounding the murder. *Id.* The Court explained that the defendant was not entitled to retool his mitigation argument into a "fancier" package:

> At the sentencing hearing, the mentality of Jones was the focus of his mitigation case. His counsel's strategy was not to portray Jones as being under active mental and emotional disturbance, but rather to emphasize his mental retardation, as evidenced by his upbringing. This strategy obviously did not succeed. Just because it was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation.

Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 826-27 (1998). Accordingly, the Court held that trial counsel was not ineffective.

Our Supreme Court also considered issues similar to those in the instant case[12] in *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). In *Moore*, defense counsel called several witnesses, including three experts, to offer mitigating evidence in the sentencing phase of a capital murder trial. The Supreme Court summarized the mitigation testimony from the trial as follows:

> Witnesses testified that Simpson's mother used heroin while pregnant with him, Simpson grew up in a drug environment, he had trouble in school, and he experienced several personal tragedies. One expert, a clinical social worker, testified that Simpson's mother abused drugs while pregnant with Simpson and after, Simpson was often abandoned as a child, he suffered chronic headaches,

[12] The Court notes that whether the defendant suffered organic brain damage was not discussed in *Simpson*. Nevertheless, the issues are analogous to the instant case: mother abused drugs while pregnant; defendant had traumatic childhood; PCR counsel claimed trial counsel failed to investigate and present evidence of these issues sufficiently; PCR counsel offered evidence and experts offered opinions regarding the defendant's mental condition, which the defendant claims could have changed the jury's sentencing decision.

> and had been exposed to traumatic life events. A second expert, a clinical psychologist, testified that Simpson's IQ was at the lower end of the normal range, and that Simpson tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania. Finally, a forensic psychiatrist, Dr. Dupree, testified that Simpson suffered from a mental illness known as dysthymic disorder, which is basically chronic depression that lasts over a period of more than two years. Dr. Dupree also testified that Simpson experienced symptoms associated with attention deficit disorder and post-traumatic stress disorder, but he could not be diagnosed as having these disorders. She also noted his history of drug and alcohol abuse.

Simpson v. Moore, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). At the PCR hearing, defendant's counsel presented testimony of two experts, who explained the relationship between Simpson's traumatic childhood and the likelihood that he would murder someone. *Id.* Also, Dr. Dupree submitted an affidavit stating her prior opinion was not reliable because she did not know that Simpson's mother had used drugs during her pregnancy with Simpson, among a variety of other facts, and that based on this new information, she was prepared to offer a different opinion. *Id.*

The Court held[13] that defense counsel was not deficient because counsel interviewed a number of witnesses about the defendant's childhood and life; counsel hired a private investigator to gather background information on the defendant; and counsel called several witnesses to offer mitigating evidence, including three experts who were provided the information gathered about the defendant's background. *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006). The Court also held that the defendant failed to show that he was prejudiced during the mitigation case because "the jury was aware of the defendant's troubled childhood, traumatic life experiences, and mental condition." Citing *Jones v. State*, the Court concluded that any "additional investigation would have merely resulted in a 'fancier'

[13] The Court reversed the PCR court, which had found that counsel failed to fully investigate the defendant's medical, mental, social, and familial history, and because of this, the jury did not have the opportunity to consider mitigating factors warranting a life sentence as opposed to the death penalty. *See Moore*, 367 S.C. at 607, 627 S.E.2d at 712.

mitigation case, having no effect on the outcome of the trial." *Simpson v. Moore*, 367 S.C. 587, 606-07, 627 S.E.2d 701, 711-12 (2006), *quoting Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998).

This Court finds the instant case analogous to *Jones v. State* and *Simpson v. Moore*. The record shows that trial counsel did not present evidence to the jury that Petitioner suffered from Fetal Alcohol Syndrome or that he had organic brain damage. At Petitioner's PCR hearing, Petitioner's trial counsel and defense mitigation investigator testified that they had evidence that Petitioner's mother, Daisy, drank alcohol during pregnancy and that they were aware of Fetal Alcohol Syndrome and the effects of prenatal exposure to alcohol. However, both Attorney Mauldin and Attorney Nettles stated that they could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome. PCR Transcript of Record at 93-97, 119, 186-88. Nevertheless, this Court finds that Petitioner has not shown trial counsel was ineffective.

Trial counsel's investigation, preparation, and presentation of defense evidence and mitigation at Petitioner's trial were not deficient. Trial counsel put together a highly qualified defense team, which included experienced capital defense attorneys, mitigation investigators, social workers, and mental health experts. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses.

Trial counsel retained Jan Vogelsang as a mitigation expert. Ms. Vogelsang is a highly-regarded clinical social worker with substantial experience in capital litigation, although this was her first trial working as a mitigation investigator. *See* PCR Transcript of Record at 15-19. Ms.

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Vogelsang testified that she was familiar with Fetal Alcohol Syndrome, including its symptoms and causes, given her prior experience with working with people affected by FAS. *Id.* at 53-55. During the course of her investigation, Vogelsang investigated and collected information regarding the mother's drinking habits. *Id.* at 50-51. For example, she interviewed family members, including Petitioner's father, Dwight Williams, and Petitioner's sister, Maureen Williams. *Id.* at 55-60. In her testimony at the PCR hearing, Ms. Vogelsang noted that neither Dwight nor Maureen could identify the precise amount of alcohol consumed by the mother. *Id.* at 55-60. Vogelsang also interviewed the mother, Daisy Huckaby, who denied drinking while pregnant. *Id.* at 58. Vogelsang presented the information she collected about the mother's drinking to trial counsel as well as to the defense team's experts. *Id.* at 59-60.

Trial counsel retained Dr. James Evans, a neuropsychologist, who completed a battery of neuropsychological testing that revealed the Petitioner suffered from neuropsychological brain damage affecting the frontal lobes. This information was presented to trial counsel and the other members of the defense team, including Jan Vogelsang, as well as to the defense experts. Also, trial counsel retained Dr. Griesemer who conducted an MRI of the Petitioner's brain and concluded the MRI Report showed a normal brain. This Report was available prior to the start of trial.

Trial counsel retained Dr. Robert Richards who testified during the guilt phase of the trial and diagnosed the Petitioner with bipolar disorder. ROA at 1961. Similarly, trial counsel retained Dr. Seymour Halleck, who testified as a forensic psychiatrist in the penalty phase of the trial. ROA at 2303. At trial, Dr. Halleck testified that Petitioner had a major depressive episode and an obsessive compulsive disorder. ROA at 2309. Dr. Halleck based his diagnosis on an extensive review of Petitioner's background and family history, including defense team's

mitigation notes, school records, police records, incident reports, medical records, as well as a four hour interview with Petitioner. ROA at 2306. Having reviewed all of this information, however, Dr. Halleck concluded that Petitioner knew right from wrong and was able, though with difficulty, to conform his behavior to the requirements of the law. ROA at 2318.

Additionally, trial counsel brought in experienced litigation attorneys from the well-regarded Washington D.C. law firm, Akin Gump, to help prepare Petitioner's defense. In particular, these attorneys helped investigate and prepare mitigation experts, including Dr. Seymour Halleck. PCR Transcript of Record at 135-36. Attorney Nettles testified that he was satisfied with the work of these attorneys and that their presentation of the mitigation experts was consistent with the defense's theory of the case. PCR Transcript of Record at 136.

Based on all the foregoing, this Court finds that trial counsel had evidence that Petitioner's mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that Petitioner possibly suffered brain damage, based on Dr. Evans' reports. Trial counsel presented this information, along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision). Instead, trial counsel's strategy was to present mitigation evidence regarding Petitioner's troubled childhood and his mental illness, as diagnosed by defense experts.

Trial counsel carefully developed its mitigation evidence. As explained above, trial counsel attempted to fully develop mitigation evidence of Petitioner's troubled childhood. As

part of that strategy, trial counsel presented evidence of mother's alcohol addiction and her consumption of alcohol during pregnancy. Trial counsel attempted—albeit unsuccessfully—to use that evidence, along with other facts in evidence, to persuade the jury to consider the lesser sentence of life. Similarly, as explained above, trial counsel presented evidence of Petitioner's mental illness, again pleading with the jury for a sentence other than death. While it is easy in retrospective to criticize an unsuccessful trial strategy, Petitioner has not shown that trial counsel's investigation and presentation of mitigation evidence fell below the standard required in a PCR action.

Accordingly, counsel's performance was not deficient. *See Johnson v. State*, 333 S.W.3d 459, 466 (Mo. 2011) (failure to present expert testimony specifically related to fetal alcohol syndrome was not ineffective assistance); *Sells v. Thaler*, CIV. SA-08-CA-465-OG, 2012 WL 2562666 (W.D. Tex. June 28, 2012) (concluding no reasonable probability that, but for the failure of petitioner's trial counsel to present evidence of fetal alcohol syndrome, the outcome of the punishment phase of petitioner's capital murder trial would have been any different); *Garza v. Thaler*, 909 F. Supp. 2d 578 (W.D. Tex. 2012) (petitioner's complaints about his trial counsel's failure to investigate whether petitioner suffers from FAS and to present evidence establishing such a diagnosis did not cause the performance of trial counsel to fall below an objective level of reasonableness); *Burgess v. State*, 962 So. 2d 272 (Ala. Crim. App. 2005) (denying defendant's claims of ineffective assistance of counsel that his trial counsel should have called an expert witness on FAS and should have obtained a neuropsychological assessment to investigate possible organic brain impairment, where defendant's counsel conducted a diligent investigation and introduced evidence in support of mitigation); *In re Andrews*, 28 Cal. 4th 1234, 1259, 52 P.3d 656 (Cal. 2002) (concluding counsel's strategic decision to limit the scope of their

investigation of mitigating background evidence and to not present evidence at the penalty phase that included FAS and organic brain damage came within "the wide range of reasonable professional assistance"); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (finding trial counsel's failure to investigate FAS not ineffective where trial counsel was provided conflicting evidence regarding mother's drinking habits during pregnancy); *State v. Murphy*, 91 Ohio St. 3d 516, 542, 747 N.E.2d 765, 797 (2001) (finding trial counsel's failure to present evidence of organic brain damage was not ineffective where record showed that counsel presented mitigating factors, including defendant's neglected childhood in an alcoholic home; and noting trial counsel "need not pursue every conceivable avenue"); *Foell v. Mathes*, 310 F. Supp. 2d 1020, 1049 (N.D. Iowa 2004) (concluding trial counsel was not ineffective for failing to present evidence of FAS where attorney conducted a satisfactory and reasonable investigation into defendant's mental state, but rejecting the viability of using FAS as a defense).

Furthermore, Petitioner has not shown prejudice. Petitioner argues that had trial counsel presented evidence of Petitioner's organic brain damage, resulting from his FAS, it is reasonable that at least one juror would have been persuaded to give a life sentence rather than the death penalty. This Court disagrees. As discussed above, trial counsel presented a well-reasoned mitigation defense, which included compelling evidence of the Petitioner's troubled childhood and evidence of the Petitioner's mental illness based on multiple expert opinions. Petitioner's fetal alcohol argument would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (trial counsel not ineffective for failing to thoroughly investigate and present mitigating evidence regarding defendant's metal impairments, including organic brain damage, where trial counsel

focused its mitigation on the mental conditions of the defendant); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

This Court also notes that a survey of jury verdicts in sister jurisdictions shows that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage. *See, e.g., Zack v. State*, 753 So. 2d 9 (Fla. 2000) (affirming death sentence where jury weighed aggravating circumstances against mitigating circumstances, including evidence and diagnosis of FAS) *aff'd Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *State v. Locklear*, 349 N.C. 118, 134, 505 S.E.2d 277, 286 (1998) (affirming sentence of death in capital case where defendant's evidence during the sentencing phase included evidence that defendant suffered from Fetal Alcohol Syndrome); *State v. Timmendequas*, 168 N.J. 20, 33, 773 A.2d 18, 25 (2001) (affirming death sentence where jury found aggravating circumstances outweighed mitigating circumstances, including jury's finding that defendant was born to a mother who was emotionally unfit and unable to meet his physical and emotional needs and caused him to suffer from fetal alcohol effect due to her drinking throughout her pregnancy); *People v. Roybal*, 19 Cal. 4th 481, 522, 966 P.2d 521 (1998) (jury instructed to consider fetal alcohol syndrome as a mitigating factor after expert testimony that defendant had organic brain damage as a result of the FAS; defendant sentenced to death); *Brown v. State*, 659 N.E.2d 671, 675 (Ind. Ct. App. 1995) (affirming trial court sentence in murder case where the court concluded that the aggravating circumstances outweighed the mitigating circumstances, which included evidence of fetal alcohol syndrome); *Davies v. State*, 758 N.E.2d 981, 988 (Ind. Ct. App. 2001) (affirming sentence where the trial court weighed aggravating and mitigating circumstances, including fetal alcohol syndrome); *State v. Sullivan*, 1995 WL 465172 (Del. Super. June 29, 1995) *aff'd*, 676 A.2d 908 (Del. 1996) (concluding that a

diagnosis of FAS would not have affected the outcome of the sentencing phase because the sentencing court relied on mitigation evidence that defendant had limited intelligence and reasoning powers); *State v. Cooper*, 410 N.J. Super. 43, 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009) (alleged deficiency in failing to present mitigation evidence that defendant had brain damage from fetal alcohol syndrome or fetal alcohol spectrum disorder was not prejudicial and thus did not constitute ineffective assistance). Accordingly, Petitioner has not met his burden.

All Other Allegations

As to any and all other allegations that were raised in Petitioner's application or at the hearing in this matter, and have not been specifically addressed in this Order, this Court finds the Petitioner failed to present any evidence regarding such allegations. Accordingly, this Court finds the Petitioner waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all of the foregoing, this Court finds that the Petitioner has not met his burden. Counsel was not deficient in any manner. Further, the Petitioner was not prejudiced by counsel's representation. Accordingly, this Court finds the allegations raised in this Application for Post-Conviction Relief are without merit and dismisses this Application with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

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2. That the Petitioner is remanded to the custody of the South Carolina Department of Corrections for the purpose of carrying out his sentence.

IT IS SO ORDERED this 24 day of July, 2013.

The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2309792

Charles Christopher Williams *vs.* South Carolina State Of

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule

SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Ban

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

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GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUL 24 P 4:38

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 24th day of July, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 24th day of July, 2013, and a copy mailed first class this 24th day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

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SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
2010-CP-23-9792

CHARLES CHRISTOPHER WILLIAMS,

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent.

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MOTION TO ALTER JUDGEMENT

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Pursuant to Rule 59, S.C. R. Civ. P., Applicant, Charles Christopher Williams, respectfully moves this Court to alter or amend the judgment contained in the Court's Order Denying Post-Conviction Relief [hereafter, "The Order"], dated July 24, 2013. The Order contains a number of factual and legal errors and fails to address several arguments that Applicant advanced in support of his claims.

Petitioner in no way means to waive any claims previously argued and would incorporate his post-trial brief in full into this motion for a more complete and detailed list of his complaints and the evidence to support same.

The order fails to adequately address the solicitors' opening and closing statements in several regards. The solicitors' opening and closing repeatedly injected improper arguments in front of the jury. The solicitors repeatedly told the jury that there were limited times where the solicitor could seek the death penalty and highlighted the Solicitor's decision making process:

> "Part of that, when the legislature passed the laws, said that the state could not seek the death penalty in every case. We talked a little bit about this. It has to be a murder plus an aggravating circumstance. And I actually went back and looked at the statute. There are 11 aggravating circumstances outlined in the statute. So, if it's murder and we don't have one of those aggravating circumstances, we can't even seek the death penalty.
>
> So it's a very limited situation. There are only limited crimes for which we can even seek the death penalty. And out of those 11 we are going to rely on two. We only have to prove one. We're going to offer to you two different aggravating circumstances for your consideration, your determination."

ROA 2112, Line 7. In closing the solicitor continued go outside the record and tell the jury that the legislature had limited the instances when he could seek the death penalty and that he also made the difficult decision to seek the death penalty and that he shared this difficult responsibility and decision with them.

Closing:

"The State is asking you to impose the death penalty. That's what we're here for and what this section is about. This phase of this case, you may hear arguments from the defense. I have to anticipate what they may say. I don't know what they will say. But you may hear arguments from defense counsel that tries to persuade you that giving the death penalty is somehow wrong or that killing the defendant is somehow wrong. Those phrases you may hear and that try to indicate to you that what you're doing may not be right.

Let me talk a little bit about that. I want to put it in context. The state, represented by the solicitor, can in certain circumstances under our law ask for the imposition of the death penalty. However, it is only in limited circumstances, specifically murder cases, and only those murder cases in which is specifically defined by our statutory law by our legislature. And only in those cases can the state seek to have the death penalty imposed.

So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government carried out by you, the citizens. And that's the way the process has been initiated and created by our state legislature and approved by our courts. This is a function of you as citizens carrying out part of our government process. You are shaping a lawful punishment to an unlawful act. So, the responsibility is given to you to decide what the appropriate punishment is.

I remember in voir dire we went over this, you are the judge. The judge does not sentence, you sentence. And that's what this process is about. And it is a process which we have entrusted to you as our citizens to carry it out fairly; and there's nothing wrong with what you're doing. You're not killing anyone, and you're not making a decision that is in any way wrong.

Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it. But responsible people make tough decisions all the time. You make tough decisions in your jobs, at your homes, regarding your children, and you make them in your marriage.

The process makes you responsible for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law entrusted it to you and it means we'll do it, just like any other tough decision that we make;"

ROA 2366, line 2.

"It's not enjoyable for me or us to ask for you to impose the death penalty. That's not something we like to do.

We wish these cases didn't exist. We wish we didn't have a case load, but we do. And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision."

ROA 2369, Line 22.

"They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. [Undersigned counsel can find no reference where defense attorneys ever made these comments.] Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to continue to live with the rest of us regardless of how confined they may be.

The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst."

ROA 2370, Line 16.

"We will agree that the defendant could adapt to prison, because they will make him adapt. But that's not the issue. Because, otherwise, we would never have the death penalty. There would be no reason for it. And the solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime."

ROA 2374, Line 7.

There was also discussion during Dr. Crawford's testimony that she was there to help the solicitor make his decision, suggesting to the jury that both mental health experts and the solicitor had approved the death penalty in this case. Justice Pleicones specifically mentioned the nature of this irrelevant and prejudicial testimony in his concurrence: "Here, however, Dr. Crawford's testimony was offered only to bolster the solicitor's decision that this case warranted a death sentence. Unlike the majority, I do not see how the curative instruction negates the prejudice from Dr. Crawford's irrelevant yet prejudicial testimony." *Williams* at 73. The majority noted Dr. Crawford was the State's "primary witness". *Id* at 64.

Furthermore, the defense was on notice that she was potentially going to testify about the irrelevant and prejudicial decision making process of the solicitor. In a pre-trial hearing, Dr. Crawford and the solicitor both explained that was her number one responsibility. The solicitor

asked Dr. Crawfrord about their working relationship in cases and what he was looking for, and she answered, "information about mitigating issues that may lead you to decide, in fact, not to seek the death penalty." And the solicitor continued, "So that the information that you would provide me in these various cases may be relevant as to whether or not, number one, I would seek the death penalty in a particular case." ROA 2696 – 2697.

This was not the only arbitrary factor the Solicitor injected in the case: In petitioner's case, the solicitor told the jury that prison would not make the defendant suffer and that it was simply a change of address for the defendant:

> "So, what is the appropriate sentence to fit this crime and hold him responsible? Life in prison is not appropriate. You can't put him in prison for life and expect him to suffer. You can't do it. Because he is not going to think about it every day, because there's not going to be anybody there to remind him of the damage that's done to Mandy's family or to his family. No one is going to do that. Nobody is going to constantly remind him. So, he's not going to think about it.
>
> Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Places, Restaurant, places to exercise, recreation when he wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.
>
> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't."

ROA 2378, Line 1.

While the order also finds Attorney Nettles made a strategic decision to not object to this argument, a strategic reason cannot always be valid in the face of improper argument. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009). Furthermore, this argument highlights the willingness of the solicitor to continuously stray outside the record in spite of our Supreme Court's instructions.

In petitioner's case, the solicitors continuously mention their role in the process by repeatedly telling the jury there were only limited circumstances wherein they could even ask for the death penalty. ROA 2112, Line 20; ROA 2113, Line 2; ROA 2113, Line 4; ROA 2366, Line 13 – 20. This decision making process was also injected into the proceedings by the testimony of Dr. Crawford that she was specifically there to help the Solicitor make his decision. Furthermore, Solicitor Arial specifically compares the difficulty of the jury's decision to his: "Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it." ROA 2367. Solicitor Arial continued by noting, "The process makes you responsible for this difficult decision; but we can't run and hide from *our* responsibilities. *The law places it on our shoulders*, the law entrusted it to you and *it means we'll do it*, just like any other tough *decision that we make*; [emphasis added]" ROA 2367. And a few pages later, "It's not enjoyable for me or us to ask for you to impose the death penalty... our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision." ROA 2369, Line 22. "The law limits the right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases." ROA 2371, Line 1.

The injection of a solicitor's personal opinion into closing arguments is a clear and independent error in sentencing phase. *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982). Solicitor Arial blatantly injected his personal opinion into the process: "They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he is going to want the death penalty, and I do." ROA 2370, Line 16. "And the solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime." ROA 2374, Line 10.

(See also the statements quoted above, "And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision." ROA 2370, Line 1.) These statements alone warrant reversal and the combined message was clearly meant to lessen the jury's sense of responsibility by telling them, "You're not killing anyone."

The order also fails to address the fact that the solicitor injected legislative considerations into the jury argument and furthermore, that his statements about the legislative limitations on the death penalty, ROA 2112, Line 20; ROA 2113, Line 2; ROA 2113, Line 4; ROA 2366, Line 13 – 20, were simply not true. As shown by the indictments from the Clerk of Court, 14 of the 15 murder cases from 2003 and 2005 were eligible for the death penalty, meaning there is no legitimate limitation on when the solicitor can seek death.

The order fails to address the appropriate standard when considering improper argument. The state's comments violated both federal and state constitutional standards, and S.C. Code Ann s 16-3-25(c)(1). See *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007). More importantly, there is a long history of acknowledging that once improper arguments are made in the sentencing phase of a capital trial, the probability of prejudice is great and it is impossible to actually determine their effect on the jury. *State v. Mclure*, 342 S.C. 403, 537 S.E.2d 273 (2000).

The order also fails to adequately address the fact that our statutory scheme fails to limit the death penalty in a meaningful way because every murder case is eligible for the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972) This is shown by the all encompassing definitions of kidnapping and physical torture as well as the cited indictments in petitioner's post trial brief, as well as the solicitor's argument that murder is the ultimate kidnapping. Furthermore, just because a case squarely fits into the definition of an aggravator, it does mean

the statute adequately narrows the circumstances under *Furman v. Georgia*, 408 U.S. 238 (1972). *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988).

While the order acknowledges that trial counsel objected to the charge relating to kidnapping the order does not meaningfully address appellate counsel's failure to raise these issues on appeal or appellate counsel's acknowledgement that it failed to present a proportionality argument to the Supreme Court. The order also fails to adequately address this third factor the United States Supreme Court relied on in upholding the Georgia death penalty, that the state supreme court reviewed the case to make sure it was appropriate under the circumstances. The court fails to address how the Supreme Court's statement about proportionality with a comparison to Tucker was a meaningful comparison of similar cases. Furthermore, undersigned repeats their allegation that the death penalty is never appropriate for individuals that are guilty but mentally ill under the statute, especially one that has cognitive deficits equivalent to someone that is mentally retarded, despite the Supreme Court's ruling in *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992) and *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002).

The order fails to use the appropriate standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into "*all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 524 (emphasis in original) *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010) (holding evidence of brain damage was "significant mitigating evidence a constitutionally adequate investigation would have uncovered"); *Porter*, 130 S.Ct. at 454 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of "'the kind of troubled history we have declared relevant to assessing a defendant's moral

culpability.'") (quoting *Wiggins*, 539 U.S. at 535); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage caused by fetal alcohol syndrome). See also footnote 8 on page 45 of petitioner's brief for a list of cases recognizing organic brain damage is uniquely mitigating. *See e.g., Sears*, 130 S.Ct. at 3265 ("We reject[] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . [can be] justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

The order fails to note the long history of FAS and its impact on criminal behavior. As the testimony and post-trial brief showed FAS has been researched since the 1970s, the IOM published its criteria in 1996, the CDC in 2004, and FAS is noted in the 2003 ABA Guidelines for Death Penalty Defense. Petitioners' experts all testified there were individuals working in this field that could give an accurate diagnosis and that did give accurate diagnosis long before 2004. The order fails to acknowledge trial counsels' failure to investigate FAS and instead finds trial counsel made a strategic decision not to present FAS. This contradicts both attorneys' testimony. PCR at 92 – 100, 104, 119-121, 136 – 137, 155 – 160, 169 – 170, 174, 180 – 182, 186 – 194, 207 – 208. Furthermore, the test is not whether trial counsel presented *some* mitigation evidence. The Supreme Court has consistently made this clear:

> We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing fact-specific analysis that the state trial court failed to undertake below.

Sears, 130 S.Ct. at 3266 (emphasis in original); *see also, Williams*, 529 U.S. at 397-398 (categorically rejecting this type of truncated prejudice inquiry); *Porter*, 130 S.Ct. at 453-454 (2009) (same).

The order then characterizes the FAS evidence as a fancier mitigation package and applies an inappropriate standard. This is contrary to the testimony of the experts and attorneys and does not conform to the appropriate standard in *Porter*, 130 S.Ct. at 453 (quoting *Strickland*, 466 U.S. at 694). The test is not whether a capital defendant would have received a life sentence absent trial counsel's deficient performance. As the United States Supreme Court recently reiterated in *Porter*:

> [w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.

130 S.Ct. at 455-56 (quoting *Strickland*, 466 U.S. at 693-94). The question is whether "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [a defendant's] culpability." *Rompilla*, 545 U.S. at 393. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. Instead the trial team presented two experts that the state noted could not even agree on a diagnosis.

The order fails to address the fact that the testimony that petitioner suffers from FAS was uncontradicted and the overwhelming evidence that petitioner's brain damage meant he had severe cognitive deficits such that he had the emotional and mental faculties of a child. The testimony showed that Williams was essentially functioning at a level of someone who is mentally retarded. PCR 300. Petitioner's attorneys were aware that he was exposed to alcohol during pregnancy. Plaintiff's Exhibits 7, 8, and 10; PCR 32-35, 91, 119-120,156-157,192.[1] The attorneys could not explain why fetal alcohol syndrome was not investigated or why it was not

[1] The trial transcript is replete with indications that the mother was an alcoholic and was intoxicated before and after petitioner was born. ROA 1769; 2180, 1877, 1978, 2179, 2214, 2236, 2237, 2252, 2262, 2331, 2336.

ruled out. PCR 97; 174. They were also familiar with the ABA guidelines for capital defense which specifically cites fetal alcohol syndrome in a number of places. PCR 93. It is also undisputed that the neurologist hired by the trial team did not have Dr. Jim Evan's testing results or the history of alcohol ingestion by the mother and that either of these factors would have caused him to respond differently than he did.

While petitioner's attorneys may have improperly characterized petitioner as a "foreign national" in its first amended application for post conviction relief, the Federal Republic of Germany clearly identified him as a German Citizen, and undersigned attorneys clearly identified petitioner as a dual citizen in their post trial brief. Undersigned certainly never intended to suggest that petitioner is not a United States citizen. Instead, and continuing to rely on the German government's pre-trial brief to fully address this topic, it is clear petitioner's attorneys never investigated this matter. PCR 107 – 108, 126, 150 – 153 and the German government could have been an enormous asset to their case.

The order fails to address whether the combination of all of these errors demands relief.

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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IN THE COURT OF COMMON PLEAS
2010-CP-23-9792

CHARLES CHRISTOPHER WILLIAMS,

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Motion To Alter Judgment, via US mail, first-class, postage pre-paid, at the following addresses:

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Spartanburg, South Carolina
August 5, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Charles Christopher Williams,	)	C.A. No. 2010-CP-23-9792
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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ENTERED COMPUTER

Before the Court is Petitioner Charles Christopher Williams' Motion to Alter Judgment pursuant to Rule 59, SCRCP. By Order of Dismissal dated July 24, 2013, the Court denied the Petitioner's Application for Post-Conviction Relief. Having had the opportunity to carefully review the Order of Dismissal, the extensive record before the Court, and each and every factor in the Petitioner's Motion to Alter Judgment, this Court finds that its Order of Dismissal adequately addresses each issue raised by the Petitioner, even though many of the Court's findings and conclusions are adverse to Mr. Williams.

This Court has again reviewed the evidence presented in light of the applicable cases, both from federal courts and from South Carolina courts. This Court has exhaustively studied the Fetal Alcohol Syndrome literature presented by the Petitioner. Having carefully considered the credentials, demeanor, and credibility of each witness, this Court has thoroughly evaluated the substance of each witness's testimony. This case, as with others of its nature, presents difficult legal issues, with which all in the legal profession and judiciary must grapple. This Court has digested, studied, and agonized about the issues presented by Mr. Williams, and firmly believes that the law has been properly applied to the evidence in this case. Fortunately, our

1

judicial system provides appellate courts, which are waiting to review this decision and will have the opportunity, with a deeper insight from an impassive record of trial, to provide wise analysis for this case.

Accordingly, the Petitioner's Motion is respectfully DENIED.

Aug 9, 2013

The Honorable G. Edward Welmaker
Circuit Court Judge
Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2309792

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 AUG -9 PM 2:24

Charles Christopher Williams *vs.* South Carolina State Of

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 9th day of August, 2013.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 9th day of August, 2013, and a copy mailed first class this 9th day of August, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Derek Joseph Enderlin 330 E. Coffee St. Greenville, SC 29601
Richard W. Vieth 360 E. Henry St. Ste.101 Spartanburg, SC 29302

ATTORNEY(S) FOR THE PLAINTIFF(S)

Donald J. Zelenka PO Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2010-CP-23-9792

Charles Christopher Williams,

Appellant,

v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Charles Christopher Williams appeals the order of the Honorable G. Edward Welmaker dismissing his post conviction relief case. The order was filed on July 24, 2013, received on July 26, 2013 by the petitioner's attorney, a motion for reconsideration was served on August 5, 2013 which was denied in an order filed August 9, 2013, and received by petitioner's attorneys on August 14, 2013.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2013 SEP 12 A 11: 25
PAUL S. WICKENSIMER

September 12, 2013

Derek J. Enderlin
ROSS AND ENDERLIN, PA
330 East Coffee Street
Greenville, SC 29609
864-647-7205
Derek@rossenderlin.com
Attorney for Appellant

Other Counsel of Record:
Attorney General of South Carolina
Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent
803-734-6305

PROOF OF SERVICE NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2010-CP-23-9792

Charles Christopher Williams,

Appellant,

v.

The State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on September 12, 2013, addressed to his attorney of record, the Attorney General of South Carolina, Attn: Donald J. Zelenka, Post Office Box 11549, Columbia, South Carolina 29211.

September 12, 2013

Derek J. Enderlin
ROSS AND ENDERLIN, PA
330 East Coffee Street
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864-647-7205
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Attorney for Appellant

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. MCKINNEY
2013 SEP 12 A 11: 25

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No. 2010-CP-23-9792

Charles Christopher Williams,

Appellant,

v.

The State of South Carolina, Respondent.

2013 SEP 12 A 11: 25

MOTION FOR APPOINTMENT OF OUTSIDE COUNSEL

Charles Christopher Williams has appealed the order of the Honorable G. Edward Welmaker dismissing his post conviction relief case. During the post conviction relief case the petitioner alleged his appellate counsel, Robert Dudek of the Office of Appellate Defense, was ineffective in several regards. Mr. Dudek testified at the post conviction relief hearing. The petitioner feels there is an inherent conflict of interest with Mr. Dudek and the Office of Appellate Defense. The petitioner has requested that his attorney, Derek J. Enderlin, be appointed to represent him on the appeal. Mr. Enderlin is obviously familiar with the case and submitted an 80 page post-trial brief in the PCR which will help facilitate filing a petition for writ of certiorari. The petitioner has therefore asked the undersigned attorney to request that he be appointed to represent him and the undersigned attorney is in agreement with that appointment.

On behalf of petitioner, I so move.



September 12, 2013

Derek J. Enderlin
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330 East Coffee Street
Greenville, SC 29609
864-647-7205
Derek@rossenderlin.com
Attorney for Appellant

COURT OF COMMON PLEAS AND GENERAL SESSIONS

EXHIBIT RECORD AND RECEIPT FORM

Charles Christopher Williams -vs- State of South Carolina (2010-CP-23-09792)

PLAINTIFF'S/ EXHIBITS

NO	DESCRIPTION	ID	EV
P-1	Family tree	x	x
P-2	Reprieve	x	x
P-2A	Affidavit of Linda Mroz	x	x
P-3	First grade report	x	x
P-4	Psychological evaluation	x	x
P-5	Christie Group	x	x
P-6	Second grade report	x	x
P-7	Confidential work product with interview notes	x	x
P-8	Investigator notes	x	x
P-9	Investigator notes	x	x
P-10	Risk factors	x	x
P-11	Themes	x	x
P-12	Dr. Evans' notes	x	x
P-13	Email - August 26, 2004	x	x
P-14	ABA Guidelines	x	x
P-15	Neuro evaluation	x	x
P-16	Email - February 2, 2005	x	x
P-17	Focus Group	x	x
P-18	Themes or Theory	x	x
P-19	ABA Guidelines	x	x
P-20	Email - January 5, 2005	x	x
P-21	Jury charge	x	x
P-22	Pretrial Brief	x	x

Annette Harper 2-1-13
COURT REPORTER DATE

Jan White 2-1-13
CLERK OF COURT DATE

COURT OF COMMON PLEAS AND GENERAL SESSIONS
EXHIBIT RECORD AND RECEIPT FORM
Charles Christopher Williams -vs- State of South Carolina (2010-CP-23-09792)

NO	DESCRIPTION	ID	EV
P-23	Appendix of FAS documents	x	x
P-24	Affidavit of Dr. David A. Griesemer	x	x
P-25	Death certificate	x	x
P-26	Citizenship certificate	x	x
P-27	Photograph of Carlo Rossi burgundy	x	x
P-28	CV of Paul David Connor, Ph.D.	x	x
P-29	CV of Natalie Novick Brown, Ph.D.	x	x
P-30	CV of Richard S. Adler, M.D.	x	x
P-31	Fetal Alcohol Syndrome book	x	x
P-32	Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis	x	x
P-33	FAS Facial Photographic Analysis Report	x	x
P-34	Diagnostic criteria for FAS	x	x
P-35	Photo of Chris Williams' brain in 2005	x	x
P-36	Quantitative EEG Analyses	x	x
P-37	Raw EEG Report of Dr. Walker	x	x
P-38	Hospital time line	x	x
P-39	GMH medical records	x	x
P-40	Slide - normal corpus callosum	x	x

DEFENDANT'S EXHIBITS

D-1	2005 Slide 12 of brain	x	x
D-2	2005 Slide 13 of brain	x	x
D-3	2011 Slide 12 of brain	x	x
D-4	2011 Slide 13 of brain	x	x
D-5	2011 Slide 14 of brain	x	x
D-6	2011 MRI report	x	x

Annette Barker 2-1-13
COURT REPORTER DATE

Jan White 2-1-13
CLERK OF COURT DATE

COURT OF COMMON PLEAS AND GENERAL SESSIONS
EXHIBIT RECORD AND RECEIPT FORM

Charles Christopher Williams -vs- State of South Carolina (2010-CP-23-09792)

NO	DESCRIPTION	ID	EV
D-7	2005 MRI report	x	x
D-8	FASD in the Legal System: A Multidisciplinary Assessment Model for Adults and Adolescents	x	x
	COURT'S EXHIBITS		
	(NONE)		

Dorothy Sparks 2-1-13
COURT REPORTER DATE

Jan White 2-1-13
CLERK OF COURT DATE

PENGAD 800-631-6989

PLAINTIFF'S EXHIBIT 1 10-9-02

4238

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REPRIEVE
INTERNAL MEMO

To: EC Project Team, Christopher Williams Defense Team
From: Irina Kozlova
Re: Interview with Manfred Leis (ML) and wife Anne-Marie (AML)
Date: 2012/03/04
File:

Present: IK, CCC, ML

Date of interview: March 04, 2012

Location:

[redacted]
Germany

ML is the uncle of Christopher Williams' (CW) mother – Daisy Huckaby (DH), born Margaret Theresa Leis. DH explained to CW's counsel that ML was her favourite uncle from Germany and that he would certainly want to help CW. Based on this information and the contact details provided by DH we called ML in November 2011, but he refused to speak to us on the phone and threatened to call the police if we ever called him again. We decided to visit ML at his home address and were surprised when he opened the door in a friendly manner. Initially ML seemed reluctant to let us into his apartment and started speaking about CW and DH whilst we were still standing on the doorstep. Because he complained he was not dressed fully and the kitchen table was full of his paperwork, we then suggested that we would come back in half an hour so he would have time to change. ML agreed and we left the apartment.

Half an hour later ML and his wife AML welcomed us in and we began speaking about the family history of the Leis family. AL used to be neighbours with family Leis ever since she was a young girl and she also knew DH since DH was one year old. Thus, AML contributed plenty to the conversation not least because AL had an extraordinary good memory of dates. It was at times a little bit difficult to follow the conversation because the couple would speak simultaneously and interrupt each other.

ML's father was Otto Leis Senior (OLS; deceased in 1967), a shoemaker, who was married to Maria (née Lehne) until her death in 1943. The name of OLS's second wife was Margarete (Née Nagel) who he married in 1945. Despite a brief compulsory training in Grafenhöhe, OLS was never drafted to the Wehrmacht both because he was a professional shoemaker and because he became a widower who had to provide for 6 children.

There were 8 children growing up in the family Leis household including Elise (later Welthe, DOB [redacted]), Erika (DOB [redacted], Walter (DOB [redacted]

PLAINTIFF'S EXHIBIT

deceased), Manfred (DOB [redacted]), Helga (later Kopka, DOB [redacted]), Otto (DOB [redacted]) and two children from the second marriage – Anita (later Wagner, DOB [redacted]) and Andreas (DOB [redacted] deceased).

When speaking about his memories of the war, ML described how their flat was destroyed during the continuous bombings of Nürnberg. This forced the family to move into the basement of a house which belonged to a local Jew but who had been forced to leave. OLS built a small shoemaking factory and could provide for the large family with his earnings form shoemaking. When the local Jew returned to his house after a short while family Leis had to find alternative housing.

ML also told us the story of one of the worst bombings he and his siblings experienced in Nürnberg. When they were convinced the end was near during this one particular bombing attack they built a circle and said their goodbyes. One of ML's most vivid wartime memories was the time when US soldiers found family Leis hiding from the bombings. Putting themselves under considerable risk considering how close the remaining German soldiers were located, the American soldiers distributed chocolate to all 6 children. According to ML, his sister Erika (now Shed, ES) always used to recall this incident and already then ML felt her fascination for the US.

Generally according to ML, all Leis children were constantly very scared during the time of the American and British bombings of Nürnberg. Nevertheless, ML believed that, given the circumstances, he and his siblings were all very healthy and nobody suffered any serious war trauma or developed any mental health problems. ML said that after a while everybody got used to the war conditions. ML did later add that only one of the siblings – Helga (HK) – was not coping well with her experiences during the post-war period. ML described her as being in ill health because of her tendency to be depressed. ML told us story from when ML spend a holiday together at the Gardalake during which HK used to hide from the others and not come out of her room.

In spite of the fact that times were very tough during the post-war period, ML described that the family kept together well and that OLS was able to sell shoes to buy food. OLS was always able to provide for the large family and make sure everybody had food to eat.

We then spoke about ML's sister ES. ML and ES grew up together and ES stayed in the family home until approximately 1953. ES and the eldest sister Elise (EW) were very close and would go out dancing together in the evenings. ML described how ES and EW would borrow the high heels which their father OLS was repairing for his customers and wear them in the evenings and return them worn out in the morning. Although ES used to help the younger siblings with their homework and helped her father around the house, EW was more of a mother figure to ML. ES would very much "do her own thing". OLS did not approve of ES socialising with black American soldiers who were stationed locally. ML recalled a time when two black American soldiers appeared in front of their window to pick up ES and EW to go dancing, but that OLS refused to allow that to happen.

OLS was not very strict compared to other parents at the time and the children were never frightened of him. OLS never beat any of his children apart from one time when OLS punished OLJ for picking a fight with ML. OLS cared very much about his children and looked after them well. OLS also always kept the house very tidy.

ML described how DH was abandoned by her mother ES who left her to be raised lovingly by DH's grandfather OLS. The name of DH's father was Bruno and he was a black soldier who was stationed close to Nürnberg at Bad Nauheim. ML believed ES used to work as a maid and also lived in the household of Bruno the American soldier. ML described that Bruno was as black as Heidi Klum's ex-husband and recording artist Seal. DH was born in 1948 in the house of OLS. Shortly after ES met her future husband – a white US soldier who was stationed at Bad Nauheim named Harold Shedd (HS). Both ML and AML believed ES met HS whilst she was working at a bar that was visited by many American soldiers in Bad Nauheim. AML explained that ES did not see herself as having a future in post-war Germany and believed she would have a better life in the US.

AML stated that ES abandoned her daughter because she did not want her American husband to know she had given birth to a mixed-race child out of wedlock. ML believed that ES felt remorse for abandoning her daughter. Initially ES would regularly sent toys and clothes for DH from the US and in the late 1960s ES sent a friend over to Germany to check on DH. ML described how the German authorities searched for ES to make her pay financial contributions to OLS for raising DH. ML believed that this was the reason that ES stopped any contact with DH or the Leis family for a while.

The family was convinced ES had moved to the US, but in fact ES stayed in Germany for a while longer and did not move to the US until the 1960s. ML recalled how one time he, his father OLS and OLS's friend drove to ES's and HS's house in Bad Nauheim to visit ES. ES was surprised but happy to see them when they turned up at her doorstep. ML remembered that he was very happy to see ES and that ES lived in a rich neighbourhood and kept her own maid.

OLS raised DH as if she were his own child. ML never noticed that OLS was angry with ES for leaving him to raise her daughter because OLS believed that "if there are 6 children already there is space for one more". ML apologised for not knowing more details about OLS's opinion of ES because he was only a young boy at the time. OLS's second wife – Margarete (MGL) – would also look after DH as if she were her own. ML also remembered that OLS never seemed to make any effort to find DH's biological father.

According to ML, DH's closest relationship amongst the siblings was with Anita (AL). AL and DH were "like sisters and best friends at the same time". Although OLS forbid the other girls from training or studying, DH was permitted to train to become a hairdresser. DH, however, never finished her training because she had her first child in [redacted] already. OLS also permitted DH to be confirmed and in fact DH had a very nice confirmation according to AML.

AML stated that DH used to struggle being the only mixed-race German child in the neighbourhood and that DH went through "an identity crisis". It must have been hard

on DH at a time when even black and white US soldiers were segregated and visited separate bars. When DH was growing up people in the neighbourhood would make racist comments regularly. Even when DH trained to become a hairdresser her customers would sometimes make such comments, which upset DH deeply.

DH was upset by the fact that she did not know her biological mother and was always very keen to find her. It appeared that AML and DH used to have a strong connection and that AML was more informed about certain things about DH's past in Germany than ML.

DH's first marriage was with Uwe Scheller Senior (USS) when she was only 19 years old. They had three children: Uwe Junior (USJ), Silvia (SS) and Peter who died after only 14 days. ML and AML knew the Scheller children only when they were very young and have not had any contact with them or their father USS ever since despite searching for them thoroughly. DH and USS did not have a happy marriage. USS did not treat DH well, but due to his brutality used to abuse DH. USS worked as a refuse collector in Nürnberg.

Nobody from the Leis family including OLS and ML approved of USS because they believed him to be bad influence on DH and "good-for-nothing". OLS was upset that DH moved out to live with USS because OLS wanted her to finish her training first. OLS also did not approve of DH having to work as a cleaner to make enough money.

AML described how USS would call DH 'brown woman' in a derogatory way ('Mulatenweib' in German). DH and USS lived in Nürnberg until 1971 when they got divorced. Around 1992 ML met USS in the local supermarket but ML did not know if USS still resides in the Nürnberg area today.

DH's second husband was the black American soldier Charles Dwight Williams (CDW). They met in Germany in 1970 or 1971. CDW was stationed in Nürnberg. DH and CDW went to the US full time in 1977 but in the years before that they moved back and forth between the US and Germany. In 1977 DH took their daughter SS with her to the US where she would attend school. However, soon after DH sent SS back to her father USS in Frankfurt where SS did not want to return.

ML showed us a letter from DH from 1977 in which she complained about the way CDW treated her and that "he finally showed his real face". EH complained that CDW was always very jealous and would not allow her to work. CDW also allegedly burned all of DH's personal belongings and clothes as well as damaging her car. CDW also threatened their son CW according to DH. However, ML and AML stated that he seemed like a decent and funny person when they knew him in Germany. CDW wanted to study music in the US and DH used to work as a hairdresser in the US to help finance CDW's studies. DH had no chance of escaping CDW's behaviour in the US compared to when they lived in Germany because in Germany she could rely on a whole family support system. ML did add, however, that cannot confirm that DH's descriptions were the absolute truth. ML thought the letter was "heartbreaking" and he was very upset when he received it. ML described DH's and CDW's marriage from the time when he knew them in Germany as the "ideal marriage". They had no financial troubles. Their daughter Maureen (later Bangcuyo, MB, DOB [redacted] – deceased 2011/10/21) had a great childhood. ML and AML were convinced that

CDW did not abuse the children when the family lived in Germany for 6 years. They also did not see DH as someone who would have let her husband abuse her or her children, but would have stepped up and protected the children.

According to ML and AML, DH was a great mother who looked after and provided for her children well. Their house was always very clean and DH was very hardworking. When she left for the US, DH stayed in touch with her son USJ and he even came to visit her in the US for a long period of time. DH had told AML that she did not want to treat her children the same way she had been treated by her own mother and therefore stayed in touch with them. USS was also good to the children and according to ML's knowledge his second wife lovingly cared for USJ and SS.

In 1987 AML and ML received the last letter from DH and did not hear anything from her for 20 years before DH resumed contact in 2010. When she first called ML, DH asked for 800 USD to pay legal fees that ML was not able to provide. Now they write letters to each other.

DH described to AML and ML how CW has been a very nice boy until he met his girl friend when he began taking drugs and drink. It became difficult for DH to control CW who was a spoiled child. DH described her latest husband – Rodney Huckaby (RH) – as a decent man and good person. DH and RH have been married for 12 years. ML nor AML have ever met RH, but DH and RH are planning to visit them in Germany in April 2012. ML believed RH currently has cancer.

ML told us that DH searched for ES and that they only re-established contact in 1991. DH undertook a 2-3 day long bus journey to ES's house with young CW (he was not yet ten). ES had not told her family in the US that she had had a daughter in Germany and it caused complications when DH just turned up at the Shed family's doorstep unannounced. However, when DH never called ES after this visit, ES was upset. According to ML, ES thought DH never got in touch again was because she must have realised that ES was not rich and would not be able to help DH out financially. DH has complained to ML that when she now calls ES her son picks up the phone and tells DH that ES is either ill or away. DH believes she does not want to speak to her.

ES never complained about any health problems to ML even though she is already 83 years old. ML described DH as very funny, intelligent, ambitious and as a great singer. According to ML, DH never showed any signs of depression or odd behaviour.

ML stated that he and his wife have never met CW, but that they have met DH's daughter MB. They told us that MB suffered from depression and that she had attempted suicide several times in the past. MB was forced to stop working due to the severity of her depression. MB's husband was a financially well off US actor and a relative of Demi Moore. MB committed suicide in October 2011: during a BBQ she and her husband were hosting at their house in Hollywood, California - MB went upstairs and hanged herself in the closet.

ML also showed us the letters he has received from DH and the pictures of her children and current husband RH she had sent in with the letters.

ML provided us with the following contact details for his brother Otto Leis Junior, and his sisters Helga Kopka and Anita Wägner:

Otto Leis

[redacted]

Helga Kopka

[redacted]

Anita Wägner

[redacted]

Contact Info for ML:

Private Address:

[redacted]

Tel: [redacted]

STATE OF SOUTH CAROLINA
County of Greenville

In the Court of Common Pleas
2010-CP-23-9792

CHARLES CHRISTOPHER WILLIAMS, Applicant,

V.

THE STATE OF SOUTH CAROLINA, Respondent.

AFFIDAVIT OF LINDA MROZ

I am a mitigation investigator in Idaho. I was asked to conduct an interview with the petitioner's grandmother, Erika Shedd. A typed version of my notes is attached. I work for the Federal Capital Habeas unit in Idaho and have for several years. I would have gladly conducted this interview in 2004 or 2005 if the defense team had called me.

Linda Mroz

Boise Idaho

Sworn to me this 23rd day of January, 2013

Notary Public for Idaho
My commission expires: 8/24/13

GREG WORTHEN NOTARY PUBLIC STATE OF IDAHO

PLAINTIFF'S EXHIBIT LA 11-9-22

Interview with Erika Shedd
By Linda Mroz 9/25/12
Phone 208-[redacted]

- Norman "Bruno" Brown; he was 21/22 years old; wore no glasses. Brown Eyes/Brown Hair; Was originally from NY/NJ she believes; she knew him for 2 years; very light skinned.

- He may have had a brother

- Their daughter Daisy looked just like her Dad

- Erika met him at a dance on his military base in Nuremberg, Germany; he was an MP (military police officer); he was not much of a drinker. This was about 1948 through 1950 when they dated. In those days there was no way women were going home with black guys to US; not at that time.

- Norman played in band; instrument unknown.

- Her Stepmother [Margarete (Née Nagel)] was a cruel woman who was jealous of her late mother's memory. Her mother died suddenly at 38 years of age, after a short, 2 days, but fatal illness associated with cysts in her throat. She died in hospital during the war in 1943. Her Father was himself hospitalized with same cyst condition he caught from mother. She stated they almost lost the father as well.

- The family home burned down in old town Nuremberg during phosphorus bombing. The family stayed in a huge place that was a shelter but even there was danger – the water pipes were collapsing over their heads. The whole town burned . Her uncle finally found them and took them all in – their six kids plus the Uncle had six children of his own.

- they were later evacuated to a farm for one year; one room building; they had lost everything; Dad had been a shoemaker – he lost all his tools and machines in bombing. Later they were able to move back to the city into low income homes

- during the last days of the war there was bombing every hour. They were in a bomb shelter and could hear heavy trucks and tanks rolling over above us in the street. Soldiers from US came down to the shelter and took over their shelter.

- After Daisy was born her Dad and stepmom took her – Erika had nothing to give, no money, no job, no husband. Her Aunts and Uncles liked her daughter Daisy and they got to have

relationships with her. Their friends all came to see her after Daisy was born (Bruno's friends). These friends could tell her nothing more about Bruno, where he was from, after he was sent back to the States.

- Leaving Daisy with her father and stepmother, she moved with a girlfriend to Munich where she got a job waiting tables. This is where she met her future husband Harold, who was serving in the Army. We dated 3-4 years and then she emigrated to CA in 1960 after she became pregnant with eldest child Sandra. Harold was still in the Army and his discharge was delayed so he sent her ahead to the care of his parents in the US. Their child Sandra was born on [redacted] in Colorado Springs. Her in-laws picked her up and took her to Alturas, CA.

- Her siblings left in Germany; Manfred, Helga, Otto.

- Daisy has called her to ask for $ but as Erika is on a fixed income/living with my son this was not possible. Erika suggested she call her family in Germany for help.

- Daisy and the client, Chris, visited Erika and her family when Chris was about 10 years old. This was during the Christmas holidays she believes. Erika and the others all thought he was a strange boy. He urinated on the carpet in one of the granddaughter's rooms.

NEW 1989

THE SCHOOL DISTRICT OF GREENVILLE COUNTY
PROGRESS REPORT – FIRST GRADE

NAME Chris Williams
SCHOOL Taylors Elem.
YEAR 1989-90 TELEPHONE [redacted]
TEACHER A. Wilson
PRINCIPAL M. Woods

ATTENDANCE RECORD

REPORT PERIOD	1	2	3	4
DAYS PRESENT	43	43	43	46
DAYS ABSENT	1	2	1	1
DAYS TARDY	1	2	1	1

EXPLANATION OF SYMBOLS

S – SATISFACTORY WORK
N – NEEDS TO IMPROVE

CHECK (✓) – INDICATES CURRENT INSTRUCTIONAL LEVEL

REPORT PERIOD	1	2	3	4
READING: Comprehension	conference	S	S	S
Vocabulary		S	S	S
Word Attack Skills		N	N	S-
MATHEMATICS: Concepts		S	S	S
Computation		S	S	S
Problem Solving		N	S	S
HANDWRITING		N	N	S-
SCIENCE		S	S	S
SOCIAL STUDIES		S	S	S
WORK HABITS	N	N	S-	S-
BEHAVIOR	N	N	N	N

INSTRUCTIONAL LEVELS

READING					MATHEMATICS				
REPORT PERIOD	1	2	3	4	REPORT PERIOD	1	2	3	4
Readiness	conference				1.1 A	conference			
Preprimer 1		✓			1.1 B				
Preprimer 2			✓		1.1 C		✓		
Preprimer 3				✓	1.1 D			✓	
Primer					1.2 A				
First Reader					1.2 B				✓
					1.2 C				
					1.2 D				
					1.2 E				
Working Below Grade Level		✓	✓	✓	Working Below Grade Level		✓	✓	✓
Working On Grade Level					Working On Grade Level				
Working Above Grade Level					Working Above Grade Level				

COMMENTS

1.

2.

3.

4. Chris is ready for a good year in first grade next year.

PLAINTIFF'S EXHIBIT 3 10-07-92

GRADE ASSIGNMENT FOR 19 90 19 91 retained in first

PARENT'S SIGNATURE _____

CONFERENCE WITH PARENTS

DATE REQUESTED Oct. 30, 1989

DATE HELD

Form 304
Page 1

THE SCHOOL DISTRICT OF GREENVILLE COUNTY

PSYCHOLOGICAL EVALUATION

ID NUMBER: [redacted] SCHOOL: Taylors Elementary GRADE: 1 repeating

AREA CASE #: NE 8805 NAME: Chris Williams FIRST EVALUATION

DATE EVALUATED: 9-25-90 ADDRESS: [redacted] PHONE: [redacted]

DATE OF BIRTH: [redacted] PARENTS: Dwight & Daisy Williams RACE/SEX: B/M

CHRONOLOGICAL AGE: 7-9 EXAMINER: Janet [redacted]

SOURCE OF REFERRAL (NAME AND TITLE): [redacted], Teacher

Reason for Referral:

Chris was referred for a psychological evaluation for the purpose of assisting school personnel in planning an educational program.

Screening Information:

DOMINANCE: Right
HEARING: 11-16-89 Passed
VISION: 9-28-89 20/30 D; 20/30 N
SPEECH: 9-89 Passed
LANGUAGE: 9-89 Passed

Background Information:

Chris is currently repeating the first grade at Taylors Elementary School. School records indicate that he attended kindergarten at Taylors and has had consistently good attendance. Chris' teacher reports that he is very distractible in the classroom and has difficulty attending to complete tasks. She adds that he exhibits a high energy level and has difficulty staying seated at times. Chris has been receiving remedial services in the EIA programs for reading and mathematics. A classroom observation of Chris indicated consistent difficulties with listening comprehension, written expression, reading and mathematics. Intervention strategies which have been attempted with Chris included seating him away from distractible areas, using a timer to help him increase time on tasks, and having him visit the office at the end of the week to share his work with the principal. There is no improvement noted following any of the interventions listed.

Social and Developmental History completed by Chris' father indicates that he was born at 7 lbs. following a normal nine months pregnancy and uncomplicated birth. There were no major illnesses or injuries noted. It was indicated that Chris had to have an eye operation when he was two years old. His present health is described as excellent and he is on no medication. Parents have not noted social or emotional difficulties in the home environment. Chris' attitude towards school was indicated as positive. Mathematics was listed as his favorite subject. Chris' father comments that Chris will finish his homework at home once he understands what to do. He feels Chris has difficulty at times understanding explanations given to him. There were some indications of difficulty with peer relationships in the neighborhood. Family relationships were reported as "great."

PLAINTIFF'S EXHIBIT 4

NAME: Chris Williams
DOB: [redacted]

Behavioral Observations:

Rapport was easily established with Chris and he readily accompanied the examiner to the evaluation session. Chris appeared to enjoy the attention of the one-to-one situation and spoke openly with the examiner. A number of verbal items had to be repeated for Chris to understand correctly. Chris reported that he enjoyed the Picture Arrangement and Object Assembly subtests on the WISC-R. He also reported to the examiner that he liked for people to call him Chris although his mom and dad call him Charlie. On a number of occasions Chris' conversation would drift from the subject of the testing to other things that were on his mind at the time. For example, on two different occasions he went into a long explanation of a pet snake he had had who had gotten loose at one point. It was necessary at times to refocus Chris' attention back to the task at hand. Distractibility may have been a factor in minimizing certain of the individual scores on the testing. Overall test results are considered valid indicators of Chris' functioning level.

Tests Administered:

Wechsler Intelligence Scale for Children - Revised (WISC-R)
Bender Visual Motor Gestalt Test
Woodcock-Johnson Psycho-Educational Battery - Tests of Achievement
Woodcock-Johnson Psycho-Educational Battery - Tests of Cognitive Ability
House-Tree-Person (HTP)
Incomplete Sentences

Test Results:

WISC-R: Verbal IQ - 103 Performance IQ - 96 Full-Scale IQ - 100

	Scaled Score		Scaled Score
Information	12	Picture Completion	11
Similarities	9	Picture Arrangement	13
Arithmetic	9	Block Design	9
Vocabulary	14	Object Assembly	8
Comprehension	9	Coding	7
Digit Span	9		

WOODCOCK-JOHNSON PSYCHO-EDUCATIONAL BATTERY

	Grade Score	Percentile	Standard Score
Reading Cluster			
Letter-Word Identification	1.4	18	86
Word Attack	1.0	10	80
Passage Comprehension	1.3	11	81
Written Language Cluster			
Dictation	1.7	25	90
Proofing	1.4	15	84
Memory Cluster	1.0	8	79

NAME: Chris Williams
DOB: [redacted]

BENDER-GESTALT: Age Appropriate 6-6.5 Standard Score: 76

Discussion and Recommendations:

Intellectual assessment was completed with the Wechsler Intelligence Scale for Children - Revised. On this administration Chris achieved a Verbal score of 103, a Performance score of 96 and a Full Scale score of 100. The chances that the range of scores from 97 to 103 includes his true IQ are approximately 68 out of 100. Chris' score places him within the average classification of intelligence when compared with other students of his age in the standardization sample. Overall verbal and performance abilities are measured as fairly evenly developed both falling within the average range. There were relative strengths noted with verbal concept formation and nonverbal sequencing skills. A relative weakness was noted on a subtest requiring extended attention to a visual motor task.

Academic achievement measures were taken with the Woodcock-Johnson Psycho-Educational Battery. Reading word recognition achievement fell at the 1.4 grade level. Word attack skills fell at the 1.0 grade level and reading comprehension fell at the 1.3 grade level. All reading scores are relatively low for Chris' aptitude and chronological age. There is a significant discrepancy noted between Chris' ability level and achievement in the area of word attack skills. Mathematics calculation fell at the 2.1 grade level and within expectancy range. Writing skills were measured at the 1.4 to 1.7 grade level. These fall within expected limits for his aptitude. A measure of listening skills placed Chris at the 1.0 grade level and was significantly discrepant from ability. At this time Chris is demonstrating significant discrepancy between aptitude and achievement in the areas of basic reading skills and listening comprehension.

The Bender Visual Motor Gestalt Test was administered as an indicator of development and functioning of visual motor integration skills. Chris' reproduced designs included the number of scoreable errors expected of average students of approximately ages 6 to 6.5. A standard score of 76 was indicated according to the Koppitz scoring system. Visual motor skills functioning was indicated as an area of relative weakness for Chris. This would indicate that Chris may take extra time to complete written assignments and overall writing skills should be closely monitored.

Personality screening testing indicated tendencies towards impulsivity with suggestion of tension and feelings of inadequacy in peer relationships. Chris did appear to have good feelings relating to his family and his teachers.

In summary, this evaluation finds Chris to be functioning within the average classification of intelligence for his age group. Overall verbal and performance abilities were measured as fairly evenly developed both falling within the average range. Verbal concept formation and nonverbal sequencing skills were indicated as areas of relative strength. Visual motor skills functioning was indicated as an area of relative weakness. Academic achievement testing indicated significant discrepancies between Chris' ability and achievement in the areas of basic reading skills and listening comprehension. Test results indicate Chris meets criteria for special education services at this time.

The following may be helpful in working with Chris:

I. For the student's problems in auditory memory these methods might be helpful:
   A. Use "eyeball to eyeball" conversation when giving directions or presenting material.
   B. Reinforce auditory material with visual material

NAME: Chris Williams
DOB: [redacted]

a. Write assignments on the chalkboard.
b. Write lists or draw maps to help locate things.
c. Write step-by-step instructions.

C. Try to relate facts, dates, or information to significant personal events of the student's own life.
D. Reward remembering instead of punishing for forgetting.
E. Teach mnemonic memory devices to help improve the student's memory.
F. Have the student repeat what has been presented to him/her.
G. Speak slowly and enunciate clearly. Emphasize important material.
H. Use short quizzes for reminding - not tests.
I. Try to give reminder checklists when possible.

2. Try to decrease competing auditory stimuli.

3. Due to the student's short attention span, these activities might be useful:
A. Break presented material into short, concise units.
B. Try to relate material presented to events that have personal interest to this student.
C. Allow the student frequent breaks.
D. Avoid long complex lectures.
E. Reward attentive listening instead of punishing lack of attention.
F. Provide visual attention grabbers to keep the student's attention.
G. Try to actively engage the student. Have him/her take notes or respond to questions.
H. Vary tone and volume of verbal presentation. Emphasize certain words or phrases.
I. Engage the student in class discussions.

4. Make up nonsense sentences with this student using the same letter at the beginning of each word. Examples could include "Bad Billy bit blueberries," or "Holy Harry has hot hands."

5. Give this student two cards numbered one and two. As you say a word, instruct him/her to listen for a specific sound and indicate whether he/she heard it at the beginning or ending of the word by holding up card #1 or #2.

6. Since this student displays good cognitive skills, use of language experience stories and the cloze technique of having the student fill in a missing word in a sentence may be good activities through which to build the student's reading skills.

7. After this student has read a story, distribute three or four sentences which indicate a sequence of events pertaining to the story. Have the student arrange them in proper order.

8. Give this student dot-to-dot puzzles to complete. The puzzles should become increasingly more difficult. Have the student develop his/her own dot-to-dot puzzles for other students to complete.

9. Ditto sheets can be purchased (or teacher-made) that are designed to teach visual perception skills. Find the objects or shapes that are different, match the same objects, find objects in varying special positions, and separate the shapes and figures from the background.

10. Provide a simplified, calm, uncluttered, unhurried environment for short-term goals.

NAME: Chris Williams
DOB: [redacted]

11. Provide changes of activity and pace as situation demands. Stress quality not quantity.

12. This student needs to develop his/her self confidence through frequent success with school work. More positive contacts with his/her schoolmates should be arranged, and he/she should be made to feel comfortable and useful within the classroom. Help the student to develop a skill that others will praise, give personal and class recognition to his/her work when it is deserved, and encourage participation within small group settings.

Recommendations:

Test results indicate that Chris meets the criteria for special education as a Learning Disabilities student at this time. Based on evaluation results, it is recommended that a Multidisciplinary Team be convened as a result of a discrepancy in the following areas:

Listening Comprehension
Basic Reading Skills

[redacted]
School Psychologist II
[redacted]

[redacted]

THE CHRISTIE PEDIATRIC GROUP, P.A.
9 MILLS AVENUE
TELEPHONE 242-4840
GREENVILLE, SOUTH CAROLINA 29605

File 6457-A

Name	Date of Birth	Sex	Race
Williams Charles Christopher	[redacted]	M	B

Address [redacted]

Father	Age	Occupation	Phone
Mr. Dwight C.	33	[illegible]	[illegible]

Mother	Age	Occupation	Phone
Mrs. Daisy	34	Cook	[redacted]

Referring M.D. Health Dept

Other Referral

IMMUNIZATION RECORD

Polio (Trivalent OPV)							
DPT							
DT							
atanus							
Measles							
Mumps							
Rubella							
Tuberculin (Tine)	Neg 10-14-83						

Drug Allergies NKDA

Special Problems 5

Mom says Christopher is UTD on his shots - will bring record.

PLAINTIFF'S EXHIBIT 5 10-97 92

C.C.

Date 10-14-83

Family History

Father 33 2 + w

Mother Gr. II Para II Ab. 0

Siblings:

Marie 12

Family Diseases (TB, DM, Etc.) POP - ↑ BP

Past History

B. wt. 7- Length ? Days in Nursery 3 days

Pregnancy (Length, problems, etc.) normal preg + delivery

Neonatal condition (Jaundice, resp. distress, etc.) good

Feedings (Breast or formula, age of weaning, etc.) Sim, c Fe

Serious illnesses, accidents or hospitalizations none

Allergies, esp. drugs NKA

Growth and Development

Sat 5 mo Walked — Talked —

Toilet Trained —

Current Medications None

APR 26 1983
T-104(R)
Ret
Sent
W7 1616

Chris was a new patient in today because of an illness. They called last night and said he had feyer to 100-101 but was sleeping. They said he was coughing but no other symptoms. I suggested they give some Tylenol and call back if he had more difficulty during the night but if not we would see him this morning. This morning his fever is 104 and he is cranky, coughing but no vomiting. They said he did have a cold last week.

PE: Normal except he is fussy as can be. Has a dull injected tympanic membrane on the right. Neck supple, lungs clear. Abdomen fine. Fontanel soft.

IMP: Otitis media but because of his age, the fever and extreme fussiness I did a spinal tap. The spinal tap was done without difficulty, the fluid was clear and colorless. Had 1 white cell, no red cells, normal glucose of 66 and normal protein of 30.

RX: He was put on Amoxicillin 125 mgs. t.i.d. for 10 days. They will call if he has more difficulty today or tomorrow. If he continues to do well we will see him for a recheck and new patient workup next week.(S)

MAY 2 1983
T. 99.4 (R)

Christopher was in because he continued to cough and have a little fever over the weekend. He would cough and then throw up. He was taking Amoxicillin pretty well.

PE: Normal except the left tympanic membrane was still injected and full. He had a few rhonchi in his chest but neck supple, lungs otherwise clear. Epiglottis normal. He was alert, active and in no acute distress. Fontanel was soft.

IMP: Unresolved otitis media.

RX: Switch to Ceclor 125 suspension 3/4 tsp. three times a day for 5 days. If he is getting better they will refill it and take it for 10 days. If not better in a couple of days the parents will call. His spinal fluid culture was still negative.(S)

DATE MAY 5 1983 AGE
WT 1983 lb.
WEIGHT HEIGHT cm
H.C. cm CHEST cm
%
BP Gm URINE
BN. AUDIO
VIS. L20/ R20/
O
P. / T R

JUN 22 1983
T- 101 (R)
Christopher is in because he started running fever yesterday. No other symptoms, except a little fussy.

PE: Normal, except he is a little cranky. Neck supple, lungs clear, ears fine, abdomen normal. He does have what looks like some little sores beginning on his posterior pharynx.

IMP: Probably current viral syndrome.

RX: Reassurance. Supportive measures. CAll back if more problems. Also urged them to get him in for a regular check-up. (S)

6-7-83 - Phone Note: cough with matted eyes. Sodium Sulamyd opth. called in. (N)

SEP 27 1983

T- 100.8(R)

Chris is in because he has had fever, fussiness over the past couple of days. He did have a cold last week.

PE: Normal except he has dull injected tympanic membranes bilaterally. Neck supple, lungs clear, abdomen fine.

IMP: Otitis media.

RX: Ceclor 125 mgs. t.i.d. for 10 days and return for recheck. Also urged to get him in for a regular check up this time also. If he is not better in a day or so the mother will call. (S)

DATE OCT 14 1983 AGE 10 mo.
30 in.
WEIGHT 18-15 HEIGHT ___ cm
HEAD 44 cm CHEST 45 cm
HCT ___ %
HGB. ___ Cm URINE ___
VBN. neg AUDIO ___
Vis. L 20/ ___ R 20/ ___ O
B. P. ___/___ T ___ R

In for checkup. No particular problems. Generally easy to manage Fairly good appetite and mother said he is interested in the bottle mainly. does not like too many foods. Sleeps well.'

PE: Both ears firey red and full with poor landmarks. Otherw no findings.

IMP: Doing fine except for otitis media.

RX: Amoxicillin 125 t.i.d. for 10 days. Told mother to work on finger foods and see if he would enjoy these better and cut back on the bottle and this would increase his appetite for solids better. Talked about compartmentatio and return in 10 days to recheck the ears. (T)

OCT ~~2 6~~ 1983

DEC 27 1983

~~DEC 27 1983~~

2-16-84 PHONE NOTE: Phenergan supp. #4 12.5 mg. called in. (S)

FEB 17 1984

T-99.8(R)

Wt-20-14

Christopher is in because he had vomiting and diarrhea for a couple of days. Called in some suppositories for him yesterday and the vomiting has just about stopped but he still has diarrhea.

PE: Normal except he has hyperactive bowel sounds but he is alert and active. Neck supple. Lungs clear. Ears fine. He is not dehydrated.

IMP: Resolving gastroenteritis.

RX: Reassurance. Continue clear liquids and suppositories as needed. Call back if more problems. (S)

MAR 23 1984

T. 103.4(R)

sore throat

Chris is in with fever and little congestion.

PE: He had a right otitis media, also injected throat. No adenopathy. Neck supple, chest clear.

IMP: Right otitis media and pharyngitis.

RX: Amoxicillin 125 t.i.d. for 10 days. (T)

Drug

PHONE NOTE: 4-18-84 Seen yesterday with rash. Switch to Amoxicillin 125 mg. (A)

JUL 17 1984

Chris is in because the father feels his right eye deviates to the right when he looks up.

PE: When he does look up his right eye wanders over laterally.

RX: Have Dr. Jervey or Dr. Shaw see him. (T)

JAN 15 1985

4-23-86 Trans. Chart to Greer Pediatrics.

4/23/90 Bad Debt Write-off KOT

0426-20

PATHOLOGY ASSOCIATES OF GREENVILLE, P.A. 6451
8 MEMORIAL MEDICAL COURT — LABORATORIES — 295-3482
GREENVILLE, SOUTH CAROLINA

Name Williams, Christopher
Address Please call [redacted]

STAT

PHYSICIAN Cary Stroud

Laboratory Misc.

DATE REQ.	TEST REQUESTED
4-26-83 DR 4-26-83 ko	Spinal Fluid
	SPECIMEN-
DATE DONE 4-27-83 cld	RESULTS: Glucose - 66 mg% Normal - 50-80 Protein - 30 mg/dl Normal - 9-46
TECHNOLOGIST BD/pc	pc Pathologist

0426-20

PATHOLOGY ASSOCIATES OF GREENVILLE, P.A. 645

8 MEMORIAL MEDICAL COURT — LABORATORIES — 295-3482

GREENVILLE, SOUTH CAROLINA

Name Williams, Christopher

Address Please call [redacted]

STAT

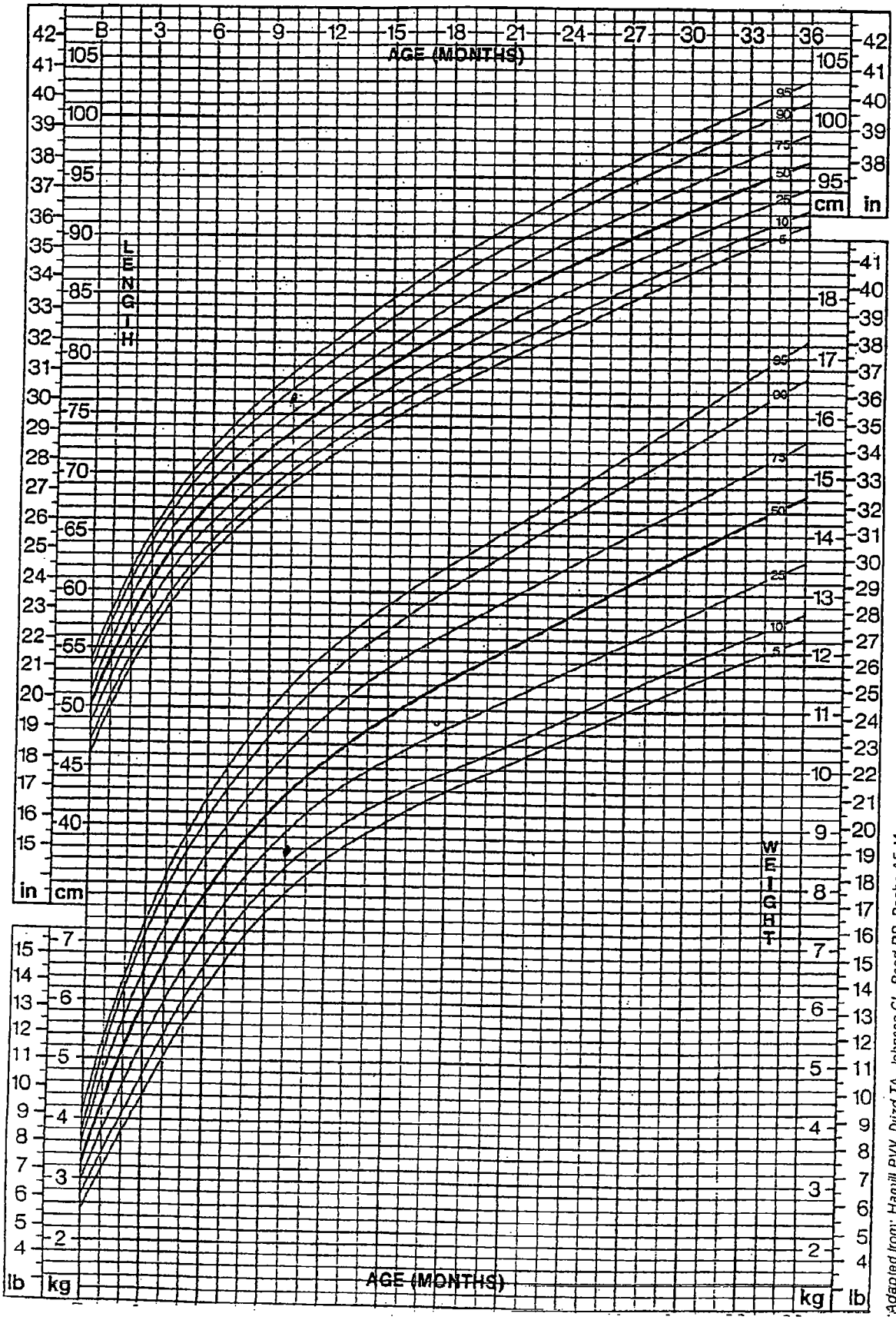
PHYSICIAN: Cary Stroud

Laboratory Misc.

DATE REQ.	TEST REQUESTED
4-26-83 DR 4-26-83 ko	Spinal Fluid
	SPECIMEN- Total Cells 1 / mm³
DATE DONE 4-27-83	RESULTS:
	RBC 0 / mm³
	WBC 1 / mm³
TECHNOLOGIST AC SP	Diff.
	Pathologist

BOYS: BIRTH TO 36 MONTHS
PHYSICAL GROWTH
NCHS PERCENTILES*

NAME Chris Williams RECORD # 6451 A



Provided as a service of Ross Laboratories

Adapted from: Hamill PVV, Drizd TA, Johnson CL, Reed RB, Roche AF, Moore WM: Physical growth: National Center for Health Statistics percentiles. AM J CLIN NUTR 32:607-629,1979. Data from the Fels Research Institute, Wright State University School of Medicine, Yellow Springs, Ohio.

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HAROLD E. SHAW, JR., M.D., P.A.
7-B CLEVELAND COURT
GREENVILLE, SOUTH CAROLINA 29607

OPHTHALMOLOGY
NEURO-OPHTHALMOLOGY

TELEPHONE
803/271-3354

August 27, 1984

4451

Carey Stroud, M.D.
Christie Pediatric Group
9 Mills Avenue
Greenville, S.C. 29605

Re: Christopher Williams

Dear Carey,

Thank you for the opportunity to see Christopher Williams. As you know this 21-month-old black male has been noted for the past few months to have a deviation of his right eye when he looks up.

On examination today Christopher fixed and followed well with either eye. Cycloplegic refraction measured +50 OU. He had good optically elicited responses. Motility testing revealed orthophoria in primary position which broke into an exotropia in upgaze. He had prominent bilateral inferior oblique overaction. His examination was otherwise normal.

In summary, Christopher has a V pattern exotropia and is orthophoric in the primary position. I would like for him to see Ellen Whitworth for orthoptics evaluation and then we will continue to follow him at regular intervals. At the present time, no other treatment is indicated.

Thank you again for referring Christopher.

Sincerely,

Hal

H. E. Shaw, Jr., M.D.

HES/jj

cc: Ellen Whitworth

FORM 280-2A
(New 90)

Page 1 of 2

INDIVIDUALIZED EDUCATION PROGRAM
THE SCHOOL DISTRICT OF GREENVILLE COUNTY
CURRENT SCHOOL Taylors Elementary

Student's Name Chris Williams Date of IEP meeting 5 / 4 / 92 (month day year)

Current Educational Placement/Grade Learning Disabilities, Resource 2nd grade

Age 9 Date of Birth [redacted] (month day year) ID Number [redacted]

Initiation Date 8 / 20 / 92. (month day year) Grade 3 for 19 92 - 19 93 School Year

Duration Date 6 / 21 / 93 (month day year) Date of Annual IEP Review by 6 / 21 / 93 (month day year)

PRESENT LEVELS OF EDUCATIONAL PERFORMANCE

I. Areas of Assessment Academic
Method of Assessment
Date 4 / 23 / 92 (month day year)
☑ Test Peabody Individual Achievement Test
☐ Observation/Checklist
Score(s) Reading Recognition - 4.1 Reading Comprehension - 6.8
Findings Due to Chris's disabilities he is not working up to his ability in the classroom.

II. Areas of Assessment Academic
Method of Assessment
Date 4 / 23 / 92 (month day year)
☑ Test Woodcock-Johnson
☐ Observation/Checklist
Score(s) Listening Comprehension - 6.0
Findings Due to his learning disabilities Chris is easily distracted in the regular classroom.

III. Strengths Chris is a good reader. Comprehension and sight word vocabulary are strong.

IV. Weaknesses (If Learning Disabled, include deficit area/s) Chris's deficit areas are basic reading skills and listening comprehension. Chris is easily distracted.

DISCIPLINE

☑ Regular pupil discipline code
☐ Special considerations or adaptations to pupil discipline code:

DIPLOMA/CERTIFICATE

☐ State High School Diploma
☐ Certificate
☑ N/A (Grades K-8)

PLAINTIFF'S EXHIBIT 6 10-9-92

WHITE = Area Office CANARY = Parent PINK = School Due Process File GOLDENROD = Teacher

FORM 280-2A
(New 90)

INDIVIDUALIZED EDUCATION PROGRAM
THE SCHOOL DISTRICT OF GREENVILLE COUNTY

CURRENT SCHOOL Taylors Elementary

Student's Name Chris Williams Date of IEP meeting 5 / 4 / 92 (month day year)

Current Educational Placement/Grade Learning Disabilities, Resource 2nd grade

Age 7 Date of Birth [redacted] (month day year) ID Number [redacted]

Initiation Date 8 / 30 / 92 (month day year) Grade 3 for 19 92 - 19 93 School Year

Duration Date 6 / 2 / 93 (month day year) Date of Annual IEP Review by 6 / 2 / 93 (month day year)

PRESENT LEVELS OF EDUCATIONAL PERFORMANCE

I. Areas of Assessment Academic
Method of Assessment
Date 4 / 23 / 92 (month day year)
☑ Test Peabody Individual Achievement Test
☐ Observation/Checklist
Score(s) Reading recognition - 4.1 Reading Comprehension - 6.8
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Method of Assessment
Date 4 / 23 / 92 (month day year)
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Score(s) Listening Comprehension - 6.0
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DISCIPLINE

☑ Regular pupil discipline code
☐ Special considerations or adaptations to pupil discipline code:

DIPLOMA/CERTIFICATE

☐ State High School Diploma
☐ Certificate
☑ N/A (Grades K-8)

WHITE – Area Office CANARY – Parent PINK – School Due Process File GOLDENROD – Teacher

CONFIDENTIAL ATTORNEY WORK PRODUCT

INTERVIEW NOTES

INTERVIEWER: Janet Vogelsang
DATE:3/18/04
RE: Christopher Williams

Individual interview with Dwight Williams, father of the defendant

Mr. Williams began the interview by handing me two letters written by Chris since he has been incarcerated. He highlighted the section where Chris tells him he wishes the police would have allowed his father to talk to him at the crime and "bring him back to reality."

I took the two letters and told Mr. Williams I would read them later.

Mr. Williams began by talking about his wife's drinking problem. He states that his wife Daisy drank during her pregnancy with Chris.

Mr. Williams said Daisy had a total of four marriages:

1. Uwe
2. Dwight Williams
3. Hans Schlesinger a businessman from Germany
4. Rodney Huckaby

Mr. Williams stated that Hans was 72 years old when Daisy met him but Daisy, in a later interview, said he was 60.

Mr. Williams feels at fault for leaving Chris with Daisy when they divorced. Daisy never shared anything with him about Chris. Daisy belittled him. If he tried to correct Chris, she would distort his attempts and make him look like the bad guy.

In November before the crime, Chris was involved in the burglary of a paintball store. Chris went to Mexico with the co-defendant (he learned this from Rodney, Chris's stepfather). Chris returned from Mexico in three days because he didn't like it there. Dwight did not know any of this until later. He did not know Chris assaulted Miranda before the second incident. He also was not told about Chris's overdose.

After saying he did not know about the original assault on Miranda, Dwight said Chris started coming to his office a lot after the first assault.

Dwight was in the US Army and did two tours of duty. He received an honorable discharge, re-enlisted and received a second honorable discharge. Chris was into the military because he wanted to be like his dad.



One and one half weeks before the shooting, Chris wanted to go to the Army/Navy Store and buy "military stuff." There was some confusing story about a $200.00 money order and how Chris cashed it.

One week before the shooting Chris "misplaced" his car. Dwight thought he was covering up something. The car was gone all weekend. Then Chris and Rodney went to Anderson to get the car. The car had been towed to Anderson. This story makes no sense to Dwight or to me. Will clarify.

After this Chris left Dwight's office and disappeared for two days. Daisy found him at a friend's house. Dwight wanted Daisy to do an APB on Chris. The police found Chris sitting on a neighbor's air conditioner. The shooting was a few days later. Again, this story is confusing to Dwight and must be clarified.

The week before the crime Daisy found shotgun shells in Chris's car and a gun in the closet in their house. She threw the shells over the back fence. Dwight could not believe Daisy and Rodney have guns in the house when Chris had attempted suicide a few weeks before. Daisy told Dwight the gun was gone on the day of the crime. Dwight said "that can't be, he doesn't have a gun." He thinks Wal-Mart sold the gun to him or to Daisy or someone and it ended up with Rodney.

Dwight met Daisy while he was stationed in Germany in 1969. He was a musician and Daisy came into the club where he played. He got her pregnant. Dwight entered the military in 1969 and met Daisy in June of 1970

Dwight and Daisy married in September of 1970. She was pregnant with Chris's older sister Maureen. Daisy was in the process of divorcing Uwe when she met Dwight. She had two children with Uwe, a son named Uwe, and a daughter Sylvia. She had lived with her husband in Nuremberg. She was 20 years old and he thought she was a good mother.

Daisy was 15 or 16 years old when she had her son Uwe. Dwight loved her kids and was like their Daddy.

In 1974, Dwight was still in the Army. He re-enlisted and rotated to Ft. Sill, Oklahoma. Dwight and Daisy brought their new daughter Maureen and Daisy's daughter Sylvia who was five years old, to the states. Uwe wanted to keep his son Uwe. They lived off base. Sylvia only spoke German and was ready to start school. She understood nothing and withdrew. She wanted to go home. Sylvia was sent home to her father.

Dwight tried to give Daisy everything she wanted, a new house, new cars. He got himself deeply in debt.

Dwight stated that Daisy's was abandoned by her mother who got pregnant and left Daisy with her grandmother. Her mother's name is Erica and she married Harold Shade, a white G.I.

Erica told Shade that Daisy was Puerto Rican. Daisy's biological father is unknown. Ms. Leiss, Daisy's maternal grand mother, raised Daisy. When Daisy was 7 or 8 years old, her grandmother got her ready to meet her mother, but her mother didn't show. Daisy never got over it.

Daisy wanted to find her mother around 1990. She found her through the computer and she was living in Idaho. She had other children. Dwight sent her and Chris to Idaho to meet Erica. The meeting went well. They stayed on a farm. After that, they wrote for a while and then dropped the correspondence.

Daisy had never been stable. She burned Dwight's clothes in front of Chris. She burned his army uniform, his medals, ammunition. She poured gas on everything and burned it. There were M16, .45,.50. M60 rounds going off.

Daisy has very bad judgement. She altered Chris's mind about Dwight. Chris didn't want to leave his mother alone. Daisy told Dwight that Hans tried to molest Chris. She manipulated money out of Hans.

One time Daisy got drunk and called Dwight claiming to have been raped. When Dwight refused to confront the guy because he knew Daisy had been drunk and probably allowed the sex, Daisy turned to Chris and made Chris confront the guy. This was right after the assault on Miranda.

For the last six years before the crime, Dwight really didn't know what was going on with Chris. Daisy harbored a hatred for Dwight. Dwight had a great job with Lockheed but lost everything. For a while he had to live in his car. He started drinking and ended up in Patrick Harris Hospital for three weeks. He was diagnosed with depression. Daisy would call the police on him. He was receiving unemployment money from Lockheed which he then spent on alcohol.

After 24 years of marriage, Dwight and Daisy divorced. The divorce was ugly. Dwight rented a storage place for their furniture.

Dwight stated that he graduated from high school at 17 and never had anything in his past but speeding tickets. His father who was divorced from the mother had 20 years in the Air Force. His mother raised three boys alone. She worked in a hospital laundry room cleaning sheets.

Dwight was a bandmaster in the Army. He learned to speak German and his band played for the reopening of the Glockenspiel in Munich. He traveled all over Germany and met kings and queens. He knew the conductor of the Nuremberg Orchestra, Albert? He had a 27 piece band and he plays 17 instruments. Since his divorce he has been unable to listen to music. He has written commercials.

Chris took the written portion of the driver's test 5 times and the driving portion 6 times.

Dwight has a brother named Miles who worked for Ammco at Donaldson for 35 years and

now lives in Tampa. His other brother Bryant, lives with his mother and is disabled. Bryant has had many hospitalizations for mental problems. He had seizures as a child. He was a twin. The other twin was stillborn. He has been epileptic since he was ten years old. Miles has a son Demetrious who was in the Navy aboard Navy subs. He is 24 years old. He and Chris are the only male children left in the family to carry on this branch of the Willliamses.

Daisy was against his mother Mary Snipes. Daisy liked to drink wine with Dr. Levy Kirkland who was much older than her. Daisy accused his brother Miles and Dr. Kirkland of making passes at her.

Dwight and Daisy had neighbors, the Brutons, Priscilla and Curt. The Brutons used to hear Daisy and Dwight fight. Dwight would stay with Priscilla when Daisy would kick him out. Daisy always called his mother a "dirty motherfucker."

Daisy picked up a boulder and busted out the window of Dwight's van.

Dwight's father is Alvin Charles Williams of Tampa.

Dwight used to take Chris hunting.

During one fight with Daisy, she grabbed his hair and literally pulled it out of his head which is why he is thin on top. He was bleeding. She burned his chest with a cigarette and hit him in the arm with a clipboard.

Dwight has a tape of Daisy cursing him.

1. Chris has a family history on his father's side that includes mental illness, family violence, and substance abuse. The emotional and behavioral problems seem to center around relationships, feelings of abandonment and lost, problems with rejection, and obsessive brooding over lost relationships.

2. Chris was born to a mother who smoked and drank during her pregnancy.

3. CW was born to parents who physically beat one another in his presence.

4. CW was born to parents who drank until drunk and who left him to manage himself as they focused their attention on their rage toward one another.

5. CW was left alone to go through developmental stages, especially those that affect social skills and relationship building and maintaining.

6. CW was an isolated and lonely child who spent most of his teenage years in his room.

7. CW was not a violent child although he was learning disabled and would get into the typical schoolyard fights with other boys. His disabilities were in reading and listening comprehension which made it difficult for him to understand many simple things other children learn easily.

8. CW was of average intelligence.

9. CW's mother poisoned him against his father.

10. CW was sexually abused by his mentally retarded uncle. He was six or seven years old

11. CW was hit in the back of the head with a hammer and has a dent in his head from that injury. He fell off a balcony when he was around three. He hit his head over the eyebrow around four. He never received treatment for falling off the balcony or being hit with the hammer.

12. CW was deeply wounded by the separation of his parents in spite of their violence toward one another. His behavior changed dramatically when his father left the home and he become angry and isolated.

13. CW had great difficulty understanding even the most simple concepts. His father had to explain things to him many times over and he still couldn't get it.

14. CW slept with his sister until four and his mother until fourteen. His mother had complete control over his thinking about everything and was very jealous of Maranda, his first love.

15. When CW walked out of his bedroom and the classroom into the real world to work at Blockbuster and other places, before BiLo, he had no skills for relationships or for managing the world. He saw the world through the eyes of his mother who had used people, drifted from job to job, used sex for favors and goods, drank until passed out, was suicidal.

16. CW's father taught him about the military, guns, fatigues,etc. His father shot a cousin when he was a teen. CW's brother-in-law was in the military and also taught him about guns when he was only twelve.

17. CW witnessed him mother's sexual behavior around many men. He had no concept of a normal male/female relationship.

18. CW's father and paternal uncle have been treated for bipolar, cyclothymic, and major depressive conditions that centered around homicidal/suicidal thoughts and feelings requiring hospitalizations.



to little girls.

Dwight choked and slapped Maureen when she was still a teen because she called the police when he beat Daisy. He told Maureen he was going to shoot her.

As children, Dwight and Daisy both would tell them, "I don't want to know how you feel or what you think."

When Daisy and Dwight divorced, Chris would sit and wait for his father to come get him for visitation. Chris "died" after that divorce.

Daisy drank everything and smoked during her pregnancy. Both parents drank and smoked pot. They told her they smuggled pot to the US in her diaper.

Daisy is a "slip and fall" artist. She has gone so far as to have knee surgery in order to try and get money out of one of her former bosses. Maureen confirmed that Dwight tried to get Chris to forge mortgage papers.

Maureen wanted to learn to play the piano but when she got good, Dwight would not teach her anymore. If she looked better than her mother, Daisy would get angry. When Maureen had to be treated for hyperthyroidism, and got very skinny, Daisy got mad.

Daisy was always seductive. A Dr. Kirkland used to come to their house. One day, Maureen walked in and her mother was on the sofa with her legs spread. Dr. Kirkland was standing over her with his weiner hanging out. She was eight. Daisy told her Dr. Kirkland was looking at her surgery scar.

Daisy had lots of men.

Daisy did not think she was loved unless she was cursed or beaten.

Daisy accused Hans of molesting Chris in an effort to extort money.

Chris was drinking every day after the breakup with Miranda. He had never been interested in alcohol before.

When Daisy was pregnant with Chris, she and Dwight fought morning, noon, and night. They boxed around and Daisy hit the floor many times. She remembers her mother screaming that Dwight was going to make her have another miscarriage. She had one miscarriage before Chris was born.

Dwight was drunk when Chris was born. He went to the hospital drunk. Chris had white curly blonde hair and Dwight was enraged. He thought Chris was some other man's child. Chris didn't look black until he was six years old.



CONFIDENTIAL ATTORNEY WORK PRODUCT

PRELIMINARY ACCUMULATION OF HARMFUL RISK FACTORS

-Mother abandoned by her mother; father unknown.

-Father abandoned by his father.

-Mother abandoned her first two children.

-Mother drank and smoked throughout pregnancy.

-Mother and father fought throughout pregnancy and mother was beaten.

-Eleven year old sister took care of Chris and kept him in her room.

-Parents were violent and drank, smoked pot and fought daily.

-Mother sexually inappropriate with Chris and his sister

-Slept with mother until fourteen

-Sexually abused by paternal uncle

-Early exposure to guns, violence, and threat of harm

-Early learning problems

-Witnessed parents' threats to kill each other

-Witnessed mother's sexual behavior with other men

-Parents fail to socialize Chris or seek intervention for him

-Chris witnesses parents' illegal behavior and is pressured to join them

-Used by mother to protect her whenever she cries rape

-Deeply affected by divorce

-Sees mother in relationships with many men

-Abnormal attachment to females

-Developmental delays

-Father homicidal and suicidal

-Paternal uncle homicidal and suicidal



THEMES

Alcohol and drug use by parents

Family violence

Mental Illness in family

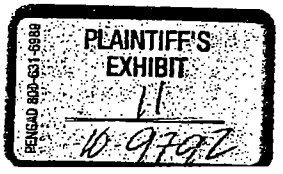
Sexualized environment

Sexual abuse

Parental corruption and missocialization

Developmental delays regarding relationships, maturity, emotions

Learning Disabilities



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August 25, 2004

DRAFT/Confidential Attorney Work Product
Memorandum

TO: John Mauldin
RE: Charles Christopher Williams

On August 2, 2004, I spoke to Dr. Jim Evans regarding the results of his evaluation on Charles Christopher Williams.

Dr. Evans stated from his notes that Chris has and average IQ but there is a split of 15 points between the verbal and performance parts of the test.

We discussed the fact that the average IQ is consistent with his school records and that he had learning problems in school, repeating the first grade and dropping out in the ninth when he was seventeen years old.

Dr. Evans also found that while Chris has a math disability, his listening comprehension is normal even though school records show a listening comprehension problem.

On the Continual Performance Test, Chris's scores didn't show much in terms of problem except perhaps in the visual area but nothing significant.

On the neuropsych portion of the test, the Halstead, Chris scored a .3 on the impairment index indicating mild brain damage. This could account for the IQ spilt between verbal and performance.

There was an indication of impairment in the parietal cortical area with low decreased coherence which could account for his disability in arithmetic. He has an indentation in he head in this area where he was hit with a hammer at the age of four or five.

The Tactual Performance test also indicated parietal impairment.

There is some evidence of frontal lobe damage with rigid thought and some impulsivity. He responded impulsively to test questions.



In Dr. Evans opinion, there is a psychiatric/personality component to Chris's behavior. He theorizes that Chris was depressed prior to the crime and one could argue for psychotic depression.

Chris's girlfriend was a blend of mom and dad, a liar and a drunk.

Chris was not thinking straight. He thought he would go out by getting shot. He did not plan on her grabbing the gun or wrestling on the floor with her.

The frontal impairment could contribute to the mild brain damage combined with a psychotic depression. He was obsessed with Mandy and extremely stressed. The rigid thinking and impulsivity affected his reaction.

Dr. Evans did not recommend an MRI or CT or EEG.

9/7/04

- Dep for low damage? Aplet w IQ.
- Statist sig grad Rlgn. -
- IQ 99 - V 105 P 90
- Some pathol. - 15 edge for dig.

- Trail Mak Part B dig copy slow
  Correct dots - 97 sec
  Slow - 12% - (88% letters do letter) numbers
  IQ 50%

- Wisconsin Card Sorting -
  fig. color numbers - matching
  Rule to switch
  89 - 0%
  low comp to IQ.
  18 trials to grasp 1st concept
  (3rd %) 97%
  Card in quicker
  to fig out ch 18's color

9/7/04

- Dep'n to damage ? Aplet w IQ.
- Statist sig grad Regn. -
- IQ 99 - V 105 P 90
- Some pathol. - 15 edge for dig.

- Trail Mak Part B reg copy flaw
  Connect dots - 97 Acc
  Slow - 12% - (88% do better) members
  48 sec
  IQ 50%

- Wisconsin Card Sorting -
  fig. color numbers - matching
  Rule to switch
  89 - 04
  low comp to IQ.
  18 trials to grasp 1st concept
  (3rd %) 97% Cated on number
  to fig out ch ik's color

- Fits w/ low perf IQ -

- Memory integration

putting pieces together
getting it all together.

Pen score -

Incidental learning -
digit symbol - did well
didn't remember
number & symbol after
dig sym test

below 5th % - bad

- prob w/ visual attention - so
didn't incid learn - all att
to vis task of 1st part

ATYPICAL LD

- Lang/Verbal Org Index — Dis
  Compre — Perc Org — 19 pts
  suggests learn better thru verbal than visual -

+ Cog. Rigidity

- Big prob / Tactual / Kinesthetic - feel forms put block in hole - Rt > left hand took longer w/ left hand - 3 trials to catch on - as has no corpus callosum - info doesn't cross over

Cause Indic of parental - injury over parietal lobe

Prone not to school learning spatial -

- Ret 1st grade
  17 m 9th

- ↓ Factual Rsg -
  mdic Parietal Ibrfr.

- Frontal - poor reasoning -
  Logical thought -
  poor impulsivity response
  ↓ Prosody Facial WCST 18 trials
  VS test
  resp Switch to Question

- Psych/Nerosa -
  - depr prior to crime
  Could argue for psychotic
  depression (Psychotic depression - 22 Pts (dsm).

- Fired, blend of Mo + dad
  Lies + drinks

- Lt crime - angry at PO. -
  go out w/ friends shots -
  (17 Prob knows not that many.

- Felt thinking straight
  the problem

- wrestling on floor

- Blind team damage
Types Dest
Obsessed w/Lex

Frontal - contrib -
L Rigid
Already Thrown
impulsive

Dance home after Rehab -

- Angry after - grabbed gun
- " " after
only found by MLB

To to MLB - to EEG
ET

4 of Combo Kayce
Learning must be damaged

- Perceptual Org Index — 107-88
  Verbal Comprehension — Vis Perc Org — 19 pts

suggests (can teach) or verbal than visual -

* COG. RIGIDITY

- Big Prob / Factual / Disorganized - feel forms put back on table - Rt > left hand

took longer w/ left hand — 3 trials to catch on - as the ~~RH~~ Corpus Callosum (Commissure) info doesn't cross over)

Can be Indic of parietal - impairment over parietal lobe

more rel to school learning spatial —

- Fits w/ low perf IQ -

- Sensory integration
(putting pieces together
getting it all to.

Pos score -

Incidental learning - Subtest score
digit symbol - did well 9

didn't remember
Number to symbol after
dig symb test
below 5th % - bad

Delayed memory

Prob w/ visual attention - so
didn't incid learn - all att
to vis task of 1st parts

ATYPICAL CD v. ADD

Used WA
sub Comp

Wr you used
→ abnormal attention w/-
Auditory 112 / Visual 86
quotient

slow wave

- QEEG - too much power
1.5-2 - esp 8-10 Hertz
in frontal areas - ADD
Did didn't score hi on ADD
esp for visual
Power (13-25)
Not enough ~~for~~ in the
higher freq. esp at
Central + frontal Sites
hib
theta-beta
or alpha-
beta ratio
Ratio bet Alpha + Beta
Only for Mental for
he did well on ways
would funding Hemi ⓒ frontal for
Rest of front had Rlowing
relative to higher freq.

ADD - EXEC FUNC - COG FLEX
ADD PLANNING
Opt did well on Attentional
with dicas. - Yes

Z score
more
Comm in ADHD

Slow to Fast wave Ratio High in Frontal ADD

* Coherence - Temp & Cent but Parietal area of brain - left to right not good

left & right tactical centers not comm at site of head injury

(R) Parietal

Pt has ADD

* Tact not comm w/ frontal abnormal right pt site ??

(L) Frontal > (R) Parietal not communicating

Hyp brain inj - below to head trauma -

* not ref to via exc lack of understanding of direction not know what to do - no flex to thinking

Reiter - neurologist

- Halstead - neurol. psych — Tests
  .3 Trails resp. -

- Reitan - Ga Tech - GEORGIA TECH
  RAINES? Ir dam Rets you up at desk
  for frontal dam - Prof tracks
  Get Cross Behav. -
  "Impulsas"

- Bloc Lane depression -
  in frontal area
  felt depression in head

- 4-5 hit w/ hammer

- 5-6 - hit left forehead
  in fall

- Rorshach - sugg R paranoia
  Rejected mother card - VII
  feeling tension - >/ movement
  movement

Karl Evans - Yale -
Oregon. -

Diane

Mick [redacted] Rowe

M- [redacted] w

Corpus

Victim age / ex domestic

unusual demeanor / SL lack

of assimilation -

slow wave

- QEEG - to meet power
(5-2 - eyc 8 9 10 Lerty
in frontal areas - ADD
Did deficit score hi on ADD
eyc for visual
Power (13-25)
Yet enough ~~to~~ in the
higher freq. esp at
central + frontal sites -

Ratio bet Al + Beta

Only for the dual used or was
word finding

Rest of front had slowing
related to higher freq.

ADD - EXEC FUNC - CDT FLEX
ADD PLANNING
yet did well on attentional

with disab. - yes

Slow to fast wave ratio high in frontal

- Coherence - Tau & Coh bet areas of brain - left to right not back
  left & right factual centers not comm at site of head injury
- Fact not comm w/ right frontal abnormal

Neg brain inj - blood to head trauma -
not rel to via
- less lack of understanding of direction not sure what to do - no flex to thinking

Reitan - neurologist

- Halstead - neurol. psych — Tests
  .3 full days -

- Reitan - Indiana -
  bi-lateral sets you up at risk for frontal damage - / Wolf Tactile Test Cross Cuing -
  "Impulsive"

- does have depression -
  in frontal area
  felt depression in head

- 4-5 hit w/ hammer

- 5-6 - hit left forehead
  w/ ball

- Raebael - sugg & paranoia
  Rey w/o Card -
  feeling tension

Hansel Evans - Finds -
  negat. -

Diane

Mick [redacted] Rosen

M- [redacted] w

Manic. 632.

Corpus

Vienta dyz / ev dometia

Unusual response / SZ lack

of aggravating -

Jim Evans 8/2/04

- Average IQ 15 pt split

- Hx learning probs
  older when went to school

other

- Crith - disability

- Listening comp OK
  normal

Mayer Salovey

-

- Attention - Cont Perf Test
  visual att
  didn't show much

- Neuropsych - Halstead 3
  impairment

Mild brain Lindal

damage - Could acct for
  IQ split

- Parietal Cortical Area -
  low decreased Coherence
(crith)

Evident in head on
Parietal

List of Examinees

Var 5 (cont)

She started last test –

I felt strong – she was
dent willing –
that afternoon –

I put pressure – she pressure
went up →
she needed to be killed →

She got up & knee –
How did it feel – I thought it would
be exhilarating – plausible –
I felt I was killing life
over and – she'd be 2x more –

Just got all excited – go to be
the last thing – would –
Want to – I don't see
happy at Natural –

Didn't sleep at life
sleep spiritual – I thought
what go to 24°

CRAWFORD

Starts the post with him -

Tells me to - get → the post
help him tell her -

I ask her - the surgeon
will get back close -

I guess it stands out
more for her →

We talk about a lot of stuff -

More with him -
Thinks about self -
Then help him -
Regrets ok -

Suicide after 15th - 16th June -
nerve pills -
took 15 or 20 -
He called ambulance -
Epi - ambulance - woke up 2½ of her
back here - took to hospital -
Greenville named

CRAWFORD

MJ x calm clear coherent organized alert
mood - pretty good - affect - blunted

Dx'd with Ext + killed self
Thought -

Main reason I did it - because of
her - thought feel better but last
- sacrifice - try to get her love & feeling.

Voices -
Internal thoughts -
Auditory Hallucinations

Something - → bedroom -
walk in top of a on top of TV stand → below TV stand
room find 60 magic → on TV on front side
of drawer Internal thoughts - of TV -

80 pages total

Burglary 3rd - Hex 20 ga Overload
Grand Larceny 8 yrs -
Using only both
4 shells
w/ 5 rounded shells
only →

Some obsessive
Magen depressed
Written apology →

10 shells -
I had a bag 200 shells - in closet

~~Defendant~~ →

☐ Clothe the murder call has not been

Burglary - grand larceny -

Me & 3 friends of mine got
kept in the to hand with
parent hold for

Me very much appreciate

Detective patrick handcuffs

John McIntyre [redacted]

callme - today at out
to much at hand -
I said call you men -
I didnt want to die
Somebody else hands

Caucasian - leg jacket black jeans - converse
black hat cap.
12 suspects in ⇒
mustache
☐ talk to some - cellphone ?
Robert Edward Griffis - store manager -
bubbly energetic
- for 3-4 years -
1 month ago - call 911 custom beefing
manager called by parking
- no -
Final Smith - worked here at 273
Sue Perry
suspect now - next door apartment

Rodney Huckleby –

Haven't seen mother – (name)

Daisy →

Living here x 4 yrs

He was a wonderful

pay bills not a payment –

Seen Mary this week

Mary mom →

He says mom tried to pay back for jail –

My car payment is up –

He said this mom is a bitch we helped

bail out like she did Mark –

Mary had a home girl Mark – dead of

in jail – She said I told Mark –

I told Mary if you ever hurt

my son I will hunt you down + hunt you dead

Talked about girl 20 yrs →

He someone ~~pick~~ pick – girls for naught

kill them + I won't.

Last 7 days – phone ring – clicks for 3 days

4 days in row – mid afternoon –

other times not a common time.

@ Jonathan – said yes to Jonathan at 11 pm –

last night called Jonathan – He said Ms Daisy – no answer at 11pm →

Mark – 20 till 9 – last night said I like you –

– husband – played tennis last week – only chit

words. He told me before yesterday she tried make up but I don't

to not me behind back – He told us I'd kill her

8/14 He said why should I call Mark? I'm not the one who killed him. I said Mark called me.

He said mom gave me too much. We phoned me. There they were to help. Saw shotgun 2 days ago in his closet. - brand new - saw drawer full of bullets →

Max - he had a computer.

He told me to take cigarette to Jonathan's computer - got called back & I left home but might be best not to go in the closet - Sat Am - I found bullet in the Tennis -

Yesterday Am - Chris said I knew I'm playing computer -

I met a new ally today -
Dwight & I went to meet ally

He took it in a joking way - He said when I get my feet I'll be cool & pick & get rid of computer music stuff - He was gone after that -

CRAWFORD

I went to bed 9 - I woke up and Jacob had to serve state chess finals - I left to leave 2:45 for prom - prom -

I took Jacob to school - 10 ft - He mumbled I'm

Got up Tues AM + ran errands - 4th marriage

Mom up all night -

[redacted]

Stepdad - Hell speech tomorrow

His dad number -

He wants to see poems -

Dropped out of school 7th or 8th grade - worked at Bilo or Blockbuster

He was put on IEP - Said took it - Said failed him -

Redsord - husband passed -
Chris helped Dorys daughter moved to
Atlanta - moved go - divorced Dwight -
Tyrone & Cole to Cali -
Averill went - husband Billy
Didn't have many together

He went to high school -
Hillcrest (?) b/w Hwy 22 -
Travelled fellow
road -

Dad was in construction company =>
Hope he kept it =>

Dropped out of HS - finish 9th grade -
Instead - Riverside -
been a student headstart went
to be med -
Grandclass
Went to elementary school - told
my mom later

I held him back in 1st grade
Got in trouble -

Dropped out of school 9th grade

- Headaches
- Water - had to go - quarter - then go back to bed
- Insomnia - 6 hrs a day - during math class → handicapped class
- Legs
- Feet
- Hot flashes →

& husband → Dwight [redacted]
Jonathan - Brent [redacted]

Serving Hors d'oeuvres and
Snacks - Shrimp cocktail

Mauldin, John

From: Mauldin, John
Sent: Thursday, August 26, 2004 9:23 AM
To: 'Vog12@aol.com'
Subject: RE: memo on Evans report

Confirmed by phone. JM

-----Original Message-----
From: Vog12@aol.com [mailto:Vog12@aol.com]
Sent: Wednesday, August 25, 2004 6:42 PM
To: JMauldin@greenvillecounty.org
Subject: Re: memo on Evans report

Confidential Attorney Work Product

RE: Evans findings

In the meantime, had a call from Rob Richards who in his enthusiasm (I think I remember what that was like), asked me about brain damage. I told him we had a little. He asked what and I told him a little parietal to frontal. Then he got real excited about some condition of brain deterioration he knows about and wanted to see the QEEG. I told him Whoa! Down Boy! and that while we would be very interested in his theory, he has to wait a minute. He said he would order an MRI immediately. But I cooled his jets. He wants the birth records to get the circumference of Chris's head at birth and his school testing. I told him I would get that to him if you approved. He wants it for weekend reading. I told him our plan for now was just incident reports and so forth but he really wants the school and birth. What do you think? There is nothing harmful in there that I can see. I know you want him to go to the introductory meeting with an open mind but I don't think the school and birth can hurt.

I will call his secretary tomorrow and set up for him to see parents and Maureen and set a date for him to meet you at the jail for introductions.

I have a call in to Marj for Follingstad.

I have a call in to Maureen regarding the phone records

Releases were sent to Warder

I want to prepare Rob a little for his meeting with Daisy and Dwight. Should I set a time to meet with him for a little prep where he just takes notes? Should he see Dwight's psych records before meeting with him or do you want cold turkey?

Jan

8/26/04



American Bar Association
Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases



Revised Edition
February 2003

PLAINTIFF'S EXHIBIT 14 10-9792
PEN040-600-631-0999

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INTRODUCTION

This revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* is the product of a two-year long drafting effort. In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation jointly sponsored the ABA Death Penalty Guidelines Revision Project to update the Guidelines, which were originally adopted by the ABA House of Delegates in 1989. An Advisory Committee of experts was recruited to review and identify necessary revisions, including representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

Expert capital litigators were retained as consultants to the ABA Death Penalty Guidelines Revision Project to incorporate the decisions of the Advisory Committee into preliminary drafts of revisions. Drafts were considered by Advisory Committee members during several day-long meetings in Washington, D.C. as well as follow-up discussions. The final working draft of the revisions was approved by the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. The ABA House of Delegates approved the revised edition of the Guidelines on February 10, 2003.

The final product, this revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, is the result of an extensive and conscientious drafting and review process by experts in the field of death penalty litigation. The revised edition provides comprehensive, up-to-date guidance for professionals who work in this specialized and demanding field and helps to ensure effective assistance of counsel for all persons charged with or convicted of capital crimes.

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Guideline 1.1 Objective and Scope of Guidelines

A. The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.

B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

Definitional Notes

Throughout these Guidelines:

1. As in the first edition, "should" is used as a mandatory term.

2. By "jurisdiction" is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, *e.g.*, a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (*e.g.*, Commonwealth, Territory). Where a federal judicial district or circuit is meant, the Commentary will so state.

3. The terms "counsel," "attorney," and "lawyer" apply to all attorneys, whether appointed, retained, acting *pro bono*, or employed by any defender organization (*e.g.*, federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by "private," these terms apply to both *pro bono* and retained attorneys.

4. The term "custody" is used in the inclusive sense of *Hensley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).

5. The term "post-conviction" is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 2255, but including all applications of similar purport, *e.g.*, for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, *e.g.*, applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (*e.g.*, stay of execution, appointment of counsel) in connection with any of the foregoing. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or Commentary will so state.

6. The terms "defendant," "petitioner," "inmate," "accused" and "client" are used interchangeably.

7. The terms "capital case" and "death penalty case" are used interchangeably.

8. The terms "defender organization," "Independent Authority," and "Responsible Agency" are defined in Guideline 3.1 and accompanying Commentary

9. The term "Legal Representation Plan" is defined in Guideline 2.1.

History of Guideline

The Commentary to the original edition of this Guideline stated that it was designed to express existing "practice norms and constitutional requirements." This thought has been moved to the black letter in order to emphasize that these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.

The first edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of "quality legal representation." The language has been amended to call for "high quality legal representation" to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.

The Guidelines formerly covered only "defendants eligible for appointment of counsel." Their scope has been revised for this edition to cover "all persons facing the possible imposition or execution of a death sentence." The purpose of the change is to make clear that the obligations of these Guidelines are applicable in all capital cases, including those in which counsel is retained or providing representation on a *pro bono* basis. The definition of "counsel" reflects this change.

The use of the term "jurisdiction" as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words "from the moment the client is taken into custody" have been added to make explicit that these Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (*e.g.*, by the federal government invoking national security, or by state authorities exceeding constitutional limitations). This language replaces phraseology in the former Guidelines which made them applicable to "cases in which the death penalty is sought." The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible – well before the prosecution has actually determined that the death penalty will be sought.

These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be

sought. The case remains subject to these Guidelines until the imposition of the death penalty is no longer a legal possibility. In addition, as more fully described in the Commentary, these Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client's behalf outside the confines of the criminal prosecution itself.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(c) & cmt. ("Role of Defense Counsel in Capital Cases"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.1 (3d ed. 1992) ("Objective").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 cmt. (3d ed. 1992) ("Capital Cases").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.1 (3d ed. 1992) ("Initial Provision of Counsel").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.2 (3d ed. 1992) ("Duration of Representation").

ABA, House of Delegates Resolution 8C (adopted Feb. 5, 2002)

Commentary

Introduction

In 1932, Mr. Justice Sutherland, writing for the United States Supreme Court in *Powell v. Alabama*, a death penalty case, acknowledged that a person facing criminal charges "requires the guiding hand of counsel at every step in the proceedings against him."[1]

More than seventy years later, death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.[2]

The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is

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1 Powell v. Alabama, 287 U.S. 45, 69 (1932).

2 *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence); s*ee also* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the highly specialized legal knowledge that counsel must possess and in the advocacy skills he or she must master. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules. Counsel must be able to develop strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.

As one writer has explained:

> Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[3]

Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused."[4] As discussed *infra* in the text accompanying notes 228-29, these efforts may need to include litigation or administrative advocacy outside the confines of the capital case itself (*e.g.*, pursuit of information through a state open records law,[5] administrative proceedings to obtain or correct a military record, a collateral attack to invalidate a predicate conviction,[6] litigation of a systemic challenge to the jury selection procedures of a jurisdiction or district,[7] or to a jurisdiction's clemency process).[8]

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3 Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) (footnote omitted).

4 *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION , Standard 4-1.2(c), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

5 *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 526 (1991) (Marshall, J., dissenting) (involving successor federal habeas corpus petition based on documents released as a result of new interpretation of Georgia Open Records Act by Georgia Supreme Court).

6 For example, the defendant prevailed in Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (disallowing use of prior conviction used in aggravation) only after the same *pro bono* counsel successfully litigated People v. Johnson, 69 N.Y.2d 339, 342 (1987) (vacating that conviction). *See infra* text accompanying note 21.

7 *Cf.* Amadeo v. Zant, 486 U.S. 214, 219 (1988) (involving federal habeas corpus petitioner who succeeded on jury discrimination claim where factual predicate was discovered in independent litigation against the county).

8 *See infra* text accompanying notes 63-64.

Structure of the Guidelines

This Commentary provides a general overview of the areas in which counsel must be prepared to perform effectively and be given appropriate governmental support in doing so. These areas are addressed more specifically in subsequent Guidelines and commentaries. While there is some inevitable overlap, Guidelines 1.1–10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.2-10.15.2 contain primarily performance standards defining the duties of counsel handling those cases.

Representation at Trial

Trial attorneys in death penalty cases must be able to apply sophisticated jury selection techniques, including rehabilitation of venire members who initially state opposition to the death penalty and demonstration of bias on the part of prospective jurors who will automatically vote to impose the death penalty if the defendant is convicted on the capital charge.[9] Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination.[10]

An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials – one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death[11] – providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. Investigation and planning for both phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty.[12] Counsel must

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9 *See infra* Guideline 10.10.2.

10 *See infra* text accompanying notes 88-97.

11 *See* Bullington v. Missouri, 451 U.S. 430, 438-446 (1981); Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989) [hereinafter *Legislative Modification*] ("[For a lawyer], taking such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum efforts to the prosecution, and where one must endure the draining emotional effects of one's personal responsibility for the outcome.")

12 *See infra* text accompanying notes 159-63; *see also* 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 STANDARDS FOR CRIMINAL JUSTICE: Standard 4-4.1(a), *in* ABA STANDARDS FOR CRIMINAL JUSTICE:

promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.[13] Comprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence,[14] to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty.[15] At the same time, counsel must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.[16]

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime, and all evidence – whether testimonial, forensic, or otherwise – purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. The defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses – ranging from absolute defenses to liability (*e.g.*, self-defense or insanity) to partial defenses that might bar a death sentence (*e.g.*, guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (*e.g.*, inculpatory statements or items recovered in searches of the accused's home).

Moreover, trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.[17]

PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) ("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.")

13 *See infra* Guideline 10.4(C) and accompanying Commentary.

14 *See infra* Guidelines 10.9.1-2

15 *See, e.g.,* Atkins v. Virginia, 122 S. Ct. 2242 (2002) (mental retardation).

16 *See infra* Guideline 10.5 and accompanying Commentary.

17 *See infra* Guideline 10.10.1 and accompanying Commentary. *See also* Stephen B. Bright, *Developing Themes in Closing Argument and Elsewhere: Lessons from Capital Cases*, LITIG., Fall 2000, at 40; Lyon, *supra* note 2, at 708-11; Mary Ann Tally, *Integrating Theories for Capital Trials: Developing the Theory of Life*, THE CHAMPION, Nov. 1998, at 34.

At that phase, defense counsel must both rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death.[18]

If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Defense counsel accordingly must comprehensively investigate – together with the defense investigator, a mitigation specialist, and other members of the defense team – the defendant's behavior and the circumstances of the conviction.[19] Only then can counsel protect the accused's Fourteenth Amendment right to deny or rebut factual allegations made by the prosecution in support of a death sentence,[20] and the client's Eighth Amendment right not to be sentenced to death based on prior convictions obtained in violation of his constitutional rights.[21]

If uncharged prior misconduct is arguably admissible, defense counsel must assume that the prosecution will attempt to introduce it, and accordingly must thoroughly investigate it as an integral part of preparing for the penalty phase.[22]

Along with preparing to counter the prosecution's case for the death penalty, defense counsel must develop an affirmative case for sparing the defendant's life.[23] A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death.[24] This Eighth Amendment right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"[25] Nor will the presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links

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18 *See infra* Guideline 10.11 and accompanying Commentary.

19 *See infra* text accompanying note 298.

20 *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 160-61 (1994); Gardner v. Florida, 430 U.S. 349, 362 (1977).

21 *See* Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Counsel's obligation to prevent the prosecution from using unconstitutionally obtained prior convictions in support of a death sentence may well require counsel to litigate collateral challenges to such prior convictions in the jurisdictions or Districts where those convictions were obtained. *See, e.g.*, Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001).

22 *See infra* text accompanying notes 299-302.

23 *See infra* text accompanying notes 275-89.

24 *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982); Lockett v. Ohio, 438 U.S. 586, 602-03 (1978) (plurality opinion).

25 Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1316-17 (1997) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

the client's behavior to the evidence offered in mitigation.[26]

Finally, trial counsel, like counsel throughout the process, must raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion. "[T]he courts have shown a remarkable lack of solicitude for prisoners – including ones executed as a result – whose attorneys through no fault of the prisoners were not sufficiently versed in the law . . . [to] consider the possibility that a claim long rejected by local, state, and federal courts might succeed in the future or in a higher court."[27]

The Commentary to the first edition of this Guideline noted that "many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance," and supported the statement with numerous examples. The situation is no better today.[28] Indeed, problems with the quality of defense representation in death penalty cases

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[26] *See infra* Guideline 10.11 and accompanying Commentary.

[27] JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2(a), at 482 (4th ed. 2001). Thus, for example, within a single week in the spring of 2002, the Supreme Court rendered two major rulings favorable to capital defendants. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002) (holding that the Constitution bars execution of mentally retarded individuals); Ring v. Arizona, 122 S. Ct. 2248, 2443 (2002) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to capital cases). In both cases, the Court squarely overruled governing precedent. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the Constitution does not bar the execution of mentally retarded individuals); Walton v. Arizona, 497 U.S. 639, 679 (1990) (upholding same statute later invalidated in *Ring* against same challenge); Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (stating that *Walton* remained good law). It would have been appropriate (and indeed, some Justices might believe, required on pain of forfeiture) for capital counsel to assert these claims at every stage in the proceedings, even though they were then plainly at odds with the governing law. *See infra* Guideline 10.8 and accompanying Commentary.

One current example is the potential categorical unconstitutionality of the execution of juveniles. In light of a growing body of scientific evidence regarding the diminished culpability of juveniles, Eighth Amendment considerations, and international laws and treaties forbidding the execution for crimes committed while under the age of 18, four current Justices have suggested that the Court should absolutely bar the execution of such offenders. *See In re* Stanford, 123 S. Ct. 472 (2002). Counsel would be remiss not to assert the claim, notwithstanding that the Court has previously rejected it. *See* Stanford v. Kentucky, 492 U.S. 361 (1989). A similar example is discussed *infra* at note 350.

[28] *See generally* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2102-08 (2000); Spec. Comm. on Capital Representation & Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *The Crisis in Capital Representation*, 51 REC. OF ASS'N OF THE BAR OF CITY OF N.Y. 169, 185-87 (1996) [hereinafter *Crisis in Capital Representation*]; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Stickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 427-33 (1996); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994). *See also infra* at note 153.

have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsberg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty."[29] Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."[30] As Justice Breyer has said, "the inadequacy of representation in capital case" is "a fact that aggravates the other failings" of the death penalty system as a whole.[31]

In the past, post-conviction review has often been relied upon to identify and correct untrustworthy verdicts.[32] However, legal changes in the habeas corpus regime,[33] combined with

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[29] Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, ASSOCIATED PRESS, Apr. 9, 2001.

[30] Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases,* N.Y. TIMES, July 5, 2001, at A1.

[31] *See* Ring v. Arizona, 122 S. Ct. 2428, 2448 (2002) (Breyer, J., concurring). The "failings" to which Justice Breyer refers are many of the same ones that led the ABA to call for a moratorium on the imposition of the death penalty. *See* ABA, *Report Accompanying Recommendation 107,* *3 (Feb. 3, 1997) ("Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.").

[32] *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 147-48 (2001) (listing numerous modern examples of injustices in capital cases redressed on federal habeas corpus); LIEBMAN & HERTZ, *supra* note 27, § 11.2(c) (same).

[33] In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (the AEDPA), which imposed substantial restrictions on the availability of federal habeas corpus for state prisoners. The AEDPA established strict deadlines for the filing of a federal habeas petition, limits on the scope of review of state court decisions, restrictions on the availability of evidentiary hearings to develop facts in support of constitutional claims, and placed stringent constraints on federal courts' consideration of additional applications for review by the petitioner. *See generally* 28 U.S.C. § 2244-2264. There is significant cause for concern that these provisions may "greatly diminish the reliability of the capital system's review process and of the capital verdicts that the system produces." James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 427 (2001). *See also* ABA Panel Discussion, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163, 166-75 (1997); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus And The New Federalism After The Anti-Terrorism And Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 387 (1997); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 386-93 (1996). One reason for this concern is that portions of the legislation seemed to reduce the level of scrutiny that the federal courts could give to state capital convictions. *See* 28 U.S.C. § 2254 (d), (e) (providing that writ may not be granted unless state proceedings resulted in a decision that was "contrary to or involved an unreasonable application of clearly established Federal law," or "was based on an

the Congress' defunding of post-conviction defender organizations (PCDOs) in 1995,[34] make it less likely that such traditional "fail-safes" will continue to operate properly in the future. Under the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel,[35] even seriously deficient performance all too rarely leads to reversal.[36] Hence, jurisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage.[37] In mandating the provision of high quality legal representation at the trial level of a capital case, this Guideline recognizes the simple truth that any other course has weighty costs – to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.

Post-conviction Review

Ensuring high quality legal representation in capital trials, however, does not diminish the need for equally effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve

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unreasonable determination of the facts").

[34] *See Crisis in Capital Representation*, *supra* note 28, at 200-05 (presenting state-by-state analysis of impact of defunding of PCDOs); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996) (emphasizing the important role that the former PCDOs played in assuring fairness in habeas corpus review of capital convictions); *see also* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 540-43 (1996).

[35] *See* Strickland v. Washington, 466 U.S. 668 (1984).

[36] *See* McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from denial of *certiorari*) ("Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'") (*quoting* Strickland v. Washington, 466 U.S. 668, 685 (1984)); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002) ("[A]ll who have seriously considered the subject agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance."); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) ("*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering"); *Legislative Modification, supra* note 11, at 862 n.28 (criticizing "the strong presumptions of attorney effectiveness mandated by *Strickland*" as applied to capital cases: "Whatever benefits counter-factual presumptions may have in other areas of the law, they are certainly out of place when a human life hangs in the balance.").

[37] *See, e.g.*, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 177, 179 (Apr. 2002), *available at* http://www.doc.state.il.us/ccp/reports/commission-report (recommending that the Illinois legislature "significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases," including the full funding of the defense, which "should significantly improve the quality of defense representation of capital defendants").

over the course of a case, and because of "the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,"[38] jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines "at all stages of the case." (Subsection B) Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to success at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases.[39] Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client's execution.[40] For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.

A. Representation on Direct Appeal

The Constitution guarantees effective assistance of counsel on an appeal as of right.[41] The "guiding hand of counsel" must lead the condemned client through direct review. Appellate counsel must be intimately familiar with technical rules of issue preservation and presentation, as well as the substantive state, federal, and international law governing death penalty cases, including issues which are "percolating" in the lower courts but have not yet been authoritatively resolved by the Supreme Court.[42] Counsel must also be capable of making complex strategic decisions that maximize the client's chances of ultimate success in the event that the direct appeal is resolved unfavorably.[43]

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38 Eric M. Freedman, *Innocence, Federalism and the Capital Jury: Two Legislative Proposals for Evaluating Post-trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (1991).

39 Under the AEDPA, "special habeas corpus procedures" may apply to federal habeas corpus petitions in capital cases if a state's post-conviction procedures satisfy certain prerequisites. *See* 28 U.S.C. § 2263. Thus, the deadline for filing of a federal habeas corpus petition by capital prisoners in qualifying "opt-in" states is 180 days, *id.*, in contrast to the one-year limitations period that would otherwise apply. 28 U.S.C. § 2244(d)(1). In addition, the AEDPA's "opt-in" procedures accelerate the time for review of the case by the district court and the court of appeals, 28 U.S.C. § 2266(b)(1)(A), (c)(1)(A), and restrict a capital habeas corpus petitioner's ability to amend a petition after the state files its response. 28 U.S.C. § 2266(b)(3)(B). *See also* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 487-92 (1991) (discussing why a six-month limit does not provide an attorney with adequate time to prepare a habeas petition properly).

40 *See infra* text accompanying notes 331-36.

41 *See* Evitts v. Lucey, 469 U.S. 387, 395-96 (1985).

42 *See* Smith v. Murray, 477 U.S. 527, 536-37 (1986) (holding that appellate counsel in a Virginia capital case had waived a legal issue by not raising it at an earlier stage of appeal; the novelty of the issue in Virginia was no excuse because it had been raised, though unsuccessfully, in an intermediate appellate court of another state).

43 *See infra* Guideline 10.15.1 and accompanying Commentary.

B. Collateral Review Proceedings

Habeas corpus and other procedures for seeking collateral relief are especially important in capital cases.[44] Quality representation in both state and federal court is essential if erroneous convictions are to be corrected.[45]

1. State Collateral Review Proceedings

Counsel's obligations in state collateral review proceedings are demanding.[46] Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present.

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[44] *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) ("[Q]uality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'") (citation omitted); LIEBMAN & HERTZ, *supra* note 27, § 2.6.

[45] A recent comprehensive study finds that of every 100 death sentences imposed, 47 are reversed at the state level, on direct appeal or collateral review. An additional 21 are overturned on federal habeas corpus. *See* JAMES S. LIEBMAN, ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, pt. I, app. A, at 5-6 (2000). These statistics indicate the importance of providing qualified counsel for both state and federal proceedings.

[46] Some states provide attorneys at public expense to death-sentenced prisoners seeking state post-conviction relief, but others do not. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83-99 (2002) (providing state-by-state list); Jennifer N. Ide, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1099-1110 (1998); Clive A. Stafford Smith & Remy Voisin Starns, *Folly By Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Postconviction Proceedings*, 45 LOY. L. REV. 55, 56 (1999). Moreover, even in those states that nominally do provide counsel for collateral review, chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance. *See, e.g.*, TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, ch. 7 (2002), *available at* http://www.texasdefender.org/study/study.html (reporting that a review of 103 post-conviction petitions filed by court-appointed counsel in Texas death penalty cases between 1995 and 2000 indicated that 25 percent of the petitions were 15 pages long or less, and that counsel offered no evidence outside the trial record in 40 percent of the cases reviewed).

These considerations suggest that counsel should continue to test the solidity of Marray v. Giarratano, 492 U.S. 1 (1989) (rejecting claim of constitutional right to counsel in state capital post-conviction proceedings).

Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence – both that which the jury heard and that which it did not – to determine whether the decision maker at trial made a fully informed resolution of the issues of both guilt and punishment.

Since the reinstatement of the death penalty in 1977, there have been more than 100 known wrongful convictions in capital cases in the United States.[47] As further described *infra* in the text accompanying notes 196-200, these resulted from a variety of causes, including the testimony of unreliable jailhouse informants,[48] the use of dubious or fraudulent forensic scientific methods,[49]

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[47] *See* DEATH PENALTY INFORMATION CENTER: *Innocence and the Death Penalty, available at* http://www.deathpenaltyinfor.org/innoc.html (last visited December 18, 2002) (stating that there are 102 people that have been wrongly convicted of capital crimes). *See generally* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED (2000); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 63-82 (1996); NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); Ken Armstrong & Steve Mills, "'Until I Can be Sure:' How the Threat of Executing the Innocent has Transformed the Death Penalty Debate," in BEYOND REPAIR? AMERICA'S DEATH PENALTY (Stephen P. Garvey, ed. 2003); Michael L. Radelet & Hugo Adam Bedau, "The Execution of the Innocent," *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 223 (James Acker et al., eds. 1998)

[48] *See* Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000) (citing "insidious reliability problems" as basis for imposing major procedural restrictions on use of jailhouse informants); CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY, at 52 (2001) (A "category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony."). *See, e.g.*, Ted Rohrlich, *Jail House Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A1 (detailing perjuries committed by Leslie White, an inmate at the Los Angeles County jail who demonstrated to authorities and reporters how he concocted false confessions, and noting confession of another informant, Stephen Jesse Cisneros, to perjury in five murder cases).

[49] *See generally* Brief of Amici Curiae Five Innocent Former Death Row Inmates & Centurion Ministries, Schlup v. Delo, 513 U.S. 298 (1995) (No. 93-7901) (reviewing generally unscrupulous practices by investigators and prosecutors that can lead to false convictions); Paul Duggan, *Oklahoma Reviews 3,000 Convictions*, WASH. POST, May 9, 2001, at A2 (discussing Oklahoma review of 3,000 convictions based on work of Joyce Gilchrist, an Oklahoma City police chemist, who went far beyond what was scientifically knowable in conducting forensic investigations of local crime); Davidson Goldin, *Fifth Trooper Pleads Guilty in Scandal*, N.Y. TIMES, Apr. 8, 1995, at A29 (describing scandal in which New York state troopers transferred fingerprints of potential suspects to crime scenes to enhance their cases); Mark Hansen, *Out of the Blue*, 82 A.B.A. J. 50 (1996) (describing dentist, widely discredited by his peers, who claimed to be able to match bite marks to the teeth that made them); Adam Liptak, *2 States to Review Lab*

prosecutorial misconduct, and incompetence of defense counsel at trial. Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made.

Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness's testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial. Counsel must also assess all of the non-testimonial evidence and consider such issues as whether forensic testing must now be performed, either because some technology, such as DNA, was unavailable at the time of trial or because trial counsel failed to ensure that necessary testing took place.[50]

Counsel must conduct a similarly comprehensive reevaluation of the punishment phase to verify or undermine the accuracy of all evidence presented by the prosecution, and to determine whether the decisionmaker was properly informed of all relevant evidence,[51] able to give appropriate weight to that evidence,[52] and provided with a clear and legally accurate set of instructions for communicating its conclusion.[53]

2. Federal Habeas Corpus

In addition to requiring counsel to undertake all the tasks just described in Section B(1), federal collateral proceedings present another set of obstacles – ones that highlight the importance of quality representation. From 1973 to 1995, capital habeas corpus petitioners obtained relief at many times the rate of non-capital ones[54] and they should continue to do so in the future. But

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Work of Expert Who Erred on ID, N.Y. TIMES, Dec. 19, 2002, at A24 (Montana and Washington reviewing over 100 cases based on questionable forensic testimony of Arnold Melnikoff); Armando Villafranca, *Bradford Cites Lab Furor, Urges Freeze on Death Row*, HOUSTON CHRONICLE, March 7, 2003 (reporting legislative testimony of Houston Police Chief urging that no execution dates be set for seven Death Row inmates whose cases may have been affected by shoddy work of Houston police crime laboratory, which was found in a state audit to have had numerous shortcomings in preservation and testing of DNA evidence; *infra* note 198.

[50] *See, e.g.*, Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1098-99 (2001) (*pro bono* counsel on state post-conviction discovered exculpatory semen stain evidence, which "having been appropriately turned over by the government, lay unappreciated in the files of former defense counsel").

[51] *See* Williams v. Taylor, 529 U.S. 362, 370-71 (2000) (granting habeas corpus relief to petitioner whose trial counsel failed to find and present mitigating evidence).

[52] *See infra* Guideline 10.10.2 and accompanying Commentary.

[53] For examples of death sentences overturned for failure to comply with this requirement, see Penry v. Johnson, 532 U.S. 782 (2001), McKoy v. North Carolina, 494 U.S. 433 (1990), and Mills v. Maryland, 486 U.S. 367 (1988), and Davis v. Mitchell, 2003 WL 222741 (6th Cir. Feb. 4, 2003).

[54] *See* James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*,

federal habeas corpus actions are governed by a complex set of procedural rules.[55] Counsel must master these thoroughly.[56] Moreover, restrictions on the availability of federal habeas relief for state prisoners imposed by the AEDPA will continue to raise numerous novel legal issues.

C. Executive Clemency

Executive clemency plays a particularly important role in death penalty cases, as it "provides the [government] with a final, deliberative opportunity to reassess this irrevocable punishment."[57] Because post-judgment proceedings have traditionally provided very limited opportunity for review of questions of guilt or innocence, clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[58] As the Supreme Court has recognized, "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."[59] Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the "fail-safe" of the criminal justice system,[60] and increased the demands on counsel.[61] Moreover, wholly apart

78 TEX. L. REV. 1839, 1849 (2000) (federal habeas relief was granted in 40 percent of 599 cases between 1973 and 1995 in which the judgment remained intact after direct appeal and state post-conviction review). *Cf.* Eric M. Freedman, *Federal Habeas Corpus in Capital Cases, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION *supra* note 47, at 417, 427 ("By the most generous estimates, the rate in non-capital cases does not exceed 7%, and, if the appropriate statistical methodology is applied, the actual number is less than 1%.").

55 *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446 (2000) (limits on asserting ineffective assistance of counsel as "cause" for procedural default); Schlup v. Delo, 513 U.S. 298 (1995) ("fundamental miscarriage of justice" exception to procedural default rule); Teague v. Lane, 489 U.S. 288 (1989) (non-retroactivity of "new rules" of constitutional procedure); Wainwright v. Sykes, 433 U.S. 72 (1977) (limiting review of constitutional claims due to procedural default). Indeed, on the website of the *New York Times*, its Supreme Court reporter, Linda Greenhouse, has described the Court's habeas jurisprudence as "so complex as to be almost theological" (posted July 6, 2001).

56 *See Legislative Modification, supra* note 11, at 854 ("The post-conviction handling of capital cases is a legal specialty requiring mastery of an intricate body of fast-changing substantive and procedural law.")

57 Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 214 (1993). *See infra* Guideline 10.15.2 and accompanying Commentary.

58 Herrera v. Collins, 506 U.S. 390, 411-12 (1993).

59 *Id.* at 415.

60 *See* Kathleen M . Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 68-77 (1998).

61 *See, e.g.*, Freedman, *supra* note 50, at 1100-03 (describing detailed oral and written

from questions of guilt or innocence, executive clemency has been granted in death penalty cases for a broad range of humanitarian reasons.[62] Recognizing these considerations, the Supreme Court has begun to apply due process protection to clemency proceedings.[63] Thus, in addition to assembling the most persuasive possible record for the decisionmaker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.[64]

The Imperative of a Systemic Approach

General statements of expectations about what lawyers should do will not themselves ensure high quality legal representation. Indeed, Guidelines confined to such statements would be ones "that palter with us in a double sense, that keep the word of promise to our ear, and break it to our hope."[65] Attorney error is often the result of systemic problems, not individual deficiency.[66] The provision of counsel for indigent capital defendants is too frequently made through *ad hoc* appointment, a system inimical to effective representation.[67] Although defender offices generally have the experience and dedication to provide high quality legal representation in capital cases, they are commonly overworked and inadequately funded. And private counsel often discover too late that they have taken on a task for which they are unqualified[68] or lack sufficient resources. The Guidelines that follow, therefore, not only detail the elements of quality representation, but mandate the systematic provision of resources to ensure that such representation is achieved in fact, whether counsel is individually assigned, employed by a defender office, or privately retained

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presentations made to two Governors of Virginia by a six-lawyer team to secure DNA testing for death row inmate Earl Washington that resulted in his exoneration). *See also infra* Guideline 10.15.2 and accompanying Commentary

62 *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Cases*, 27 U. RICH. L. REV. 289, 297-99 (1993) (identifying 29 cases between 1972 and 1993 in which death-sentenced inmates had their death sentences commuted to terms of life imprisonment through executive clemency procedures).

63 *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); s*ee also* Ford v. Wainwright, 477 U.S. 399 (1986) (invalidating Florida procedure for determining whether inmate was mentally competent to be executed).

64 *See, e.g.,* Wilson v. United States Dist. Ct., 161 F.3d 1185 (9th Cir. 1998) (affirming District Court order directing new clemency proceeding on basis that prior one had violated due process).

65 WILLIAM SHAKESPEARE, MACBETH act 5, sc. 8.

66 *See* Goodpaster, *supra* note 2, at 356.

67 *See infra* Guideline 2.1(C) and accompanying Commentary.

68 *See, e.g.,* Washington v. Murray, 952 F.2d 1472 (4th Cir. 1991) (failure of retained counsel to appreciate exculpatory significance of scientific evidence produced by prosecution). *See generally* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (guarantee of Sixth Amendment applies equally whether counsel is retained or appointed).

with or without compensation.[69]

Conclusion

Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[70] Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.[71]

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69 *See infra* Guidelines 4.1 and 9.1 and accompanying Commentary.

70 Lockett v. Ohio, 438 U.S. 586, 605 (1978).

71 *Cf. Legislative Modification, supra* note 11, at 848 ("[F]or so long as the death penalty continues to exist in this country, capital inmates are entitled to procedures – including ones for the provision of competent counsel – that result in the full and fair review of their convictions and sentences. Correlatively, any state which chooses to impose death sentences must accept the obligation of providing mechanisms for assuring that those sentences are legally and factually correct at the time of their execution.").

Guideline 2.1 Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases

A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the "Legal Representation Plan").

B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.

C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

History of Guideline

The obligation to create a formal "Legal Representation Plan" for provision of representation in death penalty cases was contained in Guideline 3.1 of the original edition. Subsection B is new and is designed to make it easier for jurisdictions to determine the necessary contents of a Plan. Subsection C is drawn from several sections of the original edition.

Related Standards

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.2 (3d ed. 1992) ("Systems for legal representation").

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.3 (3d ed. 1992) ("Professional independence").

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.4 (3d ed. 1992) ("Supporting services").

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and professional development").

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.6 (3d ed. 1992) ("Funding").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-4.1 (3d ed. 1992) ("Chief Defender and Staff").

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002) ("The public defense function, including the selection, funding and payment of defense counsel, is independent").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDSARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.8 (1973) ("Selection of Public Defenders").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.9 (1973) ("Performance of Public Defender Function").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.4 (1976) ("State Level Organization with Centralized Administration").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.10 (1976) ("The Defender Commission").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.11 (1976) ("Functions of the Defender Commission").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES Standard 2.18 (1976) (Administration of Defense System Funds").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.2 (1989) ("Independence from Judiciary and Funding Source").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.1 (1989) ("Establishment of a Legal Representation Plan").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Standard II-1 (1984) ("Policy Board").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Standard II-2 (1984) ("Members").

Commentary

Each jurisdiction should take effective measures to formalize the process by which high quality legal representation will be provided in capital cases. This may be done by statute, court order, regulation or otherwise. The critical element is that the plan be judicially enforceable against the jurisdiction.[72] Experience shows, however, that a plan is most likely to succeed if it is embodied in a statute. That route maximizes judicial neutrality in passing on claims of non-compliance, and tends to result in greater transparency and access to public funds than do the other options.

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[72] *See, e.g.*, Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988) (holding that under statute creating office for post-conviction capital representation, "each defendant . . . is entitled, as a statutory right, to effective legal representation," and may enforce that right in post-conviction proceedings).

The Legal Representation Plan should provide standards and procedures that apply to capital cases on a jurisdiction-wide basis. National professional groups concerned with criminal justice issues have for decades advocated that defender services be organized on a statewide basis.[73] Specifically, the ABA Criminal Justice Standards endorse statewide organization "as the best means for service provision."[74] Jurisdiction-wide organization and funding can best ameliorate local disparities in resources and quality of representation, and insulate the administration of defense services from local political pressures.[75]

This last item is, of course, of critical concern. "It is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain."[76]

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[73] *See, e.g.*, NAT'L LEGAL AID & DEFENDER ASS'N, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT (1976) (calling for a statewide organization with a centralized administration to "ensure uniformity and equality of legal representation and supporting services and to guarantee professional independence for individual defenders"); Nat'l Conf. of Comm'rs on Unif. State Laws, *Prefatory Note* to UNIFORM LAW COMMISSIONER'S MODEL PUBLIC DEFENDER ACT, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 267-268 (1970) (approving recommendation of National Defenders Conference that every state establish a statewide public defender system "to assure better coordination and consistency of approach throughout the state, [provide] better consultation with the several branches of state government, [...] reduce the administrative burden on court personnel and provide more efficient and more experienced defense counsel services to needy persons accused of crime"); TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 52-53 (1967) (recommending that "each State should finance assigned counsel and defender systems on a regular and statewide basis").

[74] ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.2(c) and cmt. (3d ed. 1992, black letter approved 1990, commentary completed 1992).

[75] Mississippi, for example, has recently moved from a county-based to a state-based system for the provision of capital defense services. *See* Julie Goodman, *Inmates on Death Row Given Last Hope*, CLARION-LEDGER (Jackson, Miss.), May 13, 2002, at B1 (discussing post-conviction defense office); Emily Wagster, *Capital Defense Job Filled; State Office to Provide Lawyers for Indigent*, SUN HERALD (Biloxi, Miss.), July 7, 2001, at A2 (discussing trial defense office). Similarly, California has adopted statewide qualifications for appointed trial counsel in capital cases effective January 1, 2003. *See* Cal. Rules of Ct., R. 4.117.

[76] ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 cmt. (3d ed. 1992). *See also*, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 and cmt. (2002) ("The public defense function, including the selection, funding, and payment of defense counsel, is independent.") ("The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a non-partisan board should oversee defender, assigned counsel, or

Therefore, as Guideline 2.1(C) mandates, any acceptable Legal Representation Plan must assure that individual lawyers are not subject to formal or informal sanctions (*e.g.*, through the denial of future appointments, reductions in fee awards, or withholding of promotions in institutional offices) for engaging in effective representation.[77] The same principle applies to the overall architecture of the system. Thus, for example, the head of a public defender office must be subject to judicial supervision only in the same manner and to the same extent as a lawyer in private practice – and not be subject to institutional arrangements that might enable his or her re-appointment to be blocked by judges irked at the zealous advocacy conducted by his or her office.

Moreover, the system must be structured so as to assure that each client receives defense services "in accordance with professional standards." (Subsection C) For example, it is predictable that there will be conflicts of interest among various actors in the criminal justice system (e.g. co-defendants, co-operating witnesses), who may play different roles in different cases, and the plan must provide a mechanism to assure conflict-free representation.[78]

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contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.").

[77] For example, under the North Carolina's Indigent Defense Services Act of 2000, a 13-member Indigent Defense Services Commission (consisting of ten members appointed by, but independent of, the state Bar, the Governor, the Chief Justice, and the legislature, and three members chosen collectively by those ten) appoints a Capital Defender who is responsible only to it. The Capital Defender supervises a staff of attorneys and also oversees the representation provided by a roster of private lawyers and public defenders who have been certified to provide representation in capital cases. *See* www.ncids.org (last visited March 7, 2003). *Cf. Retarding Due Process*, ST. PETERSBURG TIMES, Apr. 22, 2002, at A10 (editorial criticizing Florida legislation permanently barring any appointed capital defense attorney seeking compensation in excess of fee schedule from another appointment).

[78] For instance, although it may not violate the Sixth Amendment for defense counsel to have previously represented the victim, *see* Mickens v. Taylor, 122 S. Ct. 1237 (2002), it certainly violates ethical norms, *see* Brief of Legal Ethicists and the Stein Center for Law and Ethics as Amici Curiae in Support of Petitioner, Mickens v. Taylor, 122 S. Ct. 1237 (2002) (No. 00-9285) and would not be permitted by any acceptable plan for capital representation. *Cf. Ex parte* McCormick, 645 S.W.2d 801 (Tex. Crim. App. 1983) (en banc) (reversing two capital convictions because same counsel represented both co-defendants).

Guideline 3.1 Designation of a Responsible Agency

A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines for:

1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and

2. performing all the duties listed in Subsection E (the "Responsible Agency").

B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.

C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:

Defender Organization

1. A "defender organization," that is, either:

a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

Independent Authority

2. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

D. Conflict of Interest:

1. In any circumstance in which the performance by a defender organization of a duty listed in Subsection E would result in a conflict of interest, the relevant duty should be performed by the Independent Authority. The jurisdiction should implement an effectual system to identify and resolve such conflicts.

2. When the Independent Authority is the Responsible Agency, attorneys who hold formal roles in the Independent Authority should be ineligible to represent defendants in capital cases within the jurisdiction during their term of service.

E. The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties:

1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

2. draft and periodically publish rosters of certified attorneys;

3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

4. assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

5. monitor the performance of all attorneys providing representation in capital proceedings;

6. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

7. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

8. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

History of Guideline

The obligation of the Legal Representation Plan to designate a "Responsible Agency" for the appointment of counsel in death penalty cases was contained in Guideline 3.1 of the first edition. Subsection B makes it clear that the Responsible Agency should be an independent entity, and that lawyer selection should not be performed by the judiciary or elected officials. Subsection C is new and describes the acceptable kinds of Responsible Agencies. Subsection D is new and specifies the obligations of the Responsible Agency in the event of a conflict of interest. Lastly, part of subsection E is new and details the other duties of the Responsible Agency, including the duty to ensure that qualified attorneys are available to represent defendants in death penalty cases, the duty to promptly investigate complaints about the performance of attorneys, and the duty to take corrective action without delay.

Related Standards

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.2 (3d ed. 1992) ("Systems for legal representation").

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.3 (3d ed. 1992) ("Professional independence").

ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-4.1 (3d ed. 1992) ("Chief Defender and Staff").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.8 (1973) ("Selection of Public Defenders").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.10 (1976) ("The Defender Commission").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.11 (1976) ("Functions of the Defender Commission").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.12 (1976) ("Qualifications of the Defender Director and Conditions of Employment").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.13 (1976) ("The Governing Body For Assigned Counsel Programs").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Standard 2.18 (1976) ("Administration of Defense System Funds").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.2 (1989) ("Independence from Judiciary and Funding Source").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.1 (1989) ("Establishment of Legal Representation Plan").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.2.1 (1989) ("Creation of Board").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.2.2 (1989) ("Functions of Board").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-1 (1984) ("Purposes/ Policy Board").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-2 (1984) ("Members").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-3 (1984) ("Duties").

Commentary

As indicated in Guideline 2.1(C) and the accompanying Commentary, the Legal Representation Plan must ensure that the capital defense function remains free from political influence. One important mechanism for accomplishing this goal is granting the authority for training, assigning, and monitoring capital defense lawyers to one or more entities independent of the judiciary and wholly devoted to fostering high quality legal defense representation.

This Guideline, based on accumulated experience, contemplates two structures that jurisdictions might employ.

1. In the first structure, the jurisdiction has created (a) a jurisdiction-wide capital trial organization, relying on staff attorneys, and, optionally, members of the private bar, and/or (b) a jurisdiction-wide capital appellate and/or post-conviction defender organization, relying on staff attorneys, and, optionally, members of the private bar. (Collectively, "defender organizations").[79]

In this structure, the defender organizations may both provide representation and perform all the functions listed in Subsection E as appropriate to their portion of the system, with one key exception. No defender organization may perform any function that would involve it in a conflict of interest, *e.g.*, monitoring its own performance under Guideline 7.1 (A), investigating or disposing of a complaint against such a lawyer pursuant to Guideline 7.1 (B) against one of its staff lawyers, or making the appointment of counsel in a situation in which there exists a professional conflict. Thus, for example, if two defendants with antagonistic defenses were charged with a capital crime, the agency could assign itself to defend one of them but could play no role in the assignment of counsel to the other. Similarly, a defender organization could not monitor the quality of its own performance (Subsection E (5)).

Accordingly, this structure also contemplates the existence of an "Independent Authority," which will at minimum deal with conflicts such as these.

2. In the second structure, an "Independent Authority," an entity run by defense attorneys with demonstrated knowledge and expertise in the representation of persons facing the possible imposition or execution of a death sentence, performs all the functions listed in Subsection E but does not itself provide representation.

While serving the organization in a formal role, whether paid or unpaid (*e.g.*, officers, directors, staff members), attorneys should not be eligible for appointment to death penalty cases.

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[79] For example, in 1995, New York enacted a comprehensive legislative plan for a "capital defender office" (CDO) to provide representation and legal assistance in capital cases. NY. JUD. LAW § 35-b(3) (McKinney 2001). The CDO is authorized to represent capital defendants and also to advise and assist other appointed counsel in such cases. The office assists in determining qualification standards and presenting training programs for attorneys seeking to become certified to accept appointments. Other states have similar programs for providing representation in post-conviction proceedings. *See, e.g.*, CAL. GOV'T CODE § 68661 (West Supp. 2002) (creating California Habeas Corpus Resource Center, which is authorized to provide representation and serve as a resource in state and federal post-conviction proceedings).

The idea is that attorneys should not be appointed by an entity in whose operations they are playing a material role. Thus, this provision does not extend to persons who are simply providing occasional advice to the entity.

The agency performing the function in the particular case, whether a defender organization or the Independent Authority, is referred to as "the Responsible Agency."

The Responsible Agency must assess the qualifications of attorneys who wish to represent capital defendants, conducting a meaningful review of each request for inclusion on the roster of qualified counsel in light of the criteria listed in Guideline 5.1. In order to make informed decisions on eligibility, the Responsible Agency should have sufficient flexibility to gather as much relevant information as possible to secure a fair picture of the applicant's ability and experience. The Responsible Agency should utilize whatever sources of information it deems appropriate, including in-court observations, writing samples, and information-gathering from the applicant, from judges before whom the applicant has appeared, and from attorneys, supervisors, and former clients who are familiar with the applicant's professional abilities. The performance standards established pursuant to Guidelines 10.1 *et seq.* should also be used to evaluate the prior performance in capital cases of attorneys seeking to establish eligibility for renewal placement on the roster of qualified counsel.

In assigning attorneys to capital cases, the overriding consideration must always be to provide high quality legal representation to the person facing a possible death sentence. Adherence to a "strict rotation" system for assigning counsel in the interest of fairness to attorneys should never take precedence over the interests of the capital defendant in receiving the best possible representation. Rather, in making assignments of counsel to a particular capital case, the Responsible Agency should give careful consideration to counsel's qualifications, skills, and experience; any aspects of the case that make assignment of a lawyer with specific qualifications or skills necessary or particularly appropriate (*e.g.*, counsel's ability to speak the client's native language); and the relative oncrousness of prospective lawyers' existing caseloads. It is also appropriate to give consideration to maintaining continuity of counsel where the defendant has previously been represented by a qualified lawyer at an earlier stage of the proceedings, provided that (a) counsel is also deemed qualified to represent the client at the subsequent stage of the proceedings and (b) counsel's representation of the client at successive stages of the proceedings does not present a conflict of interest.[80] Given the extraordinary demands and pressures placed on counsel in a capital case,[81] the Responsible Agency should, in accordance with Guideline 4.1 (A)(1), ensure that at every stage of the proceedings the defendant is represented by counsel who are in a position to provide high quality legal representation. This may require the agency to furnish resources, in the form of additional counsel or otherwise,[82] to private counsel.[83]

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80 Of course, any applicable statutory provisions, *e.g.*, 28 U.S.C. § 2261(d), must also be observed.

81 *See supra* Guideline 1.1 and accompanying Commentary.

82 *See infra* Guideline 4.1 and accompanying Commentary.

83 Specifically, the Responsible Agency should in every capital case determine whether retained or *pro bono* counsel meets the qualification standards set forth in Guideline 5.1 *infra* and, if not, provide as many additional qualified attorneys as are appropriate under the circumstances

The remaining elements of this Guideline reflect the longstanding view of the ABA that "jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases."[84] Several of these functions are described in greater detail in subsequent Guidelines.[85] The common theme, however, is that the provision of consistently high quality legal representation requires that the duties given to the Responsible Agency by this Guideline be performed by an entity with the authority and resources to discharge them vigorously.

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of the case. In accordance with Guideline 4.1(B), the Responsible Agency must also assure that counsel have the necessary support services.

[84] ABA Criminal Justice Section, Report to the House of Delegates (Feb. 1990), *reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 9 (1990).

[85] *See, e.g., infra* Guideline 7.1 (removal of attorneys from roster); Guideline 8.1 (training programs).

Guideline 4.1 The Defense Team and Supporting Services

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.

2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

History of Guideline

This Guideline is based on Guideline 8.1 of the original edition. In keeping the team approach described in the Commentary, Subsection A has been added to provide for the assembly of a "defense team." The first sentence of Subsection B is based on the original version of the Guideline and has been revised to emphasize that the purpose of providing adequate support services is to further the overall goal of providing "high quality legal representation," not merely "an adequate defense." The second sentence is taken from Standard 5-1.4 of the ABA Standards for Criminal Justice: Providing Defense Services. Subsections B (1) and B (2) are new and reflect the decision to include private attorneys in these Guidelines.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1989) ("Roles of Mental Health and Mental Retardation Professionals in the Criminal Process").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 (3d ed. 1992) ("Supporting services").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to

Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.14 (1973) ("Supporting Personnel and Facilities").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 2 (1970) ("Rights to Representation, Services, and Facilities").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 12 (1970) ("Personnel and Facilities").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-8 (1984) ("Support Staff and Forensic Experts").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES §3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES §3.4 (1976) ("Nonpersonnel Needs in Defender Offices").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.6 (1989) ("Support Services").

Commentary

Introduction

In a capital case reaffirming that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense," the United States Supreme Court stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.[86]

[86] Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.[87]

The Team Approach to Capital Defense

National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate supporting services, including, "expert witnesses capable of testifying at trial and at other proceedings, personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing, and trained investigators to interview witnesses and to assemble demonstrative evidence."[88]

This need is particularly acute in death penalty cases. The prosecution commits vast resources to its effort to prove the defendant guilty of capital murder. The defense must both subject the prosecution's evidence to searching scrutiny and build an affirmative case of its own.[89] Yet investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts – whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.[90]

In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses.[91] Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings,

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87 *See* ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992).

88 *Id.*

89 *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) [hereinafter *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).

90 *See e.g.*, Alec Wilkinson, *A Night at the Beat House*, THE NEW YORKER, Feb. 13, 1995, at 68 (discussing how counsel used an expert to show that victim was not killed in the prosecuting jurisdiction but dragged to the crime scene after her death; client eventually exonerated and released).

91 *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).

including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation,[92] making this a necessary area of inquiry in every case. Further, the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase.[93] Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.[94] Counsel must compile extensive historical data, as well as obtaining a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.[95]

Counsel's own observations of the client's mental status, while necessary,[96] can hardly be expected to be sufficient to detect the array of conditions (*e.g.*, post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance. Accordingly, Subsection A (2) mandates that at least one member of the defense team (whether one of the four individuals constituting the smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.

Although mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine, it bears emphasis that every situation will also have its own unique needs. The demands of each case – and each stage of the same case – will differ. Jurisdictions must therefore construe this Guideline broadly, keeping in mind the superior opportunity of defense counsel to determine what assistance is needed to provide high quality legal representation under the particular circumstances at hand and counsel's need to explore the potential of a variety of possible theories. For example, it might well be appropriate for counsel to retain an expert familiar with the cultural context by which the defendant was shaped, or a professional researcher to track down elusive archival records. While resources are not unlimited, of course, jurisdictions should also be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.[97]

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92 *See* Atkins v. Virginia, 122 S. Ct. 2242 (2002).

93 *See* Goodpaster, *supra* note 2, at 323-24.

94 *See* John H. Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, THE ADVOCATE, Aug. 1995, *available at* http://www.dpa.state.ky.us/rwheeler/blume/blume.html.

95 *See* Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43-64 (1994).

96 *See infra* Guidelines 10.5 and 10.15.1(E)(2) and accompanying Commentary.

97 For example, in light of the constitutional prohibition on the execution of the mentally retarded, *see* Atkins v. Virginia, 122 S. Ct. 2242 (2002), significant resources spent at the pretrial phase in investigating and presenting the defendant's retardation status will be amply repaid in future cost savings since the most likely outcomes are (a) the case is taken off the capital track

Effective Assistance of Experts

Subsections B (1) and B (2) are aimed at insuring that the fact of public funding does not diminish the quality of the assistance that counsel is able to obtain from experts. Thus, unless counsel agrees otherwise, the defendant is entitled to experts independent of the government; the jurisdiction may not meet its obligations by relegating him to the state mental hospital or the state crime laboratory.[98] Similarly, doctrines of privilege, work product, and the like should protect the communications between counsel and the experts just as they would if the experts were being paid with private funds. Procedures for the auditing of public funds should be structured so as to preserve this confidentiality.

The Core Defense Team

In addition to employing the particular nonlegal resources that high quality legal representation requires in each individual case, the standard of practice demands that counsel have certain specific forms of assistance in every case. This Guideline accordingly requires that those resources be provided.[99]

A. The Investigator

The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness.[100] As a result, an investigator should be part of the defense team at stage of a capital proceeding.

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entirely, very possibly by agreement with the prosecution or (b) the issue is decided against the defendant, thus minimizing the likelihood of it being raised later. Similarly, it is not only expensive, but also extremely unjust for exculpatory evidence about which trial counsel should have learned from an expert to lie undiscovered until post-conviction proceedings many years later – years during which an innocent person is incarcerated. *See* Freedman, *supra* note 50, at 1094-95, 1098-99.

98 Of course, non-lawyer professionals on the staff of defender organizations are, even if on the public payroll, "independent of the government" for this purpose.

99 This Guideline contemplates that defense counsel will be primarily responsible for selection of the remaining members of the defense team. (Guideline 10.4 *infra* discusses in greater detail the division of this responsibility among the attorneys on the team.) The Responsible Agency should, however, be prepared to provide assistance in finding qualified individuals to fill these roles.

100 *See infra* Guideline 10.7 and accompanying Commentary.

B. The Mitigation Specialist

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have.[101] They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (*e.g.*, family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict.[102] The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.[103]

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.[104]

For all of these reasons the use of mitigation specialists has become "part of the existing 'standard of care'" in capital cases, ensuring "high quality investigation and preparation of the penalty phase."[105]

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101 *See* Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 CIV. RTS. L.J. 199, 206-11 (2002).

102 *See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases,* 18 N.Y.U. Rev Law & Soc. Change 245, 250 (1990/1991) (Many attorneys make no preparations whatsoever for the sentencing phase; because they believe that a lawyer should try to win rather than plan to lose, they "are devastated when the client is convicted and afterward just throw in the towel"); *See infra* Guideline 10.10.1 and accompanying Commentary; text accompanying notes 271-74.

103 *See* Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, Indigent Defense (NLADA July/Aug. 1999); TEXAS DEFENDER SERVICE CAPITAL TRIAL PROJECT, DEATH PENALTY MITIGATION MANUAL FOR TRIAL ATTORNEYS ch. 2 (2001) ("The Mitigation Specialist and the Team Approach") [hereinafter TEXAS DEATH PENALTY MITIGATION MANUAL].

104 *See infra* text accompanying note 178.

105 *See Federal Death Penalty Cases, supra* note 89, at 24. Numerous death penalty

Counsel Not Compensated by Public Funds

Finally, in the relatively rare case in which a capital defendant retains counsel, jurisdictions must ensure that the defendant has access to necessary investigative and expert services if the defendant cannot afford them. "Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. . . . . Supporting services [should] be made available to the clients of retained counsel who are unable to afford the required assistance."[106] Of course, the same observations apply where counsel is serving *pro bono* or, although originally retained, has simply run out of money.

jurisdictions routinely authorize the payment of funds for mitigation experts pursuant to state statute, court rule, case law or defense motion, *e.g.*, South Carolina, S.C. Code Ann. § 16-3-26(c) and State v. Bailey, 424 S.E.2d 503, 507 (S.C.1992) ("In today's capital trial, the defendant is entitled to produce mitigation evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence, the attorney must employ investigators in the course of thoroughly researching the defendant's entire life."); Tennessee, Tenn. Code. Ann. § 40-14-207(b) and Tenn. S. Ct. R. 13, § 5; Illinois, 725 Ill. Comp. Stat. 124/10 (West 2002); Washington; Kentucky, Ky. Rev. Stat. Ann. § 31.31.110; New York; Colorado, New Jersey; and Georgia, Ga. Code Ann. § 17-12-90 et seq. In federal capital trials, mitigation experts are routinely appointed and compensated under 21 U.S.C. § 848(q).

106 ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992). *See also* Edward C. Monahan & James J. Clark, *Funds for Resources for Indigent Defendants Represented by Retained Counsel*, CHAMPION, Dec. 1996, at 16.

Guideline 5.1 Qualifications of Defense Counsel

A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. In formulating qualification standards, the Responsible Agency should insure:

1. That every attorney representing a capital defendant has:

a. obtained a license or permission to practice in the jurisdiction;

b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

History of Guideline

This Guideline has been substantially reorganized for this edition. In the original edition, it emphasized quantitative measures of attorney experience – such as years of litigation experience and number of jury trials – as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised edition, the inquiry focuses on counsel's ability to provide high quality legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.2 (3d ed. 1992) ("Eligibility to Serve").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2 (1997) ("Education, Training, and Experience of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II.3 (1984) ("Duties").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.9 (1989) ("Standards for Performance of Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(b) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.1 (1989) ("Qualifications of Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.15 (1976) ("Establishing the Assigned Counsel Panel").

Commentary

Under Guideline 3.1, it is the duty of the Responsible Agency to provide capital defendants with attorneys who will give them high quality legal representation. This Guideline amplifies that duty. It is designed to be outcome-focused and to leave the Responsible Agency maximum flexibility. The Guideline sets forth the necessary qualifications for all attorneys (Subsection B (1)), and also requires that "the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation." (Subsection B (2)). The qualification standards set by the Responsible Agency must be such as to bring about this result.

This functional approach is new to this edition.

As described in the Commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.[107]

There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases.[108] Such attorneys may have specialized training and experience in the field (*e.g.*, as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice.[109] These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.

In order to make maximum use of the available resources in the legal community overall, the Responsible Agency needs to devise qualification standards that build upon the contribution that each lawyer can make to the defense team, while ensuring that the team is of such a size and aggregate level of experience as to be able to function effectively.

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[107] *See* Bright, *supra* note 28, at 1871 n.209 ("Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications").

[108] Because, as the second sentence of Subsection A emphasizes, the overriding goal is to provide high quality legal representation to the client in the individual case, it may also be appropriate for the appointing authority to certify an attorney for a limited purpose, *e.g.*, to represent a particular client with whom he or she has a special relationship.

[109] Superior post-conviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field but who did have a commitment to excellence. *See, e.g.*, Kelly Choi, *Against All Odds*, THE AMERICAN LAWYER, Dec. 2000, at 98; *Death-Row Rescue by Minnesota Life-Saving Lawyers*, STAR TRIBUNE, Jan. 5, 2001, at 18A.

Guideline 6.1 Workload

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

History of Guideline

The original edition of this Guideline stated that "attorneys accepting appointments pursuant to these Guidelines . . . should not accept appointment" if their workload would interfere with the provision of "quality representation or lead to the breach of professional obligations."

Although that admonition has been retained in Guideline 10.3, this Guideline, which in accordance with Guideline 1.1 applies to all defense counsel (not just appointed members of the private bar), has been added to make clear that it is the responsibility of the jurisdiction creating the system to establish mechanisms for controlling attorney workloads.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) ("Workload").

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.3 ("Delays; Punctuality; Workload") in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002) ("Defense counsel's workload is controlled to permit the rendering of quality representation").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973) ("Workload of Public Defenders").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.1 (1976) (Establishing Maximum Pending Workload Levels for Individual Attorneys").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.2 (1976) (Statistics and Record Keeping").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) (Elimination of Excessive Caseloads").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-12 (1984) (Case and Work Overload").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(c) (1989) ("Establishment and General Operation of

Assigned Counsel Roster").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.12 (1989) ("Workload of Attorneys").

Commentary

In order to achieve the goal of providing capital defendants with high quality legal representation, the caseloads of their attorneys must be such as to permit the investment of the extraordinary time and effort necessary to ensure effective and zealous representation in a capital case. As the ABA Defense Services Standards note:

> One of the single most important impediments to the furnishing of quality defense services for the poor is the presence of excessive caseloads. All too often in defender organizations, attorneys are asked to provide representation in too many cases. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.[110]

A numerical set of caseload standards for appointed counsel, standing alone, would not ensure high quality legal representation. While national caseload standards should in no event be exceeded, the concept of "workload" (*i.e.*, caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement of counsel's ability to provide quality representation. In assessing appointed counsel's workload, the Responsible Agency must also consider whether counsel has adequate access to essential support staff such as investigators, mitigation specialists, paralegals, and legal secretaries. Counsel's workload, including legal cases and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline to undertake additional cases above such levels.[111]

In accordance with these principles, the Responsible Agency should assess the workload of eligible attorneys prior to appointment to ensure that counsel's workload will enable counsel to provide high quality legal representation. To assist in assessing workloads, some defender offices have established workload guidelines that are useful in determining whether the workload of a particular attorney is excessive. These guidelines may be consulted as one measure of appropriate workloads.[112]

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110 ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 cmt. (3d ed. 1992). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30 (1997); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1997) ("A lawyer's workload should be controlled so that each matter can be handled adequately.").

111 *See infra* Guideline 10.3 and accompanying Commentary.

112 *See* NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guidelines 4.1, 5.1–5.3 (1976); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973). These standards all acknowledge the need to determine acceptable workloads, and all

Studies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters. For example, a study of the California State Public Defender revealed that attorneys there spent, on average, four times as much time on capital representation as on cases with any other penalty, including those involving a maximum possible sentence of life imprisonment without parole.[113] In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.[114]

Workloads for lawyers handling direct appeals should also be maintained at levels that are consistent with providing high quality legal representation. Like the responsibilities of counsel at trial, appellate work in a capital case is time-consuming and difficult. A capital trial record, which appellate counsel must review in full and with care, typically runs to thousands or even tens of thousands of pages -- even before, pursuant to Guideline 10.7 (B) (2), counsel investigates the possibility that the record may be incomplete. Once appellate counsel has reviewed the record, he or she must conduct especially wide-ranging legal research, canvassing both state and federal judicial opinions, before drafting the opening brief. Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of the defendant's conviction or punishment.[115] Further, counsel must aggressively examine the government's brief and research its legal assertions in order to prepare an adequate reply. Preparing for and presenting oral argument requires counsel to invest still more hours. In California, where the Office of the State Public Defender handled capital appeals in the California Supreme Court, a 1989 study concluded that attorneys handling such cases should be responsible for two to three briefs per year.[116]

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acknowledge within the standards themselves or in commentary the myriad factors that must be considered in weighing workload. Only the National Advisory Commission sets forth suggested numerical maximums for caseloads; those numbers are provided with the caveat "that particular local conditions – such as travel time – may mean that lower limits are essential." The National Advisory Commission standard does not address death penalty workloads.

113 Richard J. Wilson & Robert L. Spangenberg, *State-Postconviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336-337 (1989) (collecting and reviewing studies).

114 *Federal Death Penalty Cases*, *supra* note 89, at 14. This figure was only for the number of hours expended through the end of trial court proceedings, and did not include any post-conviction representation.

115 *See supra* text accompanying notes 41-43. Moreover, counsel must continue to investigate the facts. *See infra* Guideline 10.7 (A).

116 NAT'L CTR. FOR STATE COURTS & SPANGENBERG GROUP, WORKLOAD AND PRODUCTIVITY STANDARDS: A REPORT TO THE OFFICE OF THE STATE PUBLIC DEFENDER 82-93 (1989).

Similarly, the workloads of counsel handling collateral proceedings must be carefully limited to allow for high quality legal representation. A 1998 survey of the time and expenses required in Florida capital post-conviction cases concluded that "the most experienced and qualified lawyers at Florida's post-conviction defender office, the Office of Capital Collateral Representation have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari" through that state's post-conviction proceedings.[117]

It is the duty of the Responsible Agency to distribute assignments in light of each attorney's duty under the Rules of Professional Conduct to "provide competent representation to a client"[118], which requires "the legal knowledge, skill, thoroughness and preparation"[119] necessary for a complex and specialized area of the law. Thus, the Responsible Agency must monitor private counsel in accordance with Guideline 7.1, and provide them with additional assistance as necessary. And the Independent Authority must monitor the defender organizations of the jurisdiction and stand ready to supplement their resources with those of the private bar.

Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.

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117 THE SPANGENBERG GROUP, AMENDED TIME AND EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998).

118 MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1 (2002).

119 MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1 CMT. 1 (2002); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(d), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1997). The comment to that Rule says that "a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 6 (1997). *See also* NAT. LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 1.3(a) (1995).

Guideline 7.1 Monitoring; Removal

A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.

B. The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.

C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.

D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.

E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.

F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

History of Guideline

In the original edition, this Guideline provided that an attorney should receive no additional capital appointments if counsel had "inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case." In this edition, the standard has been changed to prohibit future appointment where counsel "has failed to provide high quality legal representation." The change was made because the former language was considered insufficiently stringent. Subsection B is based on Commentary to the original edition of the Guideline. Subsections C–E are taken from Subsections A and C of the original edition of the Guideline. Subsection F is new and is intended to emphasize the importance of the principle enunciated in Guideline 2.1(C).

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 (3d ed. 1992) ("Rotation of assignments and revision of roster").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.3 (3d ed. 1992) ("Removal").

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002) ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.4 (1989) ("Supervision of Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.4.2 (1989) ("Monitoring").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5 (1989).

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.1 (1989) ("Penalties Less Thank Removal").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.2 (1989) ("Removal from Program Rosters").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.3 (1989) ("Reinstatement After Removal").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.4 (1976) ("Supervision and Evaluation of Defender System Personnel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.5 (1976) ("Monitoring and Evaluation of Assigned Counsel Program Personnel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III.16 (1984) ("Supervision and Evaluation").

Commentary

Consistent with its duty to ensure that high quality legal assistance is afforded to indigent capital defendants, the Responsible Agency should monitor the performance of all capital defense counsel, including defender offices. "Admittedly, this is not an easy task and there obviously are difficulties present in having third parties scrutinize the judgments of private counsel. On the other hand, the difficulty of the task should not be an excuse to do nothing."[120]

While the Responsible Agency should investigate and maintain records regarding any complaints made against assigned counsel by judges, clients and other attorneys,[121] an effective attorney-monitoring program in death penalty matters should go considerably beyond these activities. The performance of each assigned lawyer should be subject to systematic review based upon publicized standards and procedures.[122] Counsel should be removed from the roster when counsel has failed to represent a client consistently with these Guidelines.[123]

In fulfilling its monitoring function, the Responsible Agency should not attempt to micro-manage counsel's work;[124] most lawyering tasks may reasonably be performed in a variety of ways. In order to preserve the nature of the attorney-client relationship, counsel for the accused must have the freedom to represent their client as they deem professionally appropriate. Clients, moreover, should have the right to continue satisfactory relationships with lawyers in whom they have reposed their confidence and trust. Rather, the responsibility of the Responsible Agency is to ensure that, overall, the attorney is providing high quality legal representation. Where counsel fails to do so, whether because of a mental or physical impairment,[125] or for any other reason, the

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120 ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 cmt. (3d ed. 1992).

121 *Id.*

122 *See infra* Guidelines 10.1 to 10.15.2.

123 The standard for denying additional appointments to death penalty lawyers should be more strictly applied than the standard for denying additional appointments in non-capital cases. In non-capital criminal cases, the standard provides that "where there is compelling evidence that an attorney *consistently* has ignored basic responsibilities, the attorney's name should be removed from the roster after notice and hearing, with the possibility of reinstatement after removal if adequate demonstration of remedial measures is shown." ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 cmt. (3d ed. 1992) (emphasis added). As these Guidelines make clear, low quality representation of a capital defendant may have irrevocable consequences. Accordingly, the Responsible Agency should not wait for an attorney to "consistently ignore basic responsibilities."

124 *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 cmt. (3d ed. 1992).

125 It cannot always be safely assumed that counsel who has been determined to be qualified based on past performance will represent current or future clients satisfactorily. Circumstances can change. For example, the attorney may begin suffering from illness, chemical dependency or other handicap unknown to the appointing authority, the court or the client. *See* Kirshmeier, *supra* note 28, at, 455-60 (discussing cases in which defendants were represented by lawyers who were

Responsible Agency should intervene. This may occur on the Responsible Agency's own motion or as a result of a request by the defendant or the court.[126]

In keeping with the paramount objective of protecting the rights and interests of the defendant, Subsection E provides that the Responsible Agency should have a regularized procedure for investigating and resolving complaints of inadequate representation. The procedure should recognize that many people (*e.g.*, family members of the client, witnesses whom the attorney has interviewed or not interviewed) may be in a position to provide important information. The procedure should be publicized accordingly.

The Responsible Agency must monitor cases, and take appropriate action in the event of any substandard performance. If the jurisdiction has defender organizations, the Independent Authority monitoring them must review such problems with an eye towards rectifying both deficiencies on the part of individual staff lawyers and any structural flaws that those deficiencies may reveal. If inadequate training, office workload, or some other systemic problem has resulted in representation of lower quality than required by these Guidelines and the situation is not corrected, the Independent Authority should remove the office from the roster.

Because of the unique and irrevocable nature of the death penalty, counsel or offices that have been removed from the roster should be readmitted only upon exceptional assurances that no further dereliction of duty will occur. The Responsible Agency should not readmit counsel or the office to the roster unless it determines that the original removal was in error, or finds by clear and convincing evidence that the problem which led to the removal of counsel or the office has been identified and corrected. It may condition readmission on specific actions (*e.g.*, proof of reduction in workload, proof of additional training and/or experience, substance abuse counseling, or correction of systemic defects in an office).

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intoxicated, abusing drugs, or mentally ill).

[126] *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE JUDGE Standard 6-1.1(a) (2d ed. 1986) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.").

Guideline 8.1 Training

A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;

2. pleading and motion practice;

3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;

4. jury selection;

5. trial preparation and presentation, including the use of experts;

6. ethical considerations particular to capital defense representation;

7. preservation of the record and of issues for post-conviction review;

8. counsel's relationship with the client and his family;

9. post-conviction litigation in state and federal courts;

10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

History of Guideline

The importance of training was addressed in Guideline 9.1 of the original version of the Guidelines for lawyers seeking to receive appointments in capital cases. Subsections A and D have been added to this revised edition to emphasize that the Legal Representation Plan must provide for specialized training of all members of the defense team involved in the representation of capital defendants. Subsections B and C are based on the original edition of the Guideline. This revised edition of the Guideline has been amended to emphasize that qualified training programs must be "comprehensive" in scope. Thus the eleven areas of training set forth in Subsection B are new and are intended to indicate the broad range of topics that must be covered in order for an initial training program to meet minimum requirements. The requirement of participation in a continuing legal education program every two years is also a minimum; many capital defense counsel have discovered that they must attend training programs more frequently in order to provide effective legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and Professional Development").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.6 (3d ed. 1993) ("Training Programs") in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (2002) ("Defense counsel is provided with and required to attend continuing legal education").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.16 (1973) ("Training and Education of Defenders").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID & DEFENDER ASS'N, DEFENDER TRAINING & DEVELOPMENT STANDARDS (1997).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES § III-17 (1984) ("Professional Development").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.7 (1976) (Training Staff Attorneys In A Defender System").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.8 (1976) (Training Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF

ASSIGNED COUNSEL SYSTEMS Standard 4.2 (1989) ("Orientation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.1 (1989) ("Entry-Level Training").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.2 (1989) ("In-Service Training").

Commentary

As indicated in the Commentary to Guideline 1.1, providing high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case.[127] Such training must not be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.

Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field.[128] Continuing legal education, which is required by many state bars as a matter of course for all attorneys, is critically important to capital defense attorneys. As the Commentary to Guideline 1.1 indicates, they must not only have mastery of current developments in law, forensics, and related areas, but also be able to anticipate future ones.[129]

In recognition of the central role that ongoing training plays in the provision of effective capital defense representation, a number of professional organizations, including the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Habeas Assistance Project, the NAACP Legal Defense and Education Fund, Inc., the office of the Kentucky Public Advocate, and the Association of the Bar of the City of New York, have regularly devoted significant resources to providing educational programs of the quality contemplated by this Guideline.

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127 *See, e.g.*, New York Capital Defender Office, *Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases*, *available at* http://www.nycdo.org/35b/35b-std.html (requiring that applicants submit "a description of specialized training programs regularly attended, such as the NITA, the National Criminal Defense College, or bar association criminal justice programs" and specifying that "an attorney shall not be considered eligible to be appointed as lead counsel or associate counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a basic capital training program prescribed by the Capital Defender Office").

128 As one authority has noted, capital defense counsel must exhibit "constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law." Vick, *supra* note 3, at 358.

129 *See supra* text accompanying note 27.

Guideline 9.1 Funding and Compensation

A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.

B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

C. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.

3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

D. Additional compensation should be provided in unusually protracted or extraordinary cases.

E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

History of Guideline

This Guideline was Guideline 10.1 in the original edition. The express disapproval of flat or fixed fee compensation provisions and statutory fee maximums is new to this edition. The provision is in keeping with Guideline 10.1(A) of the original edition, which mandates that counsel be fully compensated at a reasonable hourly rate of compensation, and follows the Commentary to Standard 5-2.4 of the ABA Standards for Criminal Justice: Providing Defense Services, which observes that "[t]he possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment." Subsection B (2) is new to the Guideline and has been added to provide for compensation of attorneys employed by defender organizations. Subsection B (3) is based on the original edition of the Guideline, but a provision has been added indicating that there should be no distinction between the hourly rates of compensation for services performed in or out of court. Subsection C is new to this edition and provides for compensation of the other members of the defense team. Subsection D is new to this edition. Subsection E is based on the original edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.4 (3d ed. 1992) ("Compensation and expenses").

ABA STANDARDS FOR CRIMINAL JUSTICE Standards 21-2.4, 22-4.3 (2d ed. 1980).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.7 (1973) ("Defender to be Full-Time and Adequately Compensated").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.11 (1973) ("Salaries for Defender Attorneys").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 11 (1970) ("Local Offices").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 13 (1970) ("Court Assigned Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.1 ("Assigned Counsel Fees"), 4.7.2 ("Method of Compensation"), 4.7.3 ("Payment of Expenses"), and 4.7.4 ("Only Authorized Compensation") (1989).

NAT'L LEGAL AID & DEFENDER ASS'N, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES § 3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.2 (1976) ("Defender System Salaries").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-11 (1984) ("Special Case Compensation").

Commentary

In order to fulfill its constitutional obligation to provide effective legal representation for poor people charged with crimes,[130] "[g]overnment has the responsibility to fund the full cost of quality legal representation."[131] This means that it must "firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter."[132]

As Subsection A of this Guideline emphasizes, each jurisdiction is responsible for paying not just the direct compensation of members of the defense team, but also the costs involved in meeting the requirements of these Guidelines for high quality legal representation (*e.g.*, Guideline 4.1, Guideline 8.1).

As a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and the prosecution with respect to workload, salaries, and resources necessary to provide quality legal representation (including benefits, technology, facilities, legal research, support staff, paralegals, investigators, mitigation specialists, and access to forensic services and experts). In doing so, jurisdictions must be mindful that the prosecution has access at no cost to many services for which the defense must pay. A prosecution office will not only benefit from the formal resources of its jurisdiction (*e.g.*, a state crime laboratory) and co-operating ones (*e.g.*, the FBI), but from many informal ones as well. For example, a prosecutor seeking to locate a witness in a distant city can frequently enlist the assistance of a local police department; defense counsel will have to pay to send out an investigator. Yet funding for defense services usually lags far behind prosecution funding.[133]

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130 *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

131 ABA, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 & cmt. (3d ed. 1992).

132 Pruett v. State, 574 So. 2d 1342, 1354 (Miss. 1990) (quoting Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987)).

133 Studies indicate that funding for prosecution is, on the average, three times greater than funding that is provided for defense services at both the state and federal levels. ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-1.6 cmt. (3d ed. 1992) (footnote omitted). *See also*, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 (2002) ("There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.") ("There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in

In particular, compensation of attorneys for death penalty representation remains notoriously inadequate.[134] As Justice Blackmun observed in 1994:

> [C]ompensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. . . . As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense.[135]

Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require. A 1993 study of capital representation in Texas, for example, showed that "more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and expert services and the enormous pressure that they feel in handling these cases."[136] Similarly, a survey of Mississippi attorneys appointed to represent indigent defendants in capital cases found that 82% would either refuse or be very reluctant to accept another appointment because of financial considerations.[137] A 1998 study of federal death penalty cases reported that "[a]lthough the hourly rate of compensation in federal capital cases are higher than those paid noncapital federal criminal

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addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.").

134 *See, e.g.*, Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 (1992); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991); Vick, *supra* note 3; Albert L. Vreeland, II, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626 (1991).

135 McFarland v. Scott, 512 U.S. 1256, 1257-58 (1994) (Blackmun, J., dissenting).

136 THE SPANGENBERG GROUP, *A Study of Representation in Capital Cases in Texas* (1993), at 152.

137 Friedman & Stevenson, *supra* note 134, at 31 n.148.

cases, they are quite low in comparison to hourly rates for lawyers generally, and to the imputed hourly cost of office overhead."[138]

While compensation is generally inadequate for representation at trial, it is even worse – and indeed, in a number of jurisdictions, nonexistent – for representation in state collateral proceedings.[139] Recent studies have estimated that thousands of attorney hours are required to represent a death-sentenced prisoner in such cases.[140] Not surprisingly, few attorneys are willing to take on this responsibility for negligible compensation. As a result, a substantial and growing number of condemned inmates who have completed direct review are without legal representation.[141]

It is such inmates – and the justice system – rather than lawyers (who can always move to more lucrative fields) that are victimized when jurisdictions fail to fulfill their financial responsibilities. What is "most important [is that] the quality of the representation often suffers when adequate compensation for counsel is not available."[142] This is not a merely theoretical concern. It is demonstrably the case that, by discouraging more experienced criminal defense lawyers from accepting appointments in capital cases, inadequate compensation has often left capital defense representation to inexperienced or outright incompetent counsel. A series of studies in several death penalty states have found that appointed counsel in death penalty cases have been subject to professional disciplinary action at significantly higher rates than other lawyers.[143]

These realities underlie the mandate of this guideline that members of the death penalty defense team be fully compensated at a rate commensurate with the provision of high quality legal representation. The Guideline's strong disapproval of so-called "flat fees," statutory caps, and

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138 *Federal Death Penalty Cases*, *supra* note 89, at 28.

139 For a survey of state practices regarding appointment and compensation of post-conviction counsel, see Hammel, *supra* note 46, and THE SPANGENBERG GROUP, ABA POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POSTCONVICTION DEATH PENALTY CASES (1996).

140 As discussed in the text accompanying note 117 *supra*, a 1998 study of time and expenses required in Florida capital post-conviction cases concluded that on average, over 3,300 lawyer hours are required to represent a death-sentenced prisoner in Florida's post-conviction proceedings. THE SPANGENBERG GROUP, *supra* note 117, at 16.

141 *See* Decl. Bryan A. Stevenson in *Barbour v. Haley*, No. 01-D-1530-N (M.D. Ala.) ¶ 17 (stating that there are dozens of death row inmates in Alabama without legal representation because of the $1000 per case cap on compensation for state collateral appeals); Smith & Starns, *supra* note 46, at 106-19 (discussing state provisions for appointment of counsel and states that fail to appoint or compensate counsel).

142 ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.4 cmt. (3d ed. 1992).

143 Vick, *supra* note 3, at 398 (summarizing studies).

other arbitrary limitations on attorney compensation is based upon the adverse effect such schemes have upon effective representation.[144] Rather, compensation should be based on the number of hours expended plus the effort, efficiency, and skill of counsel.[145] When assigned counsel is paid a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee.[146]

Moreover, any compensation system that fails to reflects the extraordinary responsibilities and commitment required of counsel in death penalty cases,[147] that does not provide for extra payments to counsel when unusually burdensome representation is provided, or that does not provide for the periodic payment of fees, will not succeed in obtaining the high quality legal representation required by these Guidelines.

For better or worse, a system for the provision of defense services in capital cases will get what it pays for.[148]

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144 *See id.*

145 ABA CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES Standard 5-2.4 cmt. (3d ed. 1992).

146 *See, e.g.*, Bailey v. State, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992) ("[I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. *The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor.*") (emphasis in original) (citation omitted).

147 *See supra* text accompanying notes 1-8.

148 *Cf.* Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting habeas corpus because "Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for.").

Guideline 10.1 Establishment of Performance Standards

A. The Responsible Agency should establish standards of performance for all counsel in death penalty cases.

B. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The Responsible Agency should refer to the standards when assessing the qualifications or performance of counsel.

C. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

History of Guideline

This Guideline is former Guideline 11.1 with only stylistic revisions.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.1 ("The Function of the Standards"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.1 (3d ed. 1992) ("Objective").

NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997).

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.1 (1989) ("Provision of Quality Representation").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.9 (1989) ("Standards for Performance of Counsel").

Commentary

The Structure of Guideline 10

Guideline 10 mandates the establishment of performance standards designed to insure the provision of high quality legal representation. Compliance with Guideline 10 may therefore be relevant to a determination as to whether a jurisdiction meets the requirements of Chapter 154 of the AEDPA, which provides governments with procedural advantages if they choose to establish effectual mechanisms "for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings" brought by indigent capital prisoners, and "provide standards of competency for the appointment of such counsel."[149]

[149] 28 U.S.C. § 2261(b). The standards of other Guidelines, *e.g.*, Guideline 2.1 (Legal Representation Plan), Guideline 5.1 (Qualifications of Counsel), Guideline 7.1 (Monitoring), and

Guideline 10.1 directs the Responsible Agency to promulgate performance standards. Guidelines 10.2–10.15.1 contain specific standards that should be included in any set of performance standards. They do not constitute a complete set of performance standards, however. They address only those aspects of defense representation in which death penalty cases differ from other types of criminal cases[150] and omit those that are applicable to the defense of criminal cases generally. Such standards should, however, also be included in the set established by the Responsible Agency, with the understanding that in capital cases the acceptable level of adherence to those standards must be higher than in non-capital ones. "Death is different,"[151] and, as discussed in the Commentary to Guideline 1.1, death penalty cases have become so specialized that defense counsel in such cases have duties and functions definably different from those of counsel in ordinary criminal cases. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, become educated regarding a wide range of mental health issues and scientific technologies, and be able to develop strategies for applying them in the pressure-filled environment of high-stakes, complex litigation. The level of attorney competence that may be tolerable in noncapital cases[152] can be fatally inadequate in capital ones.[153] The standards of performance established under this Guideline should accordingly

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Guideline 9.1 (Compensation and Funding), should also guide the determination as to whether a jurisdiction has "opted in" to Chapter 154.

150 There is a general description of these in the Commentary to Guideline 1.1, *supra*. Guideline 10 should be read against the background provided by that Commentary.

151 *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (plurality opinion).

152 For general standards regarding the performance of criminal defense counsel, *see* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS ANNOTATED, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979); and NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997).

153 For example, as discussed in the Commentary to Guideline 1.1, the current Supreme Court standard for effective assistance of counsel, Strickland v. Washington, 466 U.S. 668, 687 (1984), requires the defendant to show that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. However, "[m]yriad cases in which defendants have been executed confirm that *Strickland*'s minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences." Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 18 (1996). In case after case, attorneys who failed to present any evidence in mitigation of the death penalty, or who presented a bare minimum of such evidence, have been found to satisfy *Strickland*. *See, e.g.*, Chandler v. United States, 218 F.3d 1305, 1319, 1328 (11th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1204 (2001). Yet "the failure to present mitigation evidence is a virtual invitation to impose the death penalty." White, *supra* note 2, at 341.

insure that all aspects of the representation conform to the special standard of practice applicable to capital cases.[154]

Consistent with the overall purpose of these Guidelines[155] the specific standards of Guidelines 10.2-15.2 are intended to describe appropriate professional conduct. Compliance with those standards may therefore be relevant in the judicial evaluation of the performance of defense counsel to determine the validity of a capital conviction or death sentence.[156] They should in any event be utilized by the Responsible Agency in determining the eligibility of counsel for appointment or reappointment to capital cases and when monitoring the performance of counsel.[157]

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154 The standards established by the Responsible Agency should clearly state that performance in the capital context should be measured with reference to the special expertise required in capital cases. *See, e.g.,* State v. Davis, 116 N.J. 341, 355, 561 A.2d 1082, 1089 (N.J. 1989); NEBRASKA COMM'N ON PUB. ADVOCACY, STANDARDS FOR INDIGENT DEFENSE SERVICES IN CAPITAL AND NON-CAPITAL CASES. Review by the Responsible Agency should likewise be intensified, compared to the scrutiny that might be given under a system to appoint counsel in non-capital cases. *See, e.g.*, text accompanying note 123 *supra.*

155 *See supra* Guideline 1.1(A).

156 *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 396 (2000) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 cmt. at 4-55 (2d ed. 1980) for proposition that "trial counsel [in a capital case have an] obligation to conduct a thorough investigation of the defendant's background," and concluding that defense counsel performed deficiently in failing to conduct a diligent investigation into his client's background).

157 *See supra* Guidelines 5.1 and 7.1 and accompanying Commentary.

Guideline 10.2 Applicability of Performance Standards

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

History of Guideline

This Guideline is based on Guideline 11.3 of the original edition and has been revised for consistency with Guideline 1.1.

Related Standards

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002) ("Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.1 (1973) ("Availability of Publicly Financed Representation in Criminal Cases").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.5 (1989) ("Early Representation").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.6 (1989) ("Duration and Continuity of Representation").

Commentary

The Supreme Court has stated that the "existence [of a death penalty statute] on the statute books provide[s] fair warning as to the degree of culpability which the State ascribes to the act of murder."[158] In accordance with Guideline 1.1 (B), once a client is detained under circumstances in which the death penalty is legally possible, counsel should proceed as if it will be sought.

As described in the text accompanying footnotes 12-13 *supra*, early investigation to determine weaknesses in the State's case and uncover mitigating evidence is a necessity, and should not be put off in the hope that the death penalty will not be requested, or that the request will be dropped at a later point.[159] Moreover, early investigation may uncover mitigating

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[158] Dobbert v. Florida, 432 U.S. 282, 297 (1977).

[159] In a number of cases, courts have found no bar to the prosecution pursuing a death sentence, despite belated notice to the defense. *See, e.g.*, State v. Lee, 185 Ariz. 549, 555, 917 P.2d 692, 698 (1996) (affirming death sentence where state filed its written notice 87 days later than deadline provided for under state law, because defendant had actual notice that State intended to pursue death penalty); People v. District Court, Gilpin County, 825 P.2d 1000, 1002-03 (Colo. 1992) (concluding defendant received adequate notice of intent to seek death penalty where prosecution never stated death penalty would not be sought and notice was filed forty-one days before trial, even though discovery had been completed and date for filing pretrial motions had

circumstances or other information that will convince the prosecutor to forego pursuit of a death sentence.[160]

Jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty.[161] If required notice has not been given, counsel is under

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passed).

[160] *See, e.g.*, State v. Pirtle, 127 Wash. 2d 628, 642, 904 P.2d 245, 254 (Wash. 1995) (noting that under state law, before the death penalty can be sought, "there must be 'reason to believe that there are not sufficient mitigating circumstances to merit leniency,'" and "[i]nput from the defendant as to mitigating factors is normally desirable, because the subjective factors are better known to the defendant") (quoting State v. Campbell, 103 Wash. 2d 1, 24-25, 691 P.2d 929 (Wash. 1984), *cert. denied*, 47 U.S. 1094 (1985)), *cert. denied*, 518 U.S. 1026 (1996); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.030 (1998) [hereafter UNITED STATES ATTORNEYS' MANUAL] ("At the time an indictment charging a defendant with an offense subject to the death penalty is filed or unsealed, or before a United States Attorney's Office decides to request approval to seek the death penalty, whichever comes first, the United States Attorney should give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration.").

[161] Some jurisdictions require the defense be provided formal notice of the government's intent to seek the death penalty well before the guilt/innocence phase. *See, e.g.*, ARIZ. R. CRIM. P. 15.1(g)(1) (requiring a prosecutor to provide the defendant notice of intent to seek the death penalty "no later than 60 days after the arraignment in superior court"); MD. ANN. CODE art. 27, § 412(b) (2002) (providing that a person convicted of first degree murder must be sentenced to life imprisonment unless the State notifies the person in writing at least 30 days prior to trial that it intends to seek a sentence of death, and of the aggravating circumstances on which it intends to rely) (as part of an ongoing codification of Maryland law, this section has been repealed by 2002 Md. Laws 26, § 1, effective Oct. 1, 2002; an analogous provision has been enacted by 2002 Md. Laws 26, § 2, to be codified as MD. CRIM. LAW CODE ANN. § 2-201(a)); NEV. SUP. CT. R. 250(4)(c) ("No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance."); N.Y. CRIM. PROC. LAW § 250.40(1–2) (McKinney 2002) ("A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless . . . the people file with the court and serve upon the defendant a notice of intent to seek the death penalty . . . within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder . . . ."); WASH. REV. CODE ANN. § 10.95.040(2), (3) (West 2002) (stating the state is precluded from seeking the death penalty unless written notice is served on the defendant or counsel "within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice"); UNITED STATES ATTORNEYS' MANUAL, *supra* note 160, § 9-10.030 ("If the United States Attorney decides to request approval to seek the death penalty, the United States Attorney's Office should inform counsel for the defendant."). Others do not. *See, e.g.*, District Court, Gilpin County, 825 P.2d 1000, 1002 (Colo. 1992) ("There is no Colorado statute requiring the prosecutor to give notice of intent to seek the death penalty."); Sireci v. State, 399 So. 2d. 964, 970 (Fla. 1981) ("When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony

no duty to invite a death penalty prosecution. While preparing for a capital case when notice has not been given, counsel should also prepare to challenge any prosecution efforts that should be barred for failure to give notice.[162]

Counsel must continue to treat the case as capital "until the imposition of the death penalty is no longer a legal possibility."[163]

punishable by a maximum sentence of death."), *cert. denied*, 456 U.S. 984 (1982); Williams v. State, 445 So. 2d 798, 804 (Miss. 1984) ("Anytime an individual is charged with murder, he is put on notice that the death penalty may result."), *cert. denied*, 469 U.S. 1117 (1985). In jurisdictions where the prosecutor is not required to give notice of the intent to seek the death penalty, due process requires that the defendant be provided adequate notice. *See* Lankford v. Idaho, 500 U.S. 110, 119-21 (1991) (holding due process was violated where the trial court imposed a death sentence after the prosecution stated it would not recommend a death sentence and the trial judge was silent following the state's decision).

[162] *See, e.g.*, Holmberg v. De Leon, 189 Ariz. 109, 112-13, 938 P.2d 1110 (1997) (granting defense motion to strike State's notice of intent to seek death penalty on ground that it violated state court rule requiring notice within 30 days of arraignment); State v. Second Judicial Dist. Court, 11 P.3d 1209, 1211, 1215 (Nev. 2000) (concluding trial court acted within its discretion in denying prosecution motion for leave to file untimely notice of intent to seek death penalty; defense opposed motion). In accordance with the text accompanying notes 4 through 8 *supra*, counsel should be mindful of the possibility that it may be appropriate to pursue the challenge through some collateral proceeding (*e.g.*, application for a writ of prohibition).

[163] History of Guideline 1.1, *supra*.

Guideline 10.3 Obligations of Counsel Respecting Workload

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.

History of Guideline

This Guideline is based on Guideline 6.1 of the original edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) ("Workload").

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.3 ("Delays; Punctuality; Workload") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973) ("Workload of Public Defenders").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.1 (1976) ("Establishing Maximum Pending Workload Levels for Individual Attorneys").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.2 (1976) ("Statistics and Recordkeeping").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) ("Elimination of Excessive Caseloads").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-12 (1984) ("Case And Work Overload").

NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3 (1994) ("General Duties of Defense Counsel").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(c) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.2 (1989) ("Workloads of Attorneys").

Commentary

It is each attorney's duty under the Model Rules of Professional Responsibility neither to accept employment when it would "jeopardize the lawyer's ability to render competent representation"[164] nor to handle cases without "adequate preparation."[165] Applying these professional norms to the special context of defense representation in death penalty cases, this Guideline mandates that attorneys maintain a workload consistent with the provision of high quality legal representation, bearing in mind the considerations discussed in the Commentary to Guideline 6.1

Once having agreed to represent a capital client, counsel should control their overall workload so as to be able to do so effectively. Counsel who determine, in the exercise of best professional judgment, that accepting new cases or continuing with old ones will lead to providing capital defense representation of less than high quality should take such steps as may be appropriate to reduce pending or projected caseloads, such as seeking assistance from the Responsible Agency, refusing further cases and moving to withdraw from existing cases.

In short, an attorney whose workload threatens to cause a breach of his or her obligations under these Guidelines has a duty to take corrective action. Counsel in that situation may not simply attempt to muddle through.

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164 MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.1 note, at 8. (1999).

165 *Id.* at Rule 1.1 cmt. 5. *Cf.* David J. Williams, Letter to the Editor, LA. B. J., Aug./Sep. 2002, at 86 (Letter from counsel to Leslie Dale Martin, who was executed on May 10, 2002, stating, "[T]he caseload of the lead counsel was such that he only had time to read through the file once before trial. . . . This case cost me most of the respect that I formerly had for the criminal justice system.").

Guideline 10.4 The Defense Team

A. When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.

B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.

1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:

a. The Guideline specifically imposes the duty on "lead counsel," or

b. The Guideline specifically imposes the duty on "all counsel" or "all members of the defense team."

C. As soon as possible after designation, lead counsel should assemble a defense team by:

1. Consulting with the Responsible Agency regarding the number and identity of the associate counsel;

2. Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

a. at least one mitigation specialist and one fact investigator;

b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and

c. any other members needed to provide high quality legal representation.

D. Counsel should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for post-conviction review.

History of Guideline

This Guideline is new. It supplements Guideline 4.1.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1984)

("Roles of Mental Health and Mental Retardation Professionals In The Criminal Process").

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-5.7 (1985) ("Evaluation and Adjudication of Competence To Be Executed; Stay of Execution; Restoration of Competence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts") in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty To Investigate") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, Standard 13.14 (1973) ("Supporting Personnel And Facilities").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 2 (1970) ("Right To Representation, Services, And Facilities").

NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, Model Public Defender Act, Section 12 (1970) ("Personnel And Facilities").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.1 (1976) ("Assigned Counsel Fees And Supporting Services").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.4 (1976) ("Nonpersonnel Needs In Defender Offices").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-8 (1984) ("Support Staff And Forensic Experts").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators").

NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) ("Investigation").

NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF

ASSIGNED COUNSEL SYSTEMS Standard 4.6 (1989) ("Support Services").

Commentary

As reflected in Guideline 4.1 and the accompanying Commentary, the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines.[166] The team approach enhances the quality of representation by expanding the knowledge base available to prepare and present the case, increases efficiency by allowing attorneys to delegate many time-consuming tasks to skilled assistants and focus on the legal issues in the case,[167] improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.[168]

This Guideline contemplates that the Responsible Agency will ordinarily[169] begin by designating lead counsel for a particular case and then, in consultation with that counsel, designate one or more associate counsel.[170] As described in Subsection B, the role of lead counsel is to direct the work of the defense team in such a way that, overall, it provides high quality legal representation in accordance with these Guidelines and professional standards. Accordingly, lead counsel is free to allocate the duties imposed by these Guidelines to appropriate members of the defense team, with two exceptions: (1) duties (such as the one contained in Subsection C) that are specifically imposed on "lead counsel," and (2) duties (such as the one contained in Guideline 10.13) that are specifically imposed on "all counsel" or "all members of the defense team."

After designation, lead counsel should assemble the rest of the defense team. The Responsible Agency should give lead counsel maximum flexibility in this regard. For example,

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166 *See* TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 103.

167 *See* Mahoney v. Pataki, 98 N.Y.2d 45, 54, 772 N.E.2d 1118, 1123 (2002).

168 TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 103.

169 This term is meant to accommodate the variety of exigent circumstances under which the provision of high quality legal representation might require a different procedure. For example, the client may be so situated that the professionally responsible course is to have a relatively junior attorney deal with the immediate situation, designating lead counsel subsequently. Or the client might insist on having a particular retained or *pro bono* attorney involved in the representation.

170 *Cf.* N.Y. JUD. LAW § 35-b(2) (McKinney 2002) ("With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated 'lead' counsel and the other to be designated 'associated' counsel. "); Cal. Rules of Ct., R. 4.117(c)(1) (effective Jan. 1, 2003) ("If the court appoints more than one attorney, one must be designated lead counsel and . . . at least one other must be designated associate counsel."). Because the Responsible Agency has a continuing duty to monitor the performance of the defense team to insure that it is providing high quality legal representation at every stage of the case (Guideline 7.1), the Responsible Agency may appropriately change these designations to reflect developments in the case (*e.g.*, it moves to a new post-conviction stage, or lead counsel becomes ill).

counsel should structure the team in such a way as to distinguish between experts who will play a "consulting" role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections.[171] This may well require, in the words of the Guideline, "appropriate contractual arrangements," Subsection C (2).

However, Subsection C (2) provides that the Responsible Agency may impose standards on the composition of the defense team that are in accord with these Guidelines. Examples would include a requirement that a staff attorney of a defender organization utilize in-house resources in the first instance, that compensation levels be limited to levels consistent with Guideline 9.1(C), or that non-attorneys meet appropriate professional qualifications.

The defense team should include at least two attorneys, a fact investigator, and a mitigation specialist. The roles of these individuals are more fully described in the commentaries to Guidelines 1.1 and Guideline 4.1. In addition, as also described in the Commentary to Guideline 4.1, the team must have a member (who may be one of the foregoing or an additional person) with the necessary qualifications to screen individuals (the client in the first instance, but possibly family members as the mitigation investigation progresses) for mental or psychological disorders or defects and to recommend such further investigation of the subject as may seem appropriate.

The team described in the foregoing paragraph is the minimum. In many cases, more than two attorneys are necessary – for example, a specialist to assist with motions practice and record preservation, or an attorney who is particularly knowledgeable about an area of scientific evidence.[172] As discussed in the Commentary to Guideline 4.1, because mental health issues pervade capital cases a psychologist or other mental health expert may well be a needed member of the defense team. As the Commentary to Guideline 4.1 also discusses, additional expert assistance specific to the case will almost always be necessary for an effective defense.

Lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources,[173] counsel should insist on making such requests *ex parte* and *in camera*.[174]

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171 *See* James J. Clark et al., *The Fiend Unmasked: Developing the mental health dimensions of the defense, in* KENTUCKY DEP'T OF PUB. ADVOCACY, MENTAL HEALTH & EXPERTS MANUAL ch. 8 (6th ed. 2002), *available at* http://www.dpa.state.ky.us/library/manuals/mental/Ch08.html; ABA STANDARDS FOR CRIMINAL JUSTICE: MENTAL HEALTH Standard 7-1.1 & cmt., *in* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989) (mental health and mental retardation experts serving as consultants are agents of the attorney, subject to the attorney-client privilege and the work-product doctrine); *accord id.* Standard 7-3.3 cmt; *see also supra* Guideline 4.1(B)(2).

172 *Cf.* Freedman, *supra* note 50, at 1089 n.1 (each of six primary attorneys and eleven other named professionals were "critical to saving Mr. Washington's life").

173 *See supra* Guideline 4.1(B)(2).

174 Many jurisdictions provide, by statute or case law, that requests for expert assistance may

If such requests are denied, counsel should make an adequate record to preserve the issue for post-conviction review.[175]

be made *ex parte* so that indigent defendants are not required to divulge confidential work product or strategy to the prosecution. *See, e.g.*, Williams v. State, 958 S.W.2d 186, 192-94 (Tex. Crim. App. 1997); *Ex parte* Moody, 684 So. 2d 114, 120 (Ala. 1996); State v. Barnett, 909 S.W.2d 423, 428-29 (Tenn. 1995); *Ex parte* Lexington County, 314 S.C. 220, 228, 442 S.E.2d 589, 594 (1994) (equal protection concerns require hearing to be both *ex parte* and *in camera*); Brooks v. State, 259 Ga. 562, 565-66, 385 S.E.2d 81, 84 (1989) (while state could be heard on fiscal issues, showing of need for expert should be made *ex parte*), *cert. denied*, 494 U.S. 1018 (1990); McGregor v. State, 733 P.2d 416, 416 (Okla. Crim. App. 1987) ("[T]o allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants.");18 U.S.C. § 3006(A)(e)(1) (providing for *ex parte* hearings for requests for investigative, expert or other services for indigent defendants); CAL. PENAL CODE § 987.9(a) (West Supp. 2002); KAN. STAT. ANN. § 22-4508 (1995); MINN. STAT. ANN. § 611.21(a) (West Supp. 2002); NEV. REV. STAT. ANN. § 7.135 (Michie 1998); N.Y. COUNTY LAW § 722-c (McKinney Supp. 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law. Co-op. 2001); TENN. CODE ANN. § 40-14-207(b) (1997).

[175] Under the AEDPA, such a record may be critical to the ability of the client to succeed on federal habeas corpus. *See* Williams v. Taylor, 529 U.S. 420, 437 (2000); *see generally* Stephen B. Bright, *Obtaining Funds for Experts and Investigative Assistance*, THE CHAMPION, June 1997, at 31, 33; Edward C. Monahan & James J. Clark, *Funds for Defense Experts: What a National Benchmark Requires,* THE CHAMPION, June 1997, at 12.

Guideline 10.5 Relationship with the Client

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;

2. current or potential legal issues;

3. the development of a defense theory;

4. presentation of the defense case;

5. potential agreed-upon dispositions of the case;

6. litigation deadlines and the projected schedule of case-related events; and

7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (*e.g.*, prison medical providers or state psychiatrists).

History of Guideline

This Guideline collects, and slightly expands upon, material that was found in Guidelines 11.4.2, 11.6.1, and 11.8.3 of the original edition. The major revisions make this standard apply to *all* stages of a capital case and note expressly counsel's obligation to discuss potential dispositions of the case with the client.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.1 ("Establishment of Relationship"), Standard 4-3.2 ("Interviewing the Client"), Standard 4-3.8 ("Duty to Keep Client Informed"), and Standard 4-5.2 ("Control and Direction of the Case"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002) ("Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3(c) ("General Duties of Defense Counsel"), Guideline 2.2 ("Initial Interview") (1997).

Commentary

The Problem

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent uncounseled confessions or admissions and to begin to establish a relationship of trust with the client.

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."[176] There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

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[176] *See* Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, THE ADVOCATE, Mar. 2000, at 31, *available at* http://www.dpa.state.ky.us/library/advocate/mar00/plea.html; *see also* Lewis, *supra* note 91, at 840 (finding 40% of death row inmates to be chronically psychotic); Dorothy O. Lewis et al., *Neuropsychiatric, psychoeducational, and family characteristics of 14 juveniles condemned to death in the United States*, 145 AM. J. PSYCHIATRY 584, 585 (1988) (finding 50% of death sentenced juveniles in survey suffered from psychosis and all were severely abused as children).

Counsel's Duty

Although ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement;[177] others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, as discussed in the text accompanying notes 101-04 *supra*, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.[178] Client contact must be ongoing. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Similarly, a client will not – with good reason – trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential for the defense team to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.

Often, so-called "difficult" clients are the consequence of bad lawyering – either in the past or present.[179] Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.[180]

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177 *See, e.g.*, Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing), *cert. denied*, 531 U.S. 980 (2000).

178 *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 & cmt., *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). *See also* Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, THE CHAMPION, Nov. 1999, at 68 (counsel should not expect client to accept plea bargain unless opinion is founded on experience and leg work investigating the case); White, *supra* note 2, at 371, 374 (thorough investigation and relationship of trust key to persuading client to accept appropriate plea offer).

179 *See* White, *supra* note 2, at 338 ("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. Appointed capital defense attorneys sometimes exacerbate this perception by harshly criticizing their clients' conduct or making it clear that they are reluctant to represent them. A capital defendant who experiences, or previously has experienced, these kinds of judgments understandably will be reluctant to trust his attorney.").

180 A lawyer can frequently earn a client's trust by assisting him with problems he encounters in prison or otherwise demonstrating concern for the client's well being and a willingness to advocate for him. *See id.*; Lee Norton, *Mitigation Investigation*, *in* FLORIDA PUBLIC DEFENDER

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information,[181] the lawyer must understand the client and his life history.[182] To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.[183]

Counsel's Duties Respecting Uncooperative Clients

Some clients will initially insist that they want to be executed – as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect overwhelming feelings of guilt or despair rather than a rational decision.[184] Counsel should initially try to identify the source of the client's hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial.[185]

ASS'N, DEFENDING A CAPITAL CASE IN FLORIDA 25 (2001). Accordingly, such advocacy is an appropriate part of the role of defense counsel in a capital case. Indeed, a lawyer who displays a greater concern with habeas corpus doctrine than with recovering the radio that prison authorities have confiscated from the client is unlikely to develop the sort of a relationship that will lead to a satisfactory legal outcome.

[181] One important example is the fact that the client is mentally retarded – a fact that the client may conceal with great skill, *see, e.g.*, James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 484-86 (1985), but one which counsel absolutely must know. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002) (holding that mentally retarded defendants may not constitutionally be executed).

[182] *See* Goodpaster, *supra* note 2, at 321.

[183] *See* Norton, *supra* note 180, at 5; White, *supra* note 2, at 374-75 (jury will be less likely to empathize with defendant if it does "not perceive a bond between the defendant and his attorney").

[184] *See infra* Guideline 10.7(A) and accompanying Commentary; Kammen & Norton, *supra* note 176, at 32.

[185] *See* Bullington v. Missouri, 451 U.S. 430 (1981); *see also* Sattazahn v. Pennsylvania, 123 S.Ct. 732 (2003).

Counsel in any event should be familiar enough with the client's mental condition to make a reasoned decision – fully documented, for the benefit of actors at later stages of the case – whether to assert the position that the client is not competent to waive further proceedings.[186]

The Temporal Scope of Counsel's Duties

The obligations imposed on counsel by this Guideline apply to all stages of the case. Thus, post-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client's personal condition for potential legal consequences.[187] For example, actions by prison authorities (*e.g.*, solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing,[188] and changes in the client's mental state (*e.g.*, as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.[189] In any event, as already discussed, maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (*e.g.*, attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible.[190]

186 *See generally* Godinez v. Moran, 509 U.S. 389, 399-402 (1993) (setting forth minimum competency standard that the Constitution requires).

187 *See infra* text accompanying note 338.

188 *See* Riggins v. Nevada, 504 U.S. 127 (1992) (defendant was constitutionally entitled to have administration of anti-psychotic drugs cease before trial).

189 *See infra* text accompanying note 339.

190 *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a) (2002) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.").

Guideline 10.6 Additional Obligations of Counsel Representing a Foreign National

A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

B. Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

History of Guideline

This Guideline is new and reflects developments in law and practice since the original edition.

Related Standards

Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, art. 36, 21 U.S.T. 77, T.I.A.S. 6820.

Commentary

The right to consular assistance is contained in Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty ratified unconditionally by the United States in 1969. Under its provisions, an obligation rests on local authorities to promptly inform detained or arrested foreign nationals of their right to communicate with their consulate. At the request of the foreign national, local authorities must contact the consulate and permit consular communication and access.

There is considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.[191]

[191] *See* Breard v. Greene, 523 U.S. 371, 380 (1998) (Breyer, J., dissenting) (finding Paraguayan national's argument for stay of execution not wholly without merit where the United States government had submitted an *amicus* brief acknowledging that the Vienna Convention had been violated); Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT. L. 367, 368 (2002) (describing violations as "widespread and uncontested"). *See also* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.) (Order on Request for the Indication of Provisional Remedies) (Feb. 5, 2003) (text accessible at http://www.icj-ij.org/icjwww/idocket/imus/imusorder/imus_order_20030205.PDF)

Any such failure is likely to have both practical and legal implications. As a practical matter, consuls are empowered to arrange for their nationals' legal representation and to provide a wide range of other services. These include, to name a few, enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (*e.g.*, through *amicus* briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for contact with families and other supportive individuals. As a legal matter, a breach of the obligations of the Vienna Convention or a bilateral consular convention may well give rise to a claim on behalf of the client.

Enlisting the consulate's support after obtaining the client's consent to do so should therefore be viewed by counsel as an important element in defending a foreign national at any stage of a death penalty case,[192] and counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations.

Subsection B(2)(a) recognizes, however, that cases do vary. A range of considerations may make clients reluctant to have their consular office informed of their detentions. In many circumstances, such as those in which clients simply fear embarrassment if word of their plight reaches home, the attorney should counsel the client to overcome the reluctance. But if the client is a political dissident and the likely effect of informing the consulate would be to cause adverse

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(ordering United States to take all necessary measures to insure that three Mexican nationals under state death sentences are not executed pending resolution of Mexico's claim "that the United States has systematically violated the rights of Mexico and its nationals under Article 36 of the Vienna Convention").

Furthermore, counsel should be alert to the fact that the United States has bilateral consular treaties with over 50 countries which may impose obligations additional to those under the Vienna Convention, *see* www.travel.state.gov/notification5.html#provisions (listing treaties). One example is Article 16 of the Consular Convention Between the United States and the United Kingdom, 3 U.S.T. 3426 (1952), which currently covers 32 independent countries around the world that were formerly entities within the British Empire.

[192] *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting post-conviction relief because it was ineffective assistance for trial counsel not to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate"); *see also* Breard v. Greene, 523 U.S. 371, 380 (1998); Anne-Marie Slaughter, *Editorial: On a Foreign Death Row*, WASH. POST, Apr. 14, 1998, at A15 (noting that under the Vienna Convention on Consular Relations, "[a] citizen is entitled to the protection and advice of his or her government when caught in a foreign legal system and a foreign language," granting that citizen access to "a translator, local counsel and diplomatic pressure if needed"). Foreign governments often have formal assistance programs in place for nationals facing the death penalty in the United States. *See, e.g.*, Ana Mendieta, *Mexico Will Aid Nationals in US; Fund Will Help 45 Death Row Inmates*, CHICAGO SUN-TIMES, Oct. 6, 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention); *Court Blocks Execution of Canadian in Texas*, WASH. POST, Dec. 10, 1998, at A47 ("Canada . . . regularly seeks clemency for Canadians sentenced to death abroad").

consequences to his relatives without obtaining any assistance with the case, the attorney might reasonably abide by the client's direction to withhold notification. The matter should, however, be kept under continuing review, since conditions may well change over time.

Subsection A is included in the Guideline to emphasize that the determination of nationality may require some effort by counsel. A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g. one grandparent of that nationality) that would not be apparent at first glance.

Guideline 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.

History of Guideline

This Guideline is based on portions of Guideline 11.4.1 of the original edition. Changes in this Guideline clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty.

Subsection B (1) is new and describes the obligation of counsel at every stage to examine the defense provided to the client at all prior phases of the case. Subsection B (2) is also new and describes counsel's ongoing obligation to ensure that the official record of proceedings is complete.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) ("Investigation").

Commentary

At every stage of the proceedings, counsel has a duty to investigate the case thoroughly.[193] This duty is intensified (as are many duties) by the unique nature of the death penalty, has been emphasized by recent statutory changes,[194] and is broadened by the bifurcation of capital trials.[195] This Guideline outlines the scope of the investigation required a capital case, but is not intended to be exhaustive.

Guilt/Innocence

As noted *supra* in the text accompanying notes 47-49, between 1973 and 2002 some 100 people were freed from death row in the United States on the grounds of innocence.[196] Unfortunately, inadequate investigation by defense attorneys – as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony,[197] flawed or false forensic evidence,[198] and the special vulnerability of juvenile

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193 *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1, 4-6.1, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) ("Investigation").

194 *See* 28 U.S.C. § 2254(e)(2), which, as amended by the AEDPA, precludes certain claims from federal habeas corpus review if the petitioner "has failed to develop the factual basis" of them "in State court proceedings." *See also* Williams v. Taylor, 529 U.S. 420 (2000) (construing this section).

195 *See generally* Lyon, *supra* note 2; Vick, *supra* note 3. Numerous courts have found counsel to be ineffective when they have failed to conduct an adequate investigation for sentencing. *See, e.g.* 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); Brownlee v. Haley, 306 F.3d 1043, 1070 (11th Circuit 2002) (counsel ineffective for failing 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"); *infra* note 203.

196 *See* DEATH PENALTY INFORMATION CENTER: *Innocence and the Death Penalty, available at* http://www.deathpenaltyinfor.org/innoc.html (last visited November 5, 2002) (stating that there are 102 people that have been wrongly convicted of capital crimes).

197 *See generally* Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000) (canvassing special unreliability of such testimony and restricting its use); *supra* note 48.

198 Recent years have seen a series of scandals involving the prosecution's use, knowingly or unknowingly, of scientifically unsupportable or simply fabricated forensic evidence by governmental agents. *See, e.g.,* U.S. DEPT. JUSTICE, OFF. INSP. GEN., *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives Related and Other Cases* (1997) (Eighteen-months investigation into charges by whistleblower Frederic Whitehurst that FBI Laboratory mishandled "some of the most significant prosecutions in the recent history of

suspects – have contributed to wrongful convictions in both capital and noncapital cases.[199] In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error.[200] This underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence,[201] to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.[202]

In this regard, the elements of an appropriate investigation include the following:

1. Charging Documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:

a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and

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the Department of Justice" finds "significant instances of testimonial errors, substandard analytical work, and deficient practices"); Paul C. Gianelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories,* 4 VA. J. SOC. POL'Y & L. 439, 442-69 (1997) (summarizing numerous cases); *supra* note 49.

199 *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (Signet 2001 ed.).

200 *See generally* Atkins v. Virginia, 122 S. Ct. 2242, 2251-52 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."); *see also* Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (same), *cert. denied,* 450 U.S. 1001 (1981).

201 As this Guideline emphasizes, that is so even where circumstances appear overwhelmingly indicative of guilt. A recent study that includes both capital and non-capital DNA exonerations has found that in 23 percent of the cases the client had confessed notwithstanding his innocence. *See* SCHECK ET AL., *supra* note 199, at 92. *See also* Dan Morain, *Blind Justice; John Cherry's Killing Left Many Victims; Was the Accused One of Them?* L.A. TIMES, July 16, 1989, View, at 6 (noting that Jerry Bigelow confessed many times, including to the media and was eventually found to be innocent).

202 *See* Steven M. Pincus, *"It's Good to be Free": An Essay About the Exoneration of Albert Burrell,* 28 WM. MITCHELL L. REV. 27, 33 (2001).

d. defense counsel's right to obtain information in the possession of the government, and the applicability and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

(1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

(2) potential alibi witness;

(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), the degree of culpability for the offense, including:

(a) members of the client's immediate and extended family
(b) neighbors, friends and acquaintances who knew the client or his family
(c) former teachers, clergy, employers, co-workers, social service providers, and doctors
(d) correctional, probation or parole officers;

(4) members of the victim's family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:

Counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:

Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions).

Penalty

Counsel's duty to investigate and present mitigating evidence is now well established.[203] The duty to investigate exists regardless of the expressed desires of a client.[204] Nor may counsel "sit idly by, thinking that investigation would be futile."[205] Counsel cannot responsibly advise a

[203] *See, e.g.*, 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); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective for failing to investigate and present evidence of client's brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining "the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child"), *cert. denied*, 122 S. Ct. 2645 (2002); Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel's duty to investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder), *cert. denied*, 122 S. Ct. 1639 (2002); Jermyn v. Horn, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to investigate and present evidence of defendant's abusive childhood and "psychiatric testimony explaining how Jermyn's development was thwarted by the torture and psychological abuse he suffered as a child"); *supra* note 195.

[204] *See* 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), *cert. denied*, 525 U.S. 837 (1989); *see also* Karis v. Calderon, 283 F.3d 1117, 1136-41 (9th Cir. 2002), *petition for cert. filed* (U.S. Sept. 13, 2002) (No. 02-434).

[205] 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), *cert. denied*, 523 U.S. 1079 (1998).

client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.[206]

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,"[207] "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."[208] In the case of the client, this begins with the moment of conception.[209] Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (*e.g.*, failure to intervene or provide

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206 *See, e.g.*, Silva v. Woodford, 279 F.3d 825, 838-39 (9th Cir. 2002), *cert. denied,* 123 S. Ct. 342 (2002); Coleman v. Mitchell, 268 F.3d 417, 447 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002); Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) ("In addition to hampering [defense counsel's] ability to make strategic decisions, [defense counsel's] failure to investigate [defendant's background] clearly affected his ability to competently advise [defendant] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies."); United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("[C]ounsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir. 1984) (petitioner entitled to relief if record shows that "counsel could not make a valid strategic choice because he had made no investigation"), *cert. denied*, 469 U.S. 924 (1984).

207 Brown v. State, 526 So. 2d 903, 908 (Fla. 1988) (citing Hitchcock v. Dugger, 481 U.S. 393 (1987)). *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

208 Russell Stetler, *Mitigation Evidence in Death Penalty Cases,* THE CHAMPION, Jan./Feb. 1999, at 35; *see also*, ABA Criminal Justice Section, Report to the House of Delegates (Feb. 1990), *reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases*, *supra* note 84, at 63.

209 Norton, *supra* note 180, at 2 (mitigation investigation must encompass client's "whole life"); EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL DEFENSE TRIAL MANUAL ch. 12 (3d ed. 1997) [hereinafter ALABAMA CAPITAL DEFENSE TRIAL MANUAL]; Lyon, *supra* note 2, at 703 (observing that "mitigation begins with the onset of the [defendant's] life" because "[m]any [defendants'] problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy"); Vick, *supra* note 3, at 363.

necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (*e.g.*, by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[210]

Accordingly, immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client to:

1. discuss the alleged offense or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

2. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; and

3. obtain necessary releases for securing confidential records relating to any of the relevant histories.

Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer. As noted *supra* in the text accompanying note 101, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope

210 *See supra* text accompanying notes 11-26.

with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others.[211] Records – from courts, government agencies, the military, employers, etc. – can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness,[212] and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children.[213] A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.[214] The collection of corroborating information from multiple sources – a time- consuming task – is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.[215]

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211 Goodpaster, *supra* note 2, at 321; Lyon, *supra* note 2, at 703-04; Vick, *supra* note 3, at 366-67.

212 *See* Williams v. Taylor, 529 U.S. 362, 395 (2000) (counsel ineffective where they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.") (footnote omitted); Jermyn v. Horn, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective for failing to obtain school records that disclosed childhood abuse); *see also* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 209; TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 103, ch. 3; Norton, *supra* note 180, at 32-38.

213 In order to verify or corroborate witness testimony about circumstances and events in the defendant's life, defense counsel must "assemble the documentary record of the defendant's life, collecting school, work, and prison records "which might serve as sources of relevant facts. Vick, *supra* note 3, at 367; *see also* Lyon, *supra* note 2, at 705-06.

214 Norton, *supra* note 180, at 3 (counsel should "investigate at least three generations" of the client's family).

215 *See id.* (advocating "triangulation" of data).

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's contemporaneous and later conduct.[216] The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness or disability to determine whether the client's problems were ever accurately identified or properly addressed.[217]

The circumstances of a particular case will often require specialized research and expert consultation. For example, if a client grew up in a migrant farm worker community, counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child's developing brain.[218] If a client is a relatively recent immigrant, counsel must learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client's immigrant community faces in this country.[219]

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216 *See* TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT (1999).

217 *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1467 (1997) (noting damaging effects of "social conditions and experiences" often inflicted on institutionalized juvenile offenders).

218 *See* Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002), *cert. denied*, 122 S.Ct. 2645 (2002) (described *supra* note 203).

219 *See* Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (positive testimony from defendant's family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America would have humanized client and could have resulted in a life sentence for defendant convicted of 13 murders).

Miscellaneous Concerns

Counsel should maintain copies of media reports about the case for various purposes, including to support a motion for change of venue, if appropriate, to assist in *voir dire* of the jury regarding the effects of pretrial publicity, to monitor the public statements of potential witnesses, and to facilitate the work of counsel who might be involved in later stages of the case.

Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside.[220] Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.[221]

Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination in the imposition of the death penalty or in the composition of juries.[222] Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.[223]

As discussed *infra* in the text accompanying notes 247-59, counsel should consider making overtures to members of the victim's family – possibly through an intermediary, such as a clergy person, defense-victim liaison, or representative of an organization such as Murder Victim's Families for Reconciliation – to ascertain their feelings about the death penalty and/or the possibility of a plea.[224]

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220 *See* Johnson v. Mississippi, 486 U.S. 578, 586 (1988); *supra* note 6.

221 *See supra* text accompanying notes 19-22.

222 *See, e.g.*, Miller-el v. Cockrell, 2003 WL 431659 ***cite to sec. I(B)*** (U.S. Feb. 25, 2003) (ruling for habeas petitioner in reliance on evidence presented at hearings on jury discrimination claim conducted prior to trial and in state post-conviction proceedings); Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate,* N.Y. TIMES, Feb. 13, 2002, at A24 (discussing memoranda and training manuals from prosecutor's office documenting policy of racial discrimination in jury selection); Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases,* THE CHAMPION, Jan./Feb. 1997, at 22.

223 *See supra* Guideline 10.10.2; text accompanying note 7.

224 *See* Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION, June 1999, at 42; *see also* Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, at A1 (stating that the prosecutor decided to drop the death penalty in the Matthew Shepard case because the parents of the victim requested him to do so).

Guideline 10.8 The Duty to Assert Legal Claims

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

History of Guideline

This Guideline is based on Guideline 11.5.1 (The Decision to File Pretrial Motions) and Guideline 11.7.3 (Objection to Error and Preservation of Issues for Post Judgment Review) of the original edition. New language makes clear that the obligations imposed by this Guideline exist at every stage of the proceeding and extend to procedural vehicles other than the submission of

motions to the trial court.

In Subsection A (3)(b), the phrase "near certainty" is new and replaces the word "likelihood" from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death.

Subsections B and C are new to this edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.6 ("Prompt Action to Protect the Accused") and Standard 4-4.5 ("Compliance with Discovery Procedure"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995), Guideline 5.1 ("The Decision to File Pretrial Motions").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995), Guideline 5.3 ("Subsequent Filing of Pretrial Motions").

Commentary

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial."[225] For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial,[226] but also of the heightened need to fully preserve all potential issues for later review.

As the text of the first sentence of Subsection A makes clear, this obligation is not limited to trial counsel or to motions made to the trial court. For example, if a state post-conviction court rules on the merits of a claim for relief, the claim will be available for federal review even if the

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[225] Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43. For example, John Eldon Smith was executed by the State of Georgia even though he was sentenced to death by a jury selected from a jury pool from which women were unconstitutionally excluded. The federal courts refused to consider the issue because Mr. Smith's lawyers failed to preserve it. Mr. Smith's co-defendant was also sentenced to death from a jury selected from the same pool. The issue was preserved in the co-defendant's case, and the co-defendant's conviction and death sentence were vacated. At retrial, the co-defendant was sentenced to life imprisonment. Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., dissenting in part), *cert. denied*, 464 U.S. 1003 (1983).

[226] *See* NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 5.1 (1995) (listing potential motions).

state's rules required the issue to be raised at trial.[227] So, too, it may be appropriate for counsel to proceed on some claims (*e.g.*, double jeopardy) by seeking an interlocutory supervisory writ from an appellate court[228] or by otherwise seeking relief outside the confines of the capital litigation itself.[229]

As discussed in the text accompanying note 27 *supra*, most jurisdictions have strict waiver rules that will forestall post-judgment relief if an issue was not litigated at the first opportunity. An issue may be waived not only by the failure to timely file a pretrial motion, but also because of the lack of a contemporaneous objection at trial, or the failure to request a jury instruction, or counsel's failure to comply with some other procedural requirement established by statute, court rule or caselaw. Counsel must therefore know and follow the procedural requirements for issue preservation and act with the understanding that the failure to raise an issue by motion, objection or other appropriate procedure may well forfeit the ability of the client to obtain relief on that issue in subsequent proceedings.

Whether raising an issue specific to a capital case (such as requesting individual, sequestered *voir dire* on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal[230] and factual[231] bases for the request. This will

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227 *See* Ake v. Oklahoma, 470 U.S. 68, 75 (1985); *see also* Stewart v. Smith, 122 S. Ct. 2578 (2002) (*per curiam*).

228 *See, e.g.*, Schumer v. Holtzman, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983) (granting writ of prohibition sought by non-capital suspect to preclude investigation by improperly designated prosecutor). *Cf.* Hynes v. Tomei, 92 N.Y.2d 613, 706 N.E.2d 1201, 684 N.Y.S.2d 177 (1998) (invalidating portion of New York death penalty statute in proceeding for writ of prohibition brought by prosecutor), *cert. denied*, 527 U.S. 1015 (1999).

229 *See supra* text accompanying notes 4-8.

230 Counsel should always cite to any arguably applicable provision of the United States Constitution, the state constitution, and state law as bases for granting a claim. A reviewing court may refuse to consider a legal theory different from that put forward originally. *See* Anderson v. Harless, 459 U.S. 4 (1982) (refusing to consider violation of Due Process Clause of federal constitution because defense counsel in state courts relied solely upon due process clause of state constitution). For example, courts have refused to consider an assertion that a statement was taken in violation of the Sixth Amendment right to counsel because it was argued in earlier proceedings only that the statement was obtained in violation of the Fifth Amendment protection against self-incrimination. *See* McCleskey v. Zant, 499 U.S. 467 (1991). Counsel should also present all of the relevant facts at as early as feasible. *See generally* Bright, *supra* note 225, at 43, 44.

231 In this regard, as Subsection C indicates, counsel should bear in mind that in capital litigation the courts tend to be much more responsive to supplemental presentations than they might be in other contexts. *See, e.g.*, Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982); Spaziano v. State, 660 So.2d 1363 (Fla. 1995) (granting motions filed by defendant facing fifth death warrant that "seek to open by rehearing an appeal that was finalized more than thirteen years ago and a postconviction proceeding that was terminated with a denial of rehearing more than nine years ago," and ordering a remand that eventually resulted in an in-court recantation by a key witness

increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied.

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.[232] As described in the Commentary to Guideline 1.1, counsel also has a duty to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.[233] Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.[234]

Because "[p]reserving all possible grounds can be very difficult in the heat of battle during trial,"[235] counsel should file written motions *in limine* prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion.[236] Similarly, requests for rulings during the course of post-conviction proceedings (*e.g.*, for investigative resources) should be made fully and formally.

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and a life sentence, *see DNA Tests to be Done in '74 Case*, ORLANDO SENTINEL, Dec. 13, 2002 at B3).

232 *See* Bright, *supra* note 225, at 43 ("Failure to make an objection for fear of alienating the judge or jury may be a valid consideration in a case in which there is a good chance of acquittal or the length of sentence will be so short that appellate review will be irrelevant to the client. But in a capital case, it may deprive the client of a life-saving reversal on direct appeal or in habeas corpus proceedings.").

233 *See supra* text accompanying note 27. If a claim, whether then meritorious or not, is being litigated anywhere in the country, counsel is likely to be charged with knowledge that the "tools to construct their constitutional claim" exist and be expected to raise it. Engle v. Isaac, 456 U.S. 107, 133 (1982). In Smith v. Murray, 477 U.S. 527 (1986), counsel failed to raise a "losing" issue on behalf of Mr. Smith in one state court because the state supreme court had recently held the issue was meritless. Mr. Smith raised the issue in all subsequent state and federal proceedings, and, well before these were concluded, the United States Supreme Court ruled favorably on the question. However, because of counsel's previous decision to forego the presentation of a claim that was then meritless, Mr. Smith was executed.

234 For example, execution by electrocution has become *de facto* unconstitutional because state governments have concluded that challenges to the practice have merit, even though the contrary precedent remains in place. *See* In re Kemmler, 136 U.S. 436 (1890); *compare Alabama: Optional Execution by Injection*, N.Y. TIMES, Apr. 26, 2002, at A20 (discussing how Alabama enacted a law making lethal injection the state's primary method of execution when it looked as if the Supreme Court might rule that the electric chair was cruel and unusual punishment); Sarah Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (same in Florida).

235 Bright, *supra* note 225, at 45.

236 *See* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 209, at 53.

In accordance with Subsection B (2), counsel should ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court's refusal, to the substance of the court's ruling, and then at the first available opportunity make a record of what transpired in the unrecorded proceeding.[237] Counsel should also ensure that the record is clear with regard to the critical facts to support the claim. For example, if counsel objects to the peremptory strike of a juror as race-based, counsel should ensure that it is clear from the record not only that the prosecutor struck a particular juror, but the race of the juror, of every other member of the venire, and the extent to which the unchallenged venire members shared the characteristics claimed to be justifying the challenge.[238]

Further, as reflected in Guideline 10.7(B)(2), counsel at all stages of the case must determine independently whether the existing official record may incompletely reflect the proceedings, *e.g.*, because the court reporter took notes but did not transcribe them or because the court clerk does not include legal memoranda in the record transmitted to subsequent courts, or because of official negligence or misconduct.

As the nonexclusive list of considerations in Subsection A (3) suggests, there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits is at best modest. Examples of such circumstances (in addition to those in which counsel needs to forestall later procedural defenses (Subsection A (3)(c)), include instances where:

> the claim should be preserved in light of foreseeable future events (*e.g.*, the completion of an investigation, a ruling in a relevant case); or
>
> asserting the claim may increase the government's incentive to reach an agreed-upon disposition;[239] or the presentation made in support of the claim may favorably influence other relevant actors (*e.g.*, the Governor).

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237 *See* Dobbs v. Zant, 506 U.S. 357 (1993); Robinson v. Robinson, 487 S.W.2d 713, 714-15 (Tex. 1972); 4M Linen Co. v. W.P. Balard & Co., 793 S.W.2d 320, 323 (Tex. App. 1990), *writ denied* (Oct 31, 1990), *rehearing of writ of error overruled* (Jan 9, 1991).

238 Bright, *supra* note 225, at 46.

239 *See* 3 CAL. ATT'YS FOR CRIM. JUSTICE, 3 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 4 (1993 ed.).

Guideline 10.9.1 The Duty to Seek an Agreed-Upon Disposition

A. **Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.**

B. **Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:**

1. **the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;**

2. **any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;**

3. **the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;**

4. **the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;**

5. **the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;**

6. **whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;**

7. **the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;**

8. **concessions that the client might offer, such as:**

   a. **an agreement to proceed waive trial and to plead guilty to particular charges;**

   b. **an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;**

c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;

e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;

h. agreements such as those described in Subsections 8 (a)-(g) respecting actual or potential charges in another jurisdiction;

9. benefits the client might obtain from a negotiated settlement, including:

a. a guarantee that the death penalty will not be imposed;

b. an agreement that the defendant will receive a specified sentence;

c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

d. an agreement that one or more of multiple charges will be reduced or dismissed;

e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;

f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;

g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;

h. agreements such as those described in Subsections 9 (a)-(g) respecting actual or potential charges in another jurisdiction.

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

F. Counsel should not accept any agreed-upon disposition without the client's express authorization.

G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

History of Guideline

Guideline 10.9.1 is based on aspects of Guidelines 11.6.1, 11.6.2, and 11.6.3 of the original edition. New language has been added to clarify the importance of pursuing an agreed-upon disposition at every phase of the case, not just as a substitute for proceeding to trial initially.

This Guideline omits the requirement, which appeared in Guideline 11.6.1 of the original edition, of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. However, the Guideline does require counsel to obtain the client's consent before accepting any agreed-upon disposition. Moreover, the Guideline requires that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.1 ("Duty to Explore Disposition without Trial") and Standard 4-6.2 ("Plea Discussions"), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 (3d ed. 1999) ("Responsibilities of defense counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 6.1 (1995) ("The Plea Negotiation Process and the Duties of Counsel").

Commentary

Guidelines 10.9.1–2 both deal with the subject of agreed-upon dispositions. They and their associated commentaries should be read together.

"Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible"; as a result, plea bargains in capital cases are not usually "offered" but instead must be "pursued and won."[240] Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case. As in other sorts of protracted litigation, circumstances change over time and as they do (*e.g.*, through replacement of a prosecutor, death of a prosecution witness, alteration in viewpoint of a key family member of the client or the victim, favorable developments in the law or the litigation, reconsideration by the client) new possibilities arise.[241] Whenever they do, counsel must pursue them.

In many jurisdictions, the prosecution will consider waiving the death penalty after the defense makes a proffer of the mitigating evidence that would be presented at the penalty phase and explains why death would be legally and/or factually inappropriate. In some states and the federal government, this process is formalized and occurs before a decision is made whether to seek the death penalty.[242] In other jurisdictions, the process is not formalized and may occur after the prosecution has announced its intention to seek the death penalty. In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.[243]

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240 Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must be Different, Too*, THE CHAMPION, Mar. 1984, at 8, 15; *see also* Doyle, *supra* note 178.

241 Examples of agreed-upon dispositions after extended litigation include the cases of Lloyd Schlup, *see* Tim O'Neil, *Killer Who Escaped Execution Over New "Evidence" Pleads Guilty*, ST. LOUIS POST-DISPATCH, Mar. 25, 1999, at A15 (client pleads guilty to second-degree murder after new evidence appeared) and Paris Carriger, *see* Samuel R. Gross, *ABA's Proposed Moratorium: Lost Lives: Miscarriages of Justice in Capital Cases,* 61 L. & CONTEMP. PROBS. 125, 139-40 (1998) (following affirmance of federal habeas corpus relief by *Carriger v. Stewart*, 132 F.3d (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1133 (1998), client pleaded guilty to lesser offense and was released). Numerous other instances are reported in LIEBMAN ET AL., *supra* note 27, Apps. C, D.

242 *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 160, § 9-10.030. New York law gives the District Attorney a 120-day "deliberative period" to decide whether to file a notice of intent to seek the death penalty. *See* N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2002); Francois v. Dolan, 95 N.Y.2d 33, 37, 731 N.E.2d 614, 616, 709 N.Y.S.2d 898, 900 (2000). During that time, with the assistance of the Capital Defender's Office, counsel is appointed and may attempt to persuade the prosecutor not to file a notice. *See* N.Y. JUD. LAW § 35-b (McKinney 2001). The notice may also be withdrawn at any time. N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney 2002). Between 1995 and mid-2002, District Attorneys in New York formally investigated seeking the death penalty against 701 defendants, but only filed notice that they were seeking the death penalty against 43 of these. *See* New York Capital Defender Office home page, *available at* <http://www.nycdo.org>.

243 *See* Doyle, *supra* note 178; White, *supra* note 2, at 328-29.

Before entering into plea discussions, counsel should have thoroughly examined the quality of the prosecution's case and investigated possible first-phase defenses and mitigation, as discussed in the Commentary to Guideline10.7. Counsel must also consider the collateral consequences of entering a plea. For example, when the resulting adjudication of guilt could be used as an aggravating circumstance in another pending case, counsel should endeavor to structure an agreement that would resolve both cases without imposition of the death penalty.

In some cases, where there is a viable first-phase defense, it may be possible to negotiate a plea to a lesser charge. And if it is trial counsel's perception that the death penalty is being sought primarily to allow selection of a death-qualified (and therefore conviction-prone) jury, counsel should seek to remedy the situation through litigation in accordance with Guideline 10.8 as well as through negotiation. In many capital cases, however, the prosecution's evidence of guilt is strong, and there is little or no chance of charge bargaining. In these cases, a guilty plea in exchange for life imprisonment is the best available outcome.

These considerations mean that in the area of plea negotiations, as in so many others, death penalty cases are *sui generis*. Many bases for bargaining in non-capital cases are irrelevant or have little practical significance in a capital case,[244] and some uniquely restrictive legal principles apply.[245] Emotional and political pressures, including ones from the victim's family or the media, are especially likely to limit the government's willingness to bargain. On the other hand, the complexity, expense, legal risks, and length of the capital trial and appellate process may make an agreement particularly desirable for the prosecution.[246]

A very difficult but important part of capital plea negotiation is often contact with the family of the victim.[247] In some states, the prosecution is required to notify and confer with the victim's family prior to entering a plea agreement.[248] Any approaches to the victim's family should be undertaken carefully and with sensitivity. Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim's

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244 A number of concessions that the parties might exchange in the capital context appear in Subsection B.

245 *See* United States v. Jackson, 390 U.S. 570, 583 (1968) (invalidating provision of federal statute carrying capital punishment on basis that it coerced waivers or jury trial rights); Hynes v. Tomei, 92 N.Y.2d 613, 621, 706 N.E.2d 1201, 1204, 684 N.Y.S.2d 177, 180 (1998) (applying Jackson to invalidate portion of New York death penalty statute), *cert. denied* 527 U.S. 1015 (1999); New York City Bar Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty* 55 N.Y. CITY BAR REC. 129, 141-43 (2000) (describing mechanisms by which pleas in capital cases were being reached in light of *Hynes*).

246 As indicated in note 242 *supra*, plea offers are extended prior to trial in a significant proportion of cases and, as described in note 241 *supra*, also commonly occur after protracted litigation.

247 *See* Stetler, *supra* note 224, at 42.

248 *See, e.g.*, ALA. CODE § 15-23-71 (1995).

family and the client if the client is willing and able to do so. The defense team may consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims' families in the outreach effort and in crafting possible resolutions.[249] The victim's family can be critical to achieving a settlement.[250]

Except in unusual circumstances, all agreements that are made should be formally documented between the parties concerned (*e.g.*, in a writing between the client and representatives of the victim). In any event, counsel has an obligation under Guideline 10.13 to maintain in his or her own files a complete written description of any agreement.

Agreements for action or nonaction by government actors in exchange for a plea of guilty are governed by Guideline 10.9.2(B)(2) and, for the client's future benefit, should be set forth as clearly as possible on the record.[251]

In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well. As discussed in the Commentary to Guidelines 10.5 and 10.9.2, a relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.

If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client's best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously (Subsection G).

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249 *See supra* text accompanying note 224.

250 *See* McNally, *supra* note 240, at 15; White, *supra* note 2, at 368-69.

251 *See* Ricketts v. Adamson, 483 U.S. 1, 5-6 (1987) (where defendant was deemed to have breached terms of plea agreement by refusing to testify against co-defendant at a retrial, double jeopardy did not preclude state from vacating defendant's plea of guilty to second degree murder, trying him for capital murder and sentencing him to death).

Guideline 10.9.2 Entry of a Plea of Guilty

A. The informed decision whether to enter a plea of guilty lies with the client.

B. In the event the client determines to enter a plea of guilty:

1. Prior to the entry of the plea, counsel should:

a. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;

c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.

2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

History of Guideline

This Guideline amends Guideline 11.6.4 of the original edition to clarify that the decision regarding whether to enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.1 ("Duty to Explore Disposition Without Trial") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.2 ("Plea Discussions") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.4 (3d ed. 1999) ("Defendant to be Advised").

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.7 (3d ed. 1999) ("Record of Proceedings").

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 (3d ed. 1999) ("Responsibilities of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995), Guideline 6.3 "The Decision to Enter a Plea of Guilty."

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995), Guideline 6.4 "Entry of the Plea Before the Court."

Commentary

If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights.

The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel's advice regarding the advisability of a plea. The case must therefore be diligently investigated so that the client will have as realistic a view of the situation as possible. As the Commentary to Guideline10.5 describes, a client will, quite reasonably, not accept counsel's advice about the case if the attorney has failed to conduct a meaningful investigation.[252]

A competent client is ultimately entitled to make his own choice. Counsel's role is to ensure that the choice is as well considered as possible. This may require counsel to work diligently over time to overcome the client's natural resistance to the idea of standing in open court, admitting to guilt, and perhaps agreeing to permanent imprisonment. Or it may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence.[253]

Because of the factors described in the text accompanying notes 178-90 *supra*, it will often require the combined and sustained efforts of the entire defense team to dissuade the client from making a self-destructive decision. As noted there, the defense team may also need to call on family, friends, clergy, and others to provide information that assists the client in reaching an appropriate conclusion.

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252 *See supra* text accompanying note 178.

253 *See supra* Commentary to Guideline 10.5.

Guideline 10.10.1 Trial Preparation Overall

A. As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

History of Guideline

The revisions to this Guideline, which was formerly Guideline 11.7.1, are stylistic.

Related Standards

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995), Guideline 4.3 "Theory of the Case."

Commentary

Formulation of and adherence to a persuasive and understandable defense theory are vital in any criminal case. In a capital trial, the task of constructing a viable strategy is complicated by the fact that the proceedings are bifurcated. The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt.[254] At the same time, if counsel takes contradictory positions at guilt/innocence and sentencing, credibility with the sentencer is lost and the defendant's chances for a life verdict reduced. Accordingly, it is critical that, well before trial, counsel formulate an integrated defense theory[255] that will be reinforced by its presentation at both the guilt and mitigation stages.[256] Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.[257]

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254 *See* Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing), *cert. denied*, 531 U.S. 980 (2000).

255 *See infra* text accompanying notes 271-74; McNally, *supra* note 240, at 8-11; White, *supra* note 2, at 356-58.

256 As the text accompanying notes 102-03 *supra* suggests, for counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.

257 *See* Bright, *supra* note 225, at 40.

Guideline 10.10.2 Voir Dire and Jury Selection

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. Counsel should consider seeking expert assistance in the jury selection process.

History of Guideline

This Guideline is based on Guideline 11.7.2 of the original edition. Subsection A of the Guideline has been amended to make clear that potential jury composition challenges should not be limited to the petit jury, but should also include the selection of the grand jury and grand jury forepersons. Subsection B has been amended to reflect recent scholarship demonstrating that the starkest failures of capital *voir dire* are the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances which make the defendant eligible for the death penalty, and the failure to uncover jurors who are unable to consider particular mitigating circumstances. Subsection C is new. Its language is derived from NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 7.2(a)(7) (1995) ("Voir Dire and Jury Selection"), and the accompanying Commentary.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-7.2 ("Selection of Jurors"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.1 ("Selection of Prospective Jurors"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.2 ("Juror questionnaires"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.3 ("Challenge to the array"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.4 ("Conduct of Voir Dire Examination"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.5 ("Challenges for Cause"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.6 ("Peremptory Challenges"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.7 ("Procedure for Exercise of Challenges; Swearing the Jury"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.8 ("Impermissible Peremptory Challenges"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.9 ("Alternate Jurors"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 (1995) ("Voir Dire and Jury Selection").

Commentary

Jury selection is important and complex in any criminal case.[258] In capital cases, it is all the more critical. Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of *voir dire* questions, planning a strategy for *voir dire*, and choosing a jury most favorable to the theories of mitigation that will be presented. Given the intricacy of the process, counsel should consider obtaining the assistance of an expert jury consultant.[259]

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[258] *See* John H. Blume, et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1209 & n.1 (2001) ("The conventional wisdom is that most trials are won or lost in jury selection."); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 cmt. (1995) ("Voir Dire and Jury Selection").

[259] *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 cmt. (1995) ("Voir Dire and Jury Selection") (noting that the need for jury selection experts is "most obvious in extraordinary cases such as death

Counsel's jury selection strategy should minimize the problem of "death qualified" juries that result from exclusion of potential jurors whose opposition to capital punishment effectively skews the jury pool not only as to imposition of the death penalty but as to conviction.[260] Caselaw stemming from Supreme Court decisions that address capital jury selection procedures[261] has resulted in a highly specialized and technical procedure. As a practical matter, the burden rests with defense counsel to "life qualify" a jury. Counsel should conduct a *voir dire* that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law because they will either automatically vote for death in certain circumstances, or are unwilling to consider mitigating evidence.[262] Counsel should also develop a strategy for rehabilitating those prospective jurors who have indicated opposition to the death penalty. Bearing in mind that the history of capital punishment in this country is intimately bound up with its history of race relations,[263] counsel should determine whether discrimination is involved in the

penalty cases").

260 *See* Blume et al., *supra* note 258, at 1232 ("[E]xposure to the death qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty; more likely to assume that the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die; and more likely to believe that the defendant deserves the death penalty."). *See also* Liebman, *supra* note 28, at 2097 & n.164 (discussing studies demonstrating that death qualification process produces juries more likely to convict than non-death-qualified juries, and that repeated discussion of death penalty during *voir dire* in capital cases makes jurors substantially more likely to vote for death).

Nonetheless, the current state of Supreme Court caselaw is that a jurisdiction does not violate the federal Constitution by using the death qualification process. *See* Lockhart v. McCree, 476 U.S. 162, 170 (1986).

261 *See, e.g.*, Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding "juror[s] who will automatically vote for the death penalty in every case" or are unwilling or unable to give meaningful consideration to mitigating evidence must be disqualified from service); Wainwright v. Witt, 469 U.S. 412, 415-16 (1985) (holding that trial judges may exclude from a capital jury persons with absolutist views on the death penalty, such that they are either in favor of, or opposed to it in every case); Adams v. Texas, 448 U.S. 38 (1980) (invalidating statute disqualifying any juror who would not swear "that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact"); Witherspoon v. Illinois, 391 U.S. 510, 513 (1968) (holding that persons who have qualms about the death penalty in general, and who might be inclined to oppose it as a matter of public policy, but who can put aside those reservations in a particular case, and in compliance with their oaths as jurors consider imposing the death penalty according to the relevant state law, may not be precluded from serving as jurors in a death penalty case).

262 *See* Blume et al., *supra* note 258, at 1247-53.

263 *See* Stephen D. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439–42 (1995) (examining the historic relationship between racial violence and the death penalty, and describing how racial prejudice continues to influence capital sentencing decisions); William S. Loquist,

jury selection process. Counsel should investigate whether minorities or women are underrepresented on the jury lists from which grand and petit juries are drawn, or if race or gender played a role in the selection of grand jury forepersons.[264] The defense in a capital case is entitled to *voir dire* to discover those potential jurors poisoned by racial bias,[265] and should do so when appropriate. Death qualification often results in the removal of more prospective jurors who are members of minority groups than those who are white, because minority jurors are more likely to express reservations about the death penalty.[266] Neither race nor gender may form a basis for peremptory challenges,[267] but a recent empirical analysis of capital murder cases supports the conclusion that "discrimination in the use of peremptory challenges on the basis of race and gender . . . is widespread."[268] Counsel should listen closely to the prosecutor's *voir dire*, challenges for cause and reasons for exercising peremptory challenges, make appropriate objections, and ensure that all information critical to a discrimination claim is preserved on the record.[269]

Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity, 87 IOWA L. REV. 1505, 1535 (2002) (presenting social science data).

264 *See* Campbell v. Louisiana, 523 U.S. 392, 395 (1998); Amadeo v. Zant, 486 U.S. 214, 216-17 (1988); Rose v. Mitchell, 443 U.S. 545, 548 (1979).

265 *See* Turner v. Murray, 476 U.S. 28, 38 (1986).

266 *See* Bright, *supra* note 225, at 20.

267 *See* Batson v. Kentucky, 476 U.S. 79, 83 (1986); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128-29 (1994). *See also* Miller-el v. Cockrell, 2003 WL 431659 (U.S. Feb. 25, 2003).

268 David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001). *See also* Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters,* 1994 WIS. L. REV. 511 (finding persistent widespread discrimination in the use of peremptory challenges and attributing it to unwillingness or inability of the courts to scrutinize manifestly pretextual nonracial justifications). These findings emphasize the duty of counsel to pursue this area energetically, both factually and legally. *See, e.g.*, Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As A Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) (proposing 13th Amendment theory entitling a minority defendant to specific number of minority jurors).

269 *See supra* Guideline 10.8(B)(2) and text accompanying note 238.

Guideline 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.

History of Guideline

The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel's duty to present arguments in mitigation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.1 (1995) ("Obligations of Counsel in Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.2 (1995) ("Sentencing Options, Consequences and Procedures").

Commentary

Capital sentencing is unique in a variety of ways, but only one ultimately matters: the stakes are life and death.

This Commentary is written primarily from the perspective of trial counsel. But corresponding obligations rest on successor counsel. This Guideline has been broadened to include them because of the realities that in capital cases (a) more evidence tends to become available to the defense as time passes,[270] and (b) updated presentations of the defense case on penalty in accordance with Guideline 10.15.1 (E) (3) may influence decisionmakers both on the bench (*e.g.*, an appellate court considering a claim of ineffective assistance of counsel) and off it (*e.g.*, the prosecutor, the Governor).

The Importance of an Integrated Defense

During the investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, "the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation."[271] Consistency is crucial because, as discussed in the Commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant

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270 *See supra* text accompanying note 38.

271 Lyon, *supra* note 2, at 711.

did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.[272] First phase defenses that seek to reduce the client's culpability for the crime (*e.g.*, by negating intent) rather than to deny involvement altogether are more likely to be consistent with mitigating evidence of mental illness, retardation, domination by a co-defendant, substance abuse, or trauma.[273] But whether or not the guilt phase defense will be that the defendant did not commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase.[274]

The Defense Presentation at the Penalty Phase

As discussed in the Commentary to Guideline 10.7, areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death.[275] In particular, a mitigation presentation

272 *See id.* at 708.

273 In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are "imperfect" versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense. *See* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 856-57 (1992) (reviewing Beverly Lowry, CROSSED OVER: A MURDER, A MEMOIR (1992)). Of course, the defendant's penalty phase presentation may not constitutionally be limited to statutory mitigating circumstances and the jury must be allowed to give full consideration to any non-statutory ones he advances. *See* Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978).

274 For an example of an argument making an effective transition, see Edith Georgi Houlihan, *Defending the Accused Child Killer,* THE CHAMPION, Apr. 1998, at 23. Lingering doubt is a permissible mitigating circumstance in some jurisdictions (*e.g.*, California, *see* People v. Sanchez, 12 Cal. 4th 1, 77-78, 906 P.2d 1129, 1178, 47 Cal. Rptr. 2d 843, 892-93 (1995), *cert. denied*, 519 U.S. 835 (1996)), but not in others (*e.g.*, Florida, *see* Way v. State, 760 So. 2d 903, 916-17 (Fla. 2000), *cert. denied*, 531 U.S. 1155 (2001)).

Existing caselaw in the United States Supreme Court holds that a capital defendant has no federal constitutional right to have lingering doubt considered as a mitigating circumstance at the penalty phase. Franklin v. Lynaugh, 487 U.S. 164, 174-75 (1988). Given the significant number of death row exonerations, and the degree to which these have plainly troubled many Justices, *see* Atkins v. Virginia, 122 S. Ct. 2242, 2251 n.25 (2002) ("Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated."), there is ample reason to doubt the force of this precedent. *See* MANDATORY JUSTICE, *supra* note 48, at 40-41 (advocating allowing lingering doubt to be considered as a mitigating circumstance); Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307 (2001).

275 *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"). Similarly, counsel could appropriately argue to the jury that the death

may be offered not to justify or excuse the crime "but to help explain it."[276] If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense, counsel should endeavor to show the combination of factors that led the client to commit the crime.[277] In any event, it is critically important to construct a persuasive narrative, rather than to simply present a catalog of seemingly unrelated mitigating factors.[278]

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.[279] 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.[280] Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose" expert who may have insufficient knowledge or experience to testify persuasively.[281] In order to prepare effectively for trial, and to choose the best experts, counsel should take advantage of training materials and seminars and remain current on developments in fields such as neurology and psychology, which often have important implications for understanding clients' behavior.[282] Counsel should also seek advice and assistance from colleagues and experts in the field of capital litigation.

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sentence should not be imposed on a client because doing so would tend to incite the client's political followers to avenge him by committing further crimes. *See, e.g,* Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES, July 11, 2001, at B1 (reporting successful use of this argument at trial of defendant convicted of bombing American embassy).

276 *See generally* Haney, *supra* note 91, at 560.

277 *Id.* at 600.

278 *See* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1140-41 (1997) (noting that jurors find expert testimony unpersuasive if it is not tied into other evidence presented in the case).

279 *See* White, *supra* note 2, at 342-43.

280 *See, e.g.*, Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2001) ("the introduction of expert testimony would also have been important" to explain the effects that "serious physical and psychological abuse and neglect as a child" had on the defendant).

281 *See* Caro v. Calderon, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, counsel failed to consult neurologist or toxicologist who could have explained neurological effects of defendant's extensive exposure to pesticides), *cert. denied*, 527 U.S. 1049 (1999).

282 High quality continuing legal education programs on the death penalty, such as those noted *supra* in the Commentary to Guideline 8.1, regularly present such information.

Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions.[283] Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.[284]

Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.[285] Similarly, acquaintances who can testify to the client's performance of good works in the community may help the decisionmaker to have a more complete view of him. None of this evidence should be offered as counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future.

In addition to humanizing the client, counsel should endeavor to show that the alternatives to the death penalty would be adequate punishment. Studies show that "future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials," whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration.[286] Accordingly, counsel should make every effort to present information on this subject. Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors' fears and reinforce other positive mitigating evidence.[287] Counsel should therefore always encourage the client not only to avoid any disciplinary infractions but also to participate in treatment programs and/or educational, religious or other constructive activities.

Counsel should emphasize through evidence, argument, and/or instruction that the client will either never be eligible for parole, will be required to serve a lengthy minimum mandatory sentence before being considered for parole, or will be serving so many lengthy, consecutive sentences that he has no realistic hope of release.[288] In at least some jurisdictions, counsel may be

283 *See* Sundby, *supra* note 278, at 1163-84.

284 *See id.* at 1118, 1151.

285 *See id.* at 1152-62; *see also* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 12-14 (1999).

286 *See* John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398-99 (2001).

287 *See* Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (jury would "quite naturally" give great weight to the testimony of disinterested witnesses, such as "jailers who would have had no particular reason to be favorably predisposed toward one of their charges"); Sundby, *supra* note 278, at 1147 (juries tend to respond favorably to testimony of prison employees).

288 The Supreme Court has held that "when 'a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment

allowed to present evidence concerning the conditions under which such a sentence would be served.[289]

Counsel should also consider, in consultation with the client, the possibility of the client expressing remorse for the crime in testimony, in allocution, or in a post-trial statement. If counsel decides that a trial presentation by the client is desirable, and the proposed testimony or allocution is forestalled by evidentiary rulings of the court either disallowing it or conditioning it on unacceptable cross-examination, counsel should take care to make a full record of the circumstances, including the content of the proposed statement. In light of the strong common law underpinnings of allocution and the broad constitutional right to present mitigation that has already been described, any such issue is likely to merit the careful examination of successor counsel.

Finally, in preparing a defense presentation on mitigation counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible.[290]

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without possibility of parole, due process entitles the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel."'" Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726, 728 (2002) (*quoting* Shafer v. South Carolina, 532 U.S. 36, 39 (2001) and Simmons v. South Carolina, 512 U.S. 154 (1994)). The precise contours of this rule remain in dispute, *see* Brown v. Texas, 522 U.S. 940 (1997), and counsel may appropriately seek to extend them (*e.g.*, by applying the rule to other alternative sentences than life imprisonment without parole or by requiring that the jury receive the information through instructions).

Some state courts have held that the trial court must resolve, before the capital sentencing hearing, issues such as the length of other sentences the defendant would serve and whether he would be eligible for parole. *See* Clark v. Tansy, 118 N.M. 486, 493, 882 P.2d 527, 534 (N.M. 1994) (trial court must, upon defendant's request, impose sentence for noncapital convictions prior to jury deliberations on death penalty); Turner v. State, 573 So. 2d 657, 674-75 (Miss. 1990) (trial court should determine defendant's habitual offender status before capital sentencing hearing so jury could be accurately informed of defendant's parole ineligibility), *cert. denied,* 500 U.S. 910 (1991).

In other jurisdictions, the defense can at least argue that the defendant is *likely* to receive lengthy, consecutive sentences. *See* Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) (length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider), *cert. denied,* 510 U.S. 836 (1993); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994) (jury could properly consider in mitigation that alternative to death sentences would have been two life sentences with combined minimum mandatory of 50 years).

[289] In the federal capital sentencing of a defendant convicted of bombing American embassies overseas, the defense presented evidence about conditions at the federal "Super Max" prison in Florence, Colorado, where the defendant would be incarcerated if sentenced to life without parole. *See* Benjamin Weiser, *Lawyers for Embassy Bomber Push for Prison Over Execution,* N.Y. TIMES, June 27, 2001, at B4; *see also infra* note 310. The defendant was subsequently sentenced to life without parole. *See* Weiser, *supra* note 275.

The Defense Response to the Prosecution's Penalty Phase Presentation

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.[291] 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. As discussed in the Commentary to Guideline 10.2, jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty. If required notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.[292]

Counsel should carefully research applicable state and federal law governing the admissibility of evidence in aggravation. Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact.[293]

If (but only if)[294] the defense presents an expert who has examined the client, a prosecution expert may be entitled to examine the client to prepare for rebuttal.[295] Counsel should become familiar with the governing law regarding limitations on the scope of expert evaluations conducted by prosecution experts, and file appropriate motions to ensure that the scope of the examination is no broader than legally permissible.[296] If the examination is not limited as counsel deem

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290 However, as Subsection G suggests, if there is uncertainty as to the scope of how wide this opening would be or if counsel believes that excessive rebuttal is to be admitted, they should object and make a full record on the issue.

291 *See* White, *supra* note 2, at 358.

292 *See supra* text accompanying notes 161-62.

293 *See* Smith v. Stewart, 189 F.3d 1004, 1010 (9th Cir. 1999) (concluding counsel was ineffective in part for failing to challenge the state's use of prior rape convictions in aggravation as prior violent offenses where both of the convictions occurred when Arizona law did not include violence as an element of rape), *cert. denied*, 531 U.S. 952 (2000); Parker v. Bowersox, 188 F.3d 923, 929-31 (8th Cir. 1999) (concluding trial counsel was ineffective for failing to present evidence to rebut the only aggravating circumstances), *cert. denied*, 529 U.S. 1038 (2000); Summit v. Blackburn, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (concluding trial counsel was ineffective for failing to argue the lack of corroborating evidence of the sole aggravating factor when under state law a defendant cannot be convicted based solely on uncorroborated confession and the only evidence supporting the aggravating factor was defendant's confession).

294 *See* Estelle v. Smith, 451 U.S. 454 (1981).

295 As described *infra* in note 296, several states explicitly confine this right to the penalty phase.

296 *See, e.g.* FED. R. CRIM. P. 12.2(c) ("No statement made by the defendant in the course of any [court-ordered psychiatric] examination . . . shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the

appropriate, Subsection J(1) requires them to give careful consideration to their response (*e.g.*, refuse to participate on possible pain of preclusion, participate at the cost of an irretrievable surrender of information, seek relief from a higher court). Counsel must discuss with the client in advance any evaluation that is to take place and attend the examination in order to protect the client's rights (Subsections J(2)-(3)). Counsel may also seek to have the evaluation observed by a defense expert.

Counsel should integrate the defense response to the prosecution's evidence in aggravation with the overall theory of the case. In some cases, counsel's response to aggravating evidence at the penalty stage converges with the defense presentation at the guilt/innocence phase. The prosecutor will offer no additional evidence at the penalty phase but will simply rely on aggravating factors established by the evidence at the guilt/innocence phase, such as that the murder was committed during the course of a felony.[297] In such cases, counsel's rebuttal presentation should focus on the circumstances of the crime, and defendant's conduct as it relates to the elements of the applicable aggravating circumstances.

In other cases, the prosecution will introduce additional aggravating evidence at the penalty stage. If the prosecutor seeks to introduce evidence of unadjudicated prior criminal conduct as aggravating evidence, counsel should fully investigate the circumstances of the prior conduct and determine whether it is properly admissible at the penalty stage.[298]

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defendant has introduced testimony."); Abernathy v. State, 265 Ga. 754, 462 S.E.2d 615 (1995) (if defendant intends to present expert mental health testimony as mitigating evidence, he must submit to a mental health examination by a State expert, but State expert may only testify in rebuttal to the testimony of a defense expert or of the defendant himself); State v. Reid, 981 S.W.2d 166 (Tenn. 1998) (once defendant files notice of intent to present expert testimony regarding mitigating evidence, State expert may examine defendant, but State expert report will be provided only to the defense until after conviction and after defendant confirms intent to rely on expert testimony as part of case in mitigation); FLA. R. CRIM. P. 3.202(d); Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) (where defendant plans to use in the penalty phase the testimony of an expert who has interviewed him or her, the State is entitled to examine the defendant only after conviction and after the State has certified that it will seek the death penalty), *cert. denied*, 514 U.S. 1022 (1995). *See also* State v. Johnson, 2003 Ga. LEXIS 12 (Jan. 13, 2003).

297 *See, e.g.*, Lowenfeld v. Phelps, 484 U.S. 231 (1988); FLA. STAT. ANN. § 921.141(5) (West 2001) (listing as an aggravating circumstance the fact that the crime was committed while the defendant was engaged in, or an accomplice to, the commission or attempted commission or flight after committing or attempting to commit any one of twelve enumerated felonies). In some states, *e.g.*, New York, the prosecution is essentially limited at the penalty phase to the evidence admitted at the guilt phase. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002).

298 In some jurisdictions, only criminal conduct for which the client has been convicted is admissible at the penalty stage. *See, e.g.*, FLA. STAT. ANN. § 921.141(5) (West 2001) (listing as aggravating circumstance the fact that the defendant was previously convicted of capital felony or a felony involving violence). In others, no conviction is necessary, but the admissibility of a prior bad act may depend on other factors. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 1999) (allowing admission of evidence of other criminal activity at penalty phase even though the defendant was not convicted for it, unless the defendant was prosecuted and acquitted or it did not involve the use or threat of violence); Pace v. State, 271 Ga. 829, 842, 524 S.E.2d 490, 505 (1999) (prior

If the prosecution relies upon a prior conviction (as opposed to conduct), counsel should also determine whether it could be attacked as the product of invalid guilty plea,[299] as obtained when the client was unrepresented by counsel,[300] as a violation of double jeopardy,[301] or on some other basis. Counsel should determine whether a constitutional challenge to a prior conviction must be litigated in the jurisdiction where the conviction occurred.[302]

In jurisdictions where victim-impact evidence is permitted, counsel, mindful that such evidence is often very persuasive to the sentencer, should ascertain what, if any, victim-impact evidence the prosecution intends to introduce at penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence[303] and minimizing its effect on the sentencer.[304] In particular, in light of the instability of the caselaw,[305] counsel should consider the federal constitutionality of admitting such evidence to be an open field for legal advocacy.[306]

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crime without conviction may be used in aggravation unless there is a previous acquittal), *cert. denied*, 531 U.S. 839 (2000). As a matter of constitutional law, the continuing validity of the admission of unadjudicated prior misconduct has been called into further question by Ring v. Arizona, 122 S. Ct. 2248 (2002).

299 *See* Boykin v. Alabama, 395 U.S. 238, 242-244 (1969).

300 *See* Gideon v. Wainwright, 372 U.S. 335, 338-39 (1963).

301 *See* Menna v. New York, 423 U.S. 61, 61-62 (1975).

302 *See* Lackawanna County Dist. Att'y v. Coss, 531 U.S. 923 (2001), *see also supra* note 21.

303 Limitations on the admission of such evidence exist in a number of jurisdictions as a matter of state law. *See, e.g.*, Bivins v. State, 642 N.E.2d 928 (Ind. 1994), *cert. denied,* 516 U.S. 1077 (1996); People v. Edwards, 54 Cal. 3d 787, 832-36, 819 P.2d 436, 464-67, 1 Cal. Rptr. 2d 696 (1991), *cert denied*, 506 U.S. 841 (1992).

304 *See generally* Jeremy A. Blumenthal, *The Admissibility of Victim Impact Statements at Capital Sentencing: Traditional and Nontraditional Perspectives*, 50 DRAKE L. REV. 67 (2001); Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence during the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 612-15 (1992); Ellen Kreitzberg, *How Much* Payne *Will the Courts Allow?*, THE CHAMPION, Jan./Feb. 1998, at 31; Michael Ogul, *Capital Cases: Dealing with Victim Impact Evidence* (pts. 1 & 2), THE CHAMPION, June 2000, at 43, Aug./Sept. 2000, at 42.

305 *Compare* Booth v. Maryland, 482 U.S. 496, 501-03 (1987) (victim impact evidence unconstitutional), *and* South Carolina v. Gathers, 490 U.S. 805, 810-12 (1989) (prosecutorial argument for death based upon laudable characteristics of victim unconstitutional), *with* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (overruling *Booth* and *Gathers* while noting that Due Process clause is violated if such evidence is "unduly prejudicial").

306 For example, on the assumption that victim impact evidence in support of the death penalty would be admissible, there is conflicting caselaw in various states on whether the defense can call members of the victim's family to testify in opposition to the client's execution. *Compare* Greene v. State, 343 Ark. 526, 531-36 (2001) (defendant not entitled to present testimony of

Counsel should also evaluate how to blunt certain intangible factors that can be damaging to a capital defendant at sentencing, including the heinous nature of the crime or the sentencer's possible racial antagonism for the client.[307] In jurisdictions where the alternative to a death sentence is life without the possibility of parole, counsel should consider informing the jury of the defendant's parole ineligibility in order to blunt the concern that the defendant may one day be released from custody.[308] If they have not done so previously in building their affirmative case for a penalty less than death,[309] counsel should also consider putting on evidence describing the conditions under which the client would serve a life sentence to rebut aggravating evidence of future dangerousness.[310]

Jury Considerations

Personal argument by counsel in support of a sentence less than death is important. Counsel who seeks to persuade a decisionmaker to empathize with the client must convey his or her own empathy.[311] While counsel may also stress the gravity of the sentencer's life and death decision, the fact that the jury will have been death-qualified[312] means that categorical arguments against the death penalty are unlikely to be effective.

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surviving spouse that she forgave him and opposed death sentence), Ware v. State, 360 Md. 650, 688 (2000) (victim's family member not allowed to give opinion on whether death penalty should be invoked) and People v. Williams, 161 Ill. 2d 1, 70 (1994) (witness' opinion that defendant should not be sentenced to death is inadmissible) *with* Murphy v. State, 47 P.3d 876 (Okla. Crim. App. 2002) (victim's family allowed to make sentencing recommendation), and Tate v. Matteson, 123 Idaho 622, 625 (1993) (same).

307 *See* White, *supra* note 2, at 359-60.

308 *See supra* text accompanying notes 286-88.

309 *See supra* text accompanying note 289.

310 *See* United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000) (describing how, to rebut government's assertion of future dangerousness, federal capital defendant put on evidence at penalty phase regarding conditions at "Supermax" prison where defendant would be housed if sentenced to life imprisonment), *cert. denied*, 122 S. Ct. 71 (2001); *supra* note 289.

311 *See supra* text accompanying note 183; White, *supra* note 2, at 374-75. An attorney whose contempt for his client is palpable cannot provide effective representation. *See, e.g.*, Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997) (counsel's hostility to his own client was so patent that defendant was "'functionally . . . totally denied counsel'") (*quoting* Rickman v. Dutton, 864 F. Supp. 686, 701 (1994)), *cert. denied*, 523 U.S. 1133 (1998)); Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) ("Counsel completely abdicated his responsibility to Clark when he told the jury that Clark's case presented his most difficult challenge ever in arguing against imposition of the death penalty.").

312 *See supra* text accompanying note 260.

It is essential that counsel object to evidentiary rulings, instructions, or verdict forms that improperly circumscribe the scope of the mitigating evidence that can be presented or the ability of the jury to consider and give effect to such evidence.[313] Counsel should also object to and be prepared to rebut arguments that improperly minimize the significance of mitigating evidence[314] or equate the standards for mitigation with those for a first-phase defense.[315] At the same time, counsel should request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence.[316] It is vital that the instructions clearly convey the differing unanimity requirements applicable to aggravating and mitigating factors.[317]

If the jury instructions are insufficient to achieve the purposes described in the previous paragraph or are otherwise confusing or misleading, counsel must object, even if the instructions

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313 *See, e.g.*, Penry v. Johnson, 532 U.S. 782, 799-800 (2001) (instructions and verdict form prevented jury from giving effect to mitigating evidence of defendant's mental retardation); McKoy v. North Carolina, 494 U.S. 433, 438-40 (1990) (verdict form and instructions suggesting mitigating circumstances must be found unanimously improperly restricted jurors' ability to give effect to mitigating evidence); Mills v. Maryland, 486 U.S. 367, 384 (1988) (same).

314 Prosecutors will frequently try to argue, for example, that "not everybody" who is abused as a child grows up to commit capital murder or that mental illness did not "cause" the defendant to commit the crime. *See* Haney, *supra* note 91, at 589-602. Both of these arguments are objectionable on Eighth Amendment grounds because they nullify the effect of virtually all mitigation. *Id.* In any event, counsel can seek to counter such arguments by emphasizing the unique combination of factors at play in the client's life and demonstrating that there are causal connections between, for example, childhood abuse, neurological damage, and violent behavior. *See, e.g.*, Phyllis Crocker, *Childhood Abuse and Adult Murder: Implications For*, 77 N.C. L. REV. 1143, 1157-66 (1999) (reviewing scientific literature).

315 Arguments confusing the standards for a first phase defense and mitigation also violate the Eighth Amendment. *See generally* Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (trial court improperly rejected mitigating evidence of defendant's emotional disturbance on ground that defendant "knew the difference between right and wrong"); Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases,* 66 FORDHAM L. REV. 21 (1997).

316 *See* Blume et al., *supra* note 286, at 398-99. *See also* James Luginbuhl & Julie Howe, *Symposium: the Capital Jury Project, Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. REV. 1161 (1995) (results of study show that substantial percentage of jurors do not understand instructions concerning aggravating and mitigating evidence, burdens of proof and unanimity); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (results of study showing jury confusion as to meaning of instructions, particularly about the mitigating circumstance burden of proof).

317 *See* McCoy v. North Carolina, 494 U.S. 433 (1990) (instructions allowing jury to consider only mitigating circumstances found unanimously violated Eighth Amendment); Mills v. Maryland, 486 U.S. 367 (1988) (same result where jury could misinterpret instructions to require unanimity).

are the standard ones given in the jurisdiction. If the court does not instruct the jury on individual mitigating circumstances, counsel should spell them out in closing argument.

Record Preservation

In some jurisdictions, counsel is required or allowed to either proffer to the court or present to the sentencer mitigating evidence, regardless of the client's wishes.[318] Even if such a presentation is not mandatory, counsel should endeavor to put all available mitigating evidence into the record because of its possible impact on subsequent decisionmakers in the case.

318 *See, e.g.*, Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) ("When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be."); State v. Koedatich, 112 N.J. 225, 329-33, 548 A.2d 939, 993-95 (1988) (mitigating factors must be introduced regardless of the defendant's position), *cert. denied*, 488 U.S. 1017 (1989).

Guideline 10.12 The Official Presentence Report

A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

1. where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;

2. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;

3. review the completed report;

4. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;

5. take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.

History of Guideline

This Guideline is based on Guideline 11.8.4 of the original edition. New requirements in the Guideline include: (1) counsel's obligation to become familiar with the procedures governing preparation, submission, and verification of official presentence reports, where there is a chance that such a report may be presented to the court at any time; (2) counsel's obligation to provide information that is favorable to the client to the person who is preparing the report; (3) counsel's obligation to prepare the client for and attend an interview with the person preparing the report, provided counsel has first determined such an interview to be appropriate.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.3 (1995) ("Preparation for Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.4 (1995) ("The Official Presentence Report").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.5 (1995) ("The Prosecution's Sentencing Position").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.6 (1995) ("The Defense Sentencing Memorandum").

Commentary

In many jurisdictions, an official presentence report may be prepared prior to the imposition of sentence in a capital case.[319] How such reports may be used in the sentencing process differs from jurisdiction to jurisdiction, and counsel should become familiar with the statutes, court rules, caselaw, and local practice governing their use.[320] There are also constitutional limits on the use of presentence reports in capital sentencing.[321]

In some jurisdictions, a presentence report is not prepared unless requested by the defense. Counsel should carefully consider the implications of such a request.[322] In jurisdictions where a presentence report is prepared regardless of the wishes of the defense, counsel should submit information favorable to the client, including the client's social history and expert evaluations. If the report preparer does not include the defense materials, counsel should consider how they might otherwise be made part of the client's official records. This information may not only affect the sentencing decision, but also the client's classification, programming and treatment in the prison system following imposition of sentence. In any event, counsel should make a clear record of any inaccuracies they discern in the report.

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319 *See, e.g.*, Muhammad v. State, 782 So. 2d 343, 363 n.10 (Fla. 2001), *cert. denied*, 122 S. Ct. 323 (2001); State v. Dunster, 262 Neb. 329, 362-65, 631 N.W.2d 879, 906-08 (2001), *cert. denied*, 122 S. Ct. 1210 (2002); *Ex parte* George, 717 So. 2d 858, 859 (Ala. 1998), *cert. denied*, 525 U.S. 1024 (1998).

320 For example, in Florida, a presentence investigation report is required in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigating evidence. Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001), *cert. denied*, 122 S. Ct. 323 (2001). In California, although a probation report is prepared prior to the trial court's ruling on a capital defendant's post-trial motion to modify the death verdict, it is error for the judge, in ruling on that motion, to consider information contained in the probation report that was not presented to the jury. *See, e.g.*, People v. Kipp, 956 P.2d 1169, 1189-90, 18 Cal. 4th 349, 382-83, 75 Cal. Rptr. 2d 716 (1998), *cert. denied*, 525 U.S. 1152 (1999).

321 *See* Gardner v. Florida, 430 U.S. 349, 358-62 (1977) (holding that if, in imposing a death sentence, the trial judge relies in part on confidential information in a presentence investigation report, the report must be disclosed to defense counsel or due process is violated).

322 For example, in Ohio, a presentence report is prepared only at the request of the defense, and if the defense requests the preparation of a report, the prosecution is allowed to present victim-impact evidence, other crimes evidence, and other information that is not otherwise admissible at penalty phase to the jury. *See* OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 1999); State v. White, 85 Ohio St. 3d 433, 444-46, 709 N.E.2d 140, 153-55, *cert. denied*, 528 U.S. 938 (1999). Because Ohio provides capital defendants the right to reasonably necessary investigation, experts, or other assistance for trial and penalty phases, *see* OHIO REV. CODE ANN. § 2929.024 (Anderson 1999), capital counsel who request a presentence report instead may be ineffective for doing so. *See* Glenn v. Tate, 71 F.3d 1204, 1209-10 (6th Cir. 1995), *cert. denied*, 519 U.S. 910 (1996).

Guideline 10.13 The Duty to Facilitate the Work of Successor Counsel

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;

C. sharing potential further areas of legal and factual research with successor counsel; and

D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

History of Guideline

This Guideline is new.

Related Standards

NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 9.2 (c) (1997) ("Right to Appeal").

Commentary

All members of the defense team must anticipate and facilitate the duty of successor counsel, embodied in Guideline 7.1 (B) (1), to investigate the defense presentation at all prior stages of the case. As set forth in Subsection A, this duty includes an affirmative obligation to maintain contemporaneous records that will enable successor counsel to have a factual predicate for the assertion of whatever legal claims may arise. For example, there may be issues as to whether the government produced certain evidence or whether counsel knew of the existence of a particular witness or legal theory. Each counsel's files should be maintained in a manner sufficient to enable successor counsel to answer questions of this sort through appropriate documentation (*e.g.*, notes of client interviews, telephone message slips, etc.).

Even after team members have been formally replaced, they must continue to safeguard the interests of the client. Specifically, they must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.[323]

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[323] *See* David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 90-91 (1998/1999) ("While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.").

As the California Bar has ruled in a formal opinion, "[T]he Rules of Professional Conduct impose a duty upon trial counsel to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel. This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client."[324]

The duties contained in this Guideline are of enormous practical significance to the vindication of the client's legal rights. "[T]he strategic thinking of the lawyer, and learning this strategic thinking[,] is absolutely critical to the thorough presentation of a post-conviction claim. It should be routinely and openly presented to the post-conviction counsel."[325] To do otherwise is professionally unethical.[326]

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[324] State Bar of Cal. Standing Comm. on Professional Responsibility & Conduct, Formal Op. 1992-127 (1992), *available at* http://www.calbar.ca.gov/calbar/html_unclassified/ca92-127.html.

[325] Siegel, *supra* note 323, at 114.

[326] *See id.* ("[G]iven the peculiar aspects of the role of counsel whose former client brings a post-conviction action, [it] violates counsel's ethical obligations" to fail to cooperate with successor counsel in "the disclosure to the post-conviction counsel of files and notes from the representation, the volunteering of absences in the record and the volunteering of counsel's strategic thinking in the case."); Mary B. Nelson, Note, *When Clients Become "Ex-Clients": The Duties Owed After Discharge*, 26 J. LEGAL PROF. 233, 241 (2002) ("Essentially, a failure to cooperate with the client's new attorney can constitute the same violations as a failure to cooperate with the actual client under Model Rule 1.16"). *See generally* Ariz. Comm. on Professional Conduct, Formal Op. 98-07 (1998); *Returning Client Files After Termination*, Hawaii Bar J., Sept. 1998.

Guideline 10.14 Duties of Trial Counsel After Conviction

A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.

B. Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief.

C. Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Guideline 10.15 applies in its entirety.

D. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

History of Guideline

This Guideline is based on Guideline 11.9.1 of the original edition. Subsection B has been revised to require that trial counsel take whatever action(s) will maximize the client's ability to obtain post-conviction relief. Additionally, Subsection D has been revised to require that counsel take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.2 ("Appeal"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 9.2 (1995) ("Right to Appeal").

Commentary

Post-conviction procedures, and therefore the duties of counsel, vary among jurisdictions.[327] Whatever the procedures, the client should be advised of what will happen following the imposition of sentence and potential legal consequences of the client's anticipated actions. For example, if the client will be given any psychological examination or will otherwise be interviewed by prison personnel or others following the court's imposition of sentence, the client should be counseled regarding that interview and advised of the potential legal impact of any statements the client might make there.[328]

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[327] *E.g.*, trial counsel in California is given, by statute, certain post-conviction duties and must remain on the case until the record is certified. CAL. PENAL CODE §1239(b), 1240.1(e)(1) (West 1982 & Supp. 2002).

[328] *See* CAL. ATT'YS FOR CRIM. JUSTICE & CAL. DEFENDERS ASS'N, CALIFORNIA DEATH PENALTY DEFENSE MANUAL 1-38 to 1-40 (1986).

The client should also be advised of all available avenues of judicial review[329] and what the client must do to secure review (*e.g.*, sign a notice of appeal or affidavit of indigency). Trial counsel should file the necessary documents and take whatever other steps are needed to preserve the client's right to review, such as ordering transcripts of the trial proceedings and objecting to any governmentally imposed barriers (*e.g.*, failure to provide counsel) to obtaining such review. If there are any further actions available that might expand the scope of review (*e.g.*, filing a motion for a new trial), trial counsel should take them.[330]

In short, trial counsel is responsible for making sure that the client's legal position does not suffer any harm during the period of transition to successor counsel. To avoid prejudice to the client, trial counsel should, in accordance with Subsection D, make every effort to ensure that this period is as short as possible. But, in any event, trial counsel may not cease acting on the client's behalf until successor counsel has entered the case. As Subsection C provides, until that time trial counsel must discharge the duties common to all post-conviction counsel as set forth in Guideline 10.15 (including obtaining a stay of execution if needed).

Trial counsel must also monitor the client's personal condition as set out in Guideline 10.15(E)(2). If the client's mental status deteriorates under the impact of the conviction and death sentence, the client may inappropriately decide to cease efforts to secure review, thereby creating a series of problems for the defense team that might well have been avoided.

Once successor counsel are in place, trial counsel continue to be under the obligation, imposed by Guideline 10.13, to recognize a continuing duty to safeguard the interests of the client and to cooperate fully with successor counsel.

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329 Some death penalty states provide for automatic appellate review, *e.g.*, CAL. PENAL CODE § 1239(b) (West 1982 & Supp. 2002); MD. CODE ANN. art. 27, § 414(a) (2002) (this section has been repealed by 2002 Md. Laws 26, § 1, effective Oct. 1, 2002; an analogous provision has been enacted by 2002 Md. Laws 26, § 2, to be codified as MD. CODE ANN., CRIM. LAW § 2-401(a)); MD. R. 8-306(c); N.C. GEN. STAT. § 15A-2000(d)(1) (2001).

330 This comports with the requirements for counsel in all criminal cases. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 9.2(a), (b) (1995). *Cf.* Mayo v. Cockrell, 287 F.3d 336 (5th Cir. 2002) (denying federal habeas corpus relief where trial counsel was unaware that he remained on case until replaced, appellate counsel was unaware of his appointment until after expiration of time for filing of new trial motion, and a meritorious new trial motion went unfiled), *cert. denied*, 123 S.Ct. 443 (2002).

Guideline 10.15.1 Duties of Post-Conviction Counsel

A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

D. The duties of the counsel representing the client on direct appeal should include filing a petition for *certiorari* in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments; and

2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;

3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and

4. continue an aggressive investigation of all aspects of the case.

History of Guideline

This Guideline is based on Guideline 11.9.3 of the original edition. Subsections A, B, and D are entirely new. Subsection C includes new language regarding the manner in which post-conviction counsel must present all arguably meritorious issues. Subsection E includes new language emphasizing the ongoing obligations imposed by these Guidelines upon post-conviction counsel.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.5 ("Post-Conviction Remedies") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

Commentary

Almost all of the duties imposed by Guidelines 10.3 et seq. are applicable in the post-conviction context. Subsection E notes this by way of reminder. Post-conviction counsel should consult those Guidelines and accompanying commentaries.

The Paramount Duty to Obtain a Stay

No matter how compelling the client's post-conviction case may be, he faces the risk that his execution will moot it.[331] This is a phenomenon unique to capital litigation and one that must be uppermost in the mind of post-conviction counsel.

When states fail to provide post-conviction counsel entirely or in a timely manner,[332] or request the setting of an execution date to advance the litigation,[333] or impose short periods of time for filing substantive post-judgment pleadings, the result is emergency requests for stays of execution so that substantive pleadings will be considered.[334] Although the ABA and other

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331 *See* Brooks v. Estelle, 702 F.2d 84 (5th Cir. 1983) (dismissing appeal, which had received certificate of probable cause from district court, as moot since petitioner had been executed following the denial of a stay by Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982)).

332 There is no right to state post-conviction counsel in Georgia. Gibson v. Turpin, 270 Ga. 855, 513 S.E.2d 186, *cert. denied*, 528 U.S. 946 (1999). In August 1996, Georgia Supreme Court Justice Robert Benham noted that several persons under sentence of death in Georgia were in "immediate need of legal representation," and asked area law firms to volunteer. One Atlanta civil firm that volunteered was assigned the case of Marcus Wellons. Three days after the firm received a copy of the trial transcript, the trial court set an execution date for two weeks later. The firm rushed to the Georgia Supreme Court and asked for more time to submit a formal post-conviction petition. Hours before Mr. Wellons's scheduled execution, the Court denied the request by a 4-3 vote. As guards were about to shave Mr. Wellons's head for that evening's electrocution, the federal district court granted a stay of execution. State counsel and the federal defender were given ten months to prepare the federal petition. Bill Rankin, *When Death Row Inmates Go To Court Without Lawyers: In the Late Stages of Their Fight to Stay Alive, Some Must Represent Themselves*, ATLANTA J. & CONST., Dec. 29, 1996, at D5; Bill Rankin & Rhonda Cook, *Death Penalty: Sudden Speed, Then a Delay*, ATLANTA J. & CONST., Dec. 13, 1996, at A1.

333 For example, in Kentucky capital cases the Attorney General invariably requests an execution date at the end of direct appeal, and the Governor invariably signs the death warrant. No stay of execution may be granted until the state post-conviction petition is filed. As a result, in order to obtain a stay, counsel must often file a state post-conviction petition well before the time allowed under state law because there is an outstanding execution date. The practice is the same in federal *habeas* proceedings. *See, e.g.*, *Execution of Killer Delayed*, CINCINNATI ENQUIRER, June 9, 2000, at D1B.

334 When a capital case enters a phase of being "under warrant" – *i.e.*, when a death warrant has been signed – time commitments for counsel increase, "due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts." Standing Comm. on Legal Aid & Indigent Defense, ABA Bar Information Program, *Time & Expense Analysis in Postconviction Death Penalty Cases*, Feb.

professional voices have repeatedly condemned this system,[335] defense counsel must make the best of it – by seeking stays or reprieves from any available source and challenging the unfairness of any overly restrictive constraints on filing of substantive pleadings and/or stays.

And to the extent that counsel can responsibly reduce the stresses imposed upon the client by this often-nightmarish system, counsel should of course do so (*e.g.*, by reassuring the client of the unlikelihood of the execution actually occurring on its nominal date, notwithstanding the alarming preparations being made by the prison).[336]

Keeping the Client Whole

Even if their executions have been safely stayed, however, the mental condition of many capital clients will deteriorate the longer they remain on death row. This may result in suicidal tendencies and/or impairments in realistic perception and rational decisionmaking.[337] Counsel should seek to minimize this risk by staying in close contact with the client.[338]

Counsel's ongoing monitoring of the client's status, required by Subsection E(2), also has a strictly legal purpose. As described in the text accompanying notes 187-90 *supra*, a worsening in the client's mental condition may directly affect the legal posture of the case and the lawyer needs to be aware of developments. For example, the case establishing the proposition that insane

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1987, at 10.

335 *See,* ABA House of Delegates Res. 15, Rec. 11 (adopted Feb. 13, 1990) (calling for automatic federal stays throughout post-conviction period) *reprinted in Toward a More Just and Effective System of Review*, *supra* note 84, at 38; *Legislative Modification*, *supra* note 11, at 855 ("We agree with the Powell Committee [appointed by Chief Justice Rehnquist to study reform of capital habeas corpus] that the current mechanisms for obtaining stays of execution are irrational and indefensible. At best, they lead to an enormous waste of legal effort by all participants in the system, and at worst they result in inconsistencies that have fatal consequences."); Eric M. Freedman, *Can Justice Be Served by Appeals of the Dead?*, NATL. L.J., Oct. 19, 1992, at 13 (current situation respecting stays is "no way to run a judicial system").

336 *See, e.g.*, Williams v. Missouri, 463 U.S. 1301 (1983) (Blackmun, J., in chambers) (executions scheduled for prior to the expiration of the time for seeking *certiorari* on direct appeal would be stayed "as a matter of course"); McDonald v. Missouri, 464 U.S. 1306 (1984) (Blackmun, J., in chambers) ("I thought I had advised the Supreme Court of Missouri once before, in Williams, that . . . I . . . shall stay the execution of any Missouri applicant whose direct review of his conviction is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.")

337 *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 850 (2000) (noting that between 1977 and March 1998, 59 condemned inmates had volunteered for execution, compared to 382 executed unwillingly).

338 *See supra* text accompanying notes 187-90.

persons cannot be executed[339] was heavily based on notes on the client's mental status that counsel had kept over a period of months.

The Labyrinth of Post-conviction Litigation

A. The Direct Appeal

Practice varies among jurisdictions as to the limits of the appellate process and the relationship between direct appeals and collateral post-conviction challenges to a conviction or sentence.[340] Issues that are only partially or minimally reflected by the record, or that are outside the record, should be explored by appellate counsel as a predicate for informed decision making about legal strategy.

As Subsection C emphasizes, it is of critical importance that counsel on direct appeal proceed, like all post-conviction counsel, in a manner that maximizes the client's ultimate chances of success. "Winnowing" issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later.[341] When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.[342]

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339 Ford v. Wainwright, 477 U.S. 399 (1986).

340 In some states, there is a unitary appeal system in which direct appeal and collateral challenges such as ineffective assistance of counsel claims are raised simultaneously. *See, e.g.*, IDAHO CODE § 19-2719 (Michie Supp. 2000). In other jurisdictions, ineffective assistance of counsel claims generally may not be raised on direct appeal but are reserved for separate post-conviction proceedings. *See, e.g.*, Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997) (claims of ineffective assistance of counsel not cognizable on direct appeal) *cert. denied*, 522 U.S. 880 (1997).

341 For example, in Smith v. Murray, 477 U.S. 527 (1986), appellate counsel failed to assert on direct appeal that the defendant's Fifth Amendment rights had been violated by the testimony of a psychiatrist who had examined the defendant without warning him the interview could be used against him. The Virginia Supreme Court had rejected such claims at the time of the defendant's direct appeal. The U.S. Supreme Court reached a contrary result, however, in Estelle v. Smith, 451 U.S. 454 (1981). In a Catch-22 for the client, the Court concluded appellate counsel was not ineffective, because "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Murray, 477 U.S. at 536 (citation omitted). At the same time, the claim was not deemed sufficiently "'novel'" to constitute cause for the procedural default because "forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal." *Id.* at 536-37 (citations omitted). Mr. Smith was therefore barred from raising the issue in federal habeas proceedings and was subsequently executed.

342 It is for this reason that, consistent with the text *supra* accompanying note 27, Subsection C refers to "issues that are arguably meritorious under the standards applicable to high quality capital defense representation."

Appellate counsel must be familiar with the deadlines for filing petitions for state and federal post-conviction relief and how they are affected by the direct appeal. If the conviction and sentence are affirmed, appellate counsel should ordinarily file on the client's behalf a petition for *certiorari* review in the United States Supreme Court. Under the AEDPA, a client's one-year statute of limitations for filing a petition for federal habeas corpus relief generally begins to run upon the denial of *certiorari* or when the 90 days for filing a petition has elapsed.[343] Appellate counsel should therefore immediately inform successor counsel if he or she does not intend to file a petition for *certiorari* or when a petition for *certiorari* is denied; if successor counsel is not yet appointed, counsel should promptly advise the Responsible Agency of the need to designate successor counsel. (Subsection D)

Appellate counsel should also advise the client directly of all applicable deadlines for seeking post-conviction relief and explain the tolling provisions of the AEDPA,[344] emphasizing that a state post-conviction motion should be filed sufficiently in advance of the one-year deadline to allow adequate time to prepare a federal habeas corpus petition. In states in which the direct appeal and state post-conviction review are conducted simultaneously,[345] post-conviction proceedings may be concluded at the same time as, or even before, the direct appeal, effectively rendering the tolling provisions inapplicable.

In light of this mutual dependency among all the post-conviction legal procedures, it is of the utmost importance that, in accordance with Guideline 10.13, appellate counsel cooperates fully with successor counsel and turn over all relevant files promptly.

B. Collateral Relief – State and Federal

As described in the Commentary to Guideline 1.1, providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy and knowledge. The field is increasingly complex and ever changing. As state and federal collateral proceedings become ever-more intertwined, counsel representing a capital client in state collateral proceedings must become intimately familiar with federal habeas corpus procedures. As indicated above, for example, although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a *de facto* statute of limitations for filing a collateral review petition in state court. Some state collateral counsel have failed to understand the AEDPA's implications, and unwittingly forfeited their client's right to federal *habeas corpus* review.[346]

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343 28 U.S.C. § 2244(d)(1)(A); *see* LIEBMAN & HERTZ, note 27 *supra* § 5.1b.

344 28 U.S.C. § 2244(d)(2).

345 *See, e.g.*, Policy 3, California Supreme Court Policies Regarding Cases Arising From Judgments of Death (2002) (petitions for writ of habeas corpus to be filed within 90 days of final due date for filing reply brief on direct appeal); 22 OKLA. STAT. ANN. tit. 22, § 1089(D)(1) (West Supp. 2002) (motion for post-conviction relief must be filed within 90 days from filing of reply brief on direct appeal).

346 *See, e.g.*, Goodman v. Johnson, No. 99-20452 (5th Cir. Sept. 19, 1999) (unpublished), *cert. denied*, 528 U.S. 1131 (2000); Cantu-Tzin v. Johnson, 162 F.3d 295 (5th Cir. 1998), *cert. denied*, 525 U.S. 1091 (1999). Spencer Goodman was executed by Texas in January 2000, and

Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client. But by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row. Counsel should not be surprised if the client initially exhibits some hostility and lack of trust, and must endeavor to overcome these barriers.

Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments – those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal – are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.[347] Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not.

For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.[348] That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.[349] These include not only challenges to the conviction and sentence, but also issues which may arise

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Andrew Cantu-Tzin was executed by Texas in January 1999.

347 *See generally* Russell Stetler, *Post-Conviction Investigation in Death Penalty Cases*, THE CHAMPION, Aug. 1999, at 41, *available at* http://www.criminaljustice.org/public.nsf/ChampionArticles/99Aug06/.

348 *See supra* text accompanying note 38.

349 *See supra* Guideline 10.8 and accompanying Commentary.

subsequently.[350] Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications.[351] Counsel should also be aware that any change in the availability of post-conviction relief may itself provide an issue for further litigation.[352] This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

[350] For example, although the Justices disagree on the point, as shown most recently by their varying opinions respecting the *certiorari* petition in Foster v. Florida, 123 S. Ct. 470 (2002), it may well be that after a certain length of time continued confinement on Death Row ripens into an Eighth Amendment violation.

[351] *See* Mason v. Meyers, 208 F.3d 414, 417 (3d Cir. 2000) (stating that as a result of the strict rules governing successive *habeas corpus* petitions enacted by the AEDPA and codified at 28 U.S.C. § 2244(b), "it is essential that habeas petitioners include in their first petition *all* potential claims for which they might desire to seek review and relief").

[352] *See, e.g.*, Lindh v. Murphy, 521 U.S. 320 (1997) (discussing the retroactive application of various procedural provisions in the AEDPA to pending cases).

Guideline 10.15.2 Duties of Clemency Counsel

A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.

C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.

D. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

History of Guideline

This Guideline is based on Guideline 11.9.4 of the original edition. Subsection D of the Guideline was added to reflect the effect of the decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), on the duties of clemency counsel.

Related Standards

None.

Commentary

As discussed in the text accompanying notes 57-64 *supra,* a series of developments in law, public opinion, and forensic science suggests that clemency petitions in capital cases will in the future enjoy a greater success rate than they do now, which will place additional demands on clemency counsel.

As Subsection B emphasizes, further investigation is critical at this phase. Beyond that, the manner in which clemency is dispensed in the jurisdiction controls what clemency counsel needs to do.[353]

Counsel should be familiar with the clemency-dispenser, and with the factors the

[353] The states utilize 50 different clemency processes, which can be categorized in the following manner: the Governor has sole authority over the clemency process; the Governor cannot grant clemency without a recommendation from a board or advisory group to do so; the Governor decides clemency after receiving a nonbinding recommendation from a board or advisory group; a board or advisory group makes the clemency determination; or, the Governor sits as a member of the board which makes the clemency determination. The Death Penalty Information Group details the process by state, *available at* http://www.deathpenaltyinfo.org/clemency.htm/#process. For federal death row inmates, the President alone has pardon power. *See* U.S. CONST. art. II, § 2, cl. 1.

clemency-dispenser has historically found persuasive. As possible innocence is the most frequently cited reason for clemency,[354] if there is a possibility that the client is innocent, counsel should mobilize an especially detailed investigation to determine whether confidence in the client's guilt can be undermined. If doubts about the fairness of the judicial proceedings that produced the death sentence have led to clemency in other cases, counsel should consider whether particular instances of procedural unfairness can be set out as to the client's case.[355] If personal characteristics of the condemned, such as youth, mental illness,[356] spousal abuse, or cultural barriers, have proven helpful in past clemency proceedings, then counsel should discover and demonstrate examples of the client's similar characteristics to the extent possible.

In any event, the presentation should be as complete and persuasive as possible, utilizing all appropriate resources in support (e.g. relevant outside organizations, the trial judge, prominent citizens), and discussing explicitly why the clemency-dispenser should act favorably notwithstanding the repeated reaffirmation of the client's conviction and sentence by the judicial system. For example, counsel may be in a position to argue that the underlying claims were powerful ones but procedural technicalities barred the courts from addressing their merits.

As discussed in the text accompanying notes 63-64 *supra*, due process protections apply to clemency proceedings, and counsel should be alert to the possibility of developing the nascent existing law in this area.

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354 The Death Penalty Information Center reports that since 1976, of the 35 death row inmates who have been granted clemency for reasons other than the personal convictions of the governor in opposition to the death penalty, the possible innocence of the condemned inmate was provided as the reason for granting clemency in 16 cases (46%). *Available at* http://www.deathpenaltyinfo.org/clemency.html.

355 For example, in 1999 the Governor of Arkansas commuted the death sentence of Bobby Ray Fretwell after receiving a letter from a juror at Fretwell's trial stating that he had been the lone holdout against the death penalty, but had relented for fear that he would be an outcast in the small community where the killing had occurred. *See Arkansas Governor Spares Killer's Life After Juror's Plea*, L.A. TIMES, Feb. 6, 1999, at A19. In the case of Charlie Brooks, who was executed in Texas in 1982, counsel enlisted the trial prosecutor to argue before the Board of Pardons and Paroles that it would be unfair to execute the client when his co-defendant was serving a term of years and the state did not know who the triggerman had been. *See* Robert Reinhold, *Groups Race to Prevent Texas Execution*, N.Y. Times, Dec. 6, 1982, at A16.

356 In 2002, the Georgia Board of Pardons commuted the death sentence of Alexander Williams to life in prison without parole in large part due to Williams's profound mental illness. *See* Rhonda Cook, *Death penalty reduced to life*, ATLANTA J. & CONST., Feb. 26, 2002, at A1.

my copy slow - no mention of alcohol by mom of Williams PS A.

Neurological Evaluation

Name:	**Charles Christopher Williams**
Date of Birth:	[redacted]
MUSC ID:	[redacted]
Evaluation Date:	**January 27, 2005**

Referred By:	Mr. William Nettles 914 Richland Street Suite A-102 Columbia, SC 29201 (803) 779-9966	Billing To:	Greenville Court Public Defenders Office Attn: Mr. John Mauldin P.O. Box 10264 Greenville, SC 29603

Sources of Information

The following evaluation is based exclusively upon interview and examination of Mr. Charles Christopher Williams. No medical, educational, psychological, or judicial records are available for review.

Venue of Examination

Mr. Williams was transported for evaluation from the Greenville County Detention Center, where he has been incarcerated for the past 18 months, to the Medical University of South Carolina, Rutledge Tower, 135 Rutledge Avenue. He arrived at 10:30 AM with evaluation taking place between 11:00 AM and 1:00 PM. Un-handcuffed and unshackled, Mr. Williams met with me privately in a patient examination room, with security guards outside the room. The available time was divided between review of neurological history, testing of cognitive abilities, and physical examination of general and neuromuscular function.

At the outset of the evaluation we established that Mr. Williams understood the purpose of my evaluation and the absence of typical patient confidentiality; that he could hear my questions and would ask for clarification if he did not fully understand them; that he could adequately see me, my gestures, and materials that I showed him; that he would seek to clarify any confusion that he encountered during the evaluation; and that there would be no questions about the criminal act for which legal proceedings are ongoing.

Current Medical Concerns

Mr. Williams indicated that he had no medical problems or concerns at the present time. However, he acknowledged that he had been hospitalized in June, 2003, at Greenville Regional Medical Center with an overdose of **Klonopin**. He indicated that is last medical evaluation was in December, 2003, when he was given **Risperdal** for depression. He said that he is no longer taking the medication because he did not sleep as well while taking it, even though during the day it made him sleepy and it "mentally slowed (him) down."

Review of Systems

Review of all organ systems was negative, indicating that Mr. Williams reported no abnormal symptoms. Hew specifically denied prior head injuries, seizures, loss of consciousness, or fainting spells. When asked about sleep, he indicated that in high school – because of his need to work – he only slept 4 or 5 hours a night, struggling to wake up when

PLAINTIFF'S EXHIBIT 15

called and often falling asleep in class. (He purchased a car and was carrying both the car payment and the $200/month insurance payment; he "didn't want to shift responsibility" to his parents; he considered this his personal "obligation, otherwise I would have.") He is sleeping satisfactorily now.

When asked about sadness, he indicated that he has experienced no problems recently. However, before he was arrested (June through September, 2003) he was very "irritable," feeling himself to be "a loner. . . unfriendly." This surprised him as he considers himself to usually be a "high energy" person. He said he was "definitely a big spender . . . money would flow out of my pocket." He acknowledged that he "oversteps boundaries at times." When asked how he handles anger, he indicated that he "separates himself from the situation and from people" and that he is "never violent."

Family Profile

Mr. Williams stated that his mother, Daisy Huckaby, is of German-Polish descent. Now 56 years old, she separated from Mr. Williams' father in 1991 and remarried in 1998. She is a cosmetologist who graduated from high school and college. He is aware the she takes medication for high blood pressure and "nerve pills" for what may be bipolar illness.

Mr. Williams stated that his father, Dwight Miller, is African-American and also 56 years old. A graduate of high school and the University of Maryland, he met Mr. Williams' mother in Germany, when he worked for the Army as an aircraft mechanic. Now retired from the military, he has worked in the mortgage loan business for 7 or 8 years. Mr. Williams describes his relationship with his father as "irregular," with communication occurring "off and on." They may talk as often as once a month, or they may allow 6 to 18 months to pass between conversations. Mr. Williams said that his father was "fun to be around" and taught him "ethics and morals." Mr. Williams recalls that "it was a task to get him to spend time with me" and that he was "irregular with (playing) sports or videogames (with me)."

Mr. Williams has one sister, Maureen Bangoyo, who is 33 years old and a registered nurse. Mr. Williams recalls that his "sister did as much as his mom" in raising him. His step-father is Rodney Huckaby, who was married previously but had no children.

Mr. Williams grew up in Taylors, South Carolina (in Greenville County) because his father was working as an aircraft mechanic at Lockheed. He recalls that his parents were always fighting that there was physical abuse involved. When his mother called the police, his father left and it was necessary for them to sell their house. Mr. Williams recalls having to move every 2 to 3 months, going "from place to place, to the Women's Shelter in Spartanburg" until his mother married Rodney Huckaby.

Psychosocial Profile

Mr. Williams described his strengths as being "loyal" and "dependable," noting that he would both *finish* his work and *do it well*. He felt his weakness was being "stubborn (but agreeable)," especially "about what I wanted to do." He described his sense of humor as "pretty decent . . . no comedian, but I try to make people laugh."

Educational History

Mr. Williams stated that he dropped out of school during his 9th grade year for financial reasons, even though he felt he was "good in class." He recognized the importance of getting his GED, however, and he took preparatory classes at Greenville Tech. Ironically, he never took the test because he was "too nervous" about how he would do.

In elementary and middle school, Mr. Williams got "in trouble daily for talking. . . the things I did before were just not funny anymore." He noted that his grades were "average or

slightly below at the beginning of the year, and got much better at the end of the year when tested." All things considered, Mr. Williams concluded: "I know I had the ability to be a good student" and "I could have been a lot better than I was at the time."

Cognitive Evaluation

Mr. Williams was focused, respectful, restrained, and cooperative throughout the visit. He answered questions promptly, clearly and with detail, revealing no evidence of confusion or delay in processing what he heard. There were no lapses of eye contact or vigilance that might suggest seizure activity. There was no suggestion of fatigue in his attention, effort or cooperation, and there was no suggestion of distractibility at any time during the 2-hour session. There were no restless movements or tics. Mr. Williams' affect was appropriate; he demonstrated no jocularity, excessive familiarity, suspicion or apathy. Although subdued and perhaps mildly dysthymic, he demonstrated a normal range of emotions, without lability, anger, or euphoria. Intensity and congruence of emotions were appropriate. Mr. Williams' speech was fluent, his vocabulary was good, and his sentences were moderately complex and appropriate for casual conversation.

Mr. Williams' cognitive skills were evaluated using the mental status assessment recommended by the American Academy of Neurology[1], supplemented by elements from the Neurobehavioral Cognitive Status Examination[2]. Mr. Williams' *global attention*, as measured by orientation to time and by A-vigilance, was normal. *Speech comprehension* assessed by verbal commands (token test) was also normal. *Language screening*, as assessed by verbal repetition and category fluency were normal. His writing to dictation was normal, with clear, neat printed letters and correct use of capital and lower case forms. *Visual naming to confrontation* was marginal; he called the stem of a watch the "winder" or "dial" and he called a belt buckle a "belt loop." *Memory screening* using the reverse digit span was normal; Mr. Atkins could correctly recall 5 digits backwards. A more detailed test of memory, the serial word list learning test, was also administered; this is a sensitive screening device for frontal lobe dysfunction and left mesial temporal lobe dysfunction. In this test a normal response is to recall five of 10 unrelated nouns on the first trial and nine of the same 10 nouns by the fourth trial. Mr. Williams recalled seven of 10 on the first trial, nine of 10 on the second trial, and ten of 10 on the third trial. On a 5-minute delayed recall, Mr. Williams had borderline normal performance, recalling seven of the 10 words, but with correct recognition of only one of the two nouns that he had forgotten; he correctly rejected four of 5 distracter nouns offered.

Higher cognitive visual perception was assessed finger constructions and clock-drawing, both of which were normal. Abstract construction ability with design tiles was very good, with designs optimally completed within 30 seconds, taking 13, 20 and 22 seconds. Calculation skills were average. Without use of paper, he was able to correctly answer screening questions, including 39 divided by 3, 31 minus 8, and 5 times 13.

Executive function screening was done with the Luria 3-step test ("fist-edge-palm" test) which evaluates premotor, prefrontal and parietal cortex, as well as visual working memory; his performance was normal bilaterally. He demonstrated no abnormal grasp response, imitation behavior, or problem with anti-saccades. Additional tests of executive function included 3-finger go-no go test and parapet drawing, both of which were normal. Design fluency, in which an individual is asked to draw as many nameless designs as possible, was between normal and abnormal. Mr. Williams produced nine designs in the allotted two minutes; whereas most people produce 6 or more different designs, Mr. Williams produced four designs which involved intersecting lines, three designs that were ameba-shaped, and one design that was a variation on a demonstration example. This performance suggests some difficulty with frontal lobe flexibility. *Reasoning* was assessed using word similarities. He correctly identified painting and music as

"art;" all other word pairs were quickly and correctly categorized. *Judgment* was assessed with situational responses. When asked what he would do if he was walking along the sidewalk of a busy street and saw a 2-year-old by himself playing in the street, he provided the following sequence: he would first rescue the child and then "call the police; it makes no sense to ask a 2-year-old where his parents are." When asked what he would do if he came to his mother's house and found the kitchen flooded, he indicated that he would turn off the water, soak up the water with towels, and then call the insurance company. Only with prodding did he consider calling a plumber to fix the leak.

Physical Examination

Mr. Williams is a 22-year-old right-handed African-American male, whose height was 161.5 cm and whose weight was 67.8 kg. His head circumference was 58 cm and roundly shaped. Vital signs included an elevated blood pressure of 167/90 in the left arm and 155/100 in the right arm' his pulse was 88. He had a prominent raised, erythematous rash over much of his scalp, which appears to be chronic because of associated hair thinning in the region of rash. Scalp lesions were occasionally pustular. Mr. Williams had no dysmorphic facial features. There were no café-au-lait spots or other neurocutaneous abnormalities, although there was a small area of depigmentation above his right eyebrow. *HEENT* examination was normal except for erythema of the right external auditory canal and erythema in the center of the right tympanic membrane. Ophthalmoscopy revealed unremarkable fundi with no A-V nicking. Examination of the nose, mouth, dentition, palate, and pinnae was normal. No thyroid enlargement or adenopathy was seen. *Chest* examination revealed normal cardiac rhythm and rate without murmers. Lungs were clear. *Abdominal* and *genitourinary* examinations were not performed. *Skeletal* examination revealed no joint abnormalities or bony malformations. Posture, station and gait were normal.

Neurological Examination

Cranial nerve examination revealed normal visual fields by confrontation and finger counting. Eye movements were full with smooth pursuits and normal saccades. There was, however, fine end-gaze nystagmus with movement of the eyes to the left. Pupils were briskly and symmetrically reactive to light. There was no asymmetry of facial sensation or musculature. Hearing was adequate to hear the rubbing of fingers. Bulbar function was normal.

Motor examination showed normal muscle bulk and resistance to passive movement. There was no suggestion of rigidity or spasticity. Strength was symmetric and normal throughout, in fact quite impressive for his medium physique. There was no drift or pronation of outstretched arms while the eyes were closed; however, there was a fine tremor of both hands. Rapid alternating movements of fingers and feet were well performed. There were no mirror movements, tics, or tremors. Finger-to-nose testing was normal. Muscle stretch reflexes were bilaterally symmetric, measuring trace at the chin, 3++ at the biceps, 3+ at the brachioradialis, and 2+ at the triceps. In the lower extremities, knee jerks were 3++ bilaterally, with 3+ at the ankles; a trace crossed adductor reflex could be elicited. Plantar responses were downgoing.

Screening sensory examination, focusing on touch and position sense, was normal. Romberg sign was present, with falling to the left. Mr. Williams, however, was able to stand on either foot alone, briefly with eyes closed.

Review of Neuropsychological Testing

No school-based psychoeducational test results or court-ordered psychological assessments were available for review.

Review of Neuroimaging Studies

Following examination, Mr. Williams underwent magnetic resonance imaging imaging of the brain. This demonstrated no structural abnormalities upon my review. Independent interpretation by Dr. Ranjiv Saini was normal.

Diagnostic Impressions

Physical Assessment

(1) Hypertension, untreated
(2) Mild hyperreflexia with crossed leg adductor reflex, suggesting minimal impairment of corticospinal tract function
(3) Mild "cerebellar" dysfunction with asymmetric end-gaze nystagmus and Romberg sign and symmetric tremor of outstretched hands
(4) Scalp rash with secondary alopecia
(5) Mild right otitis externa

Cognitive Assessment

(1) Average intelligence with effective communication skills
(2) Good visual-motor speed despite fine motor impairment

Psychosocial Assessment

(1) Impaired reciprocal relationships with parents
(2) School drop-out *without* academic failure
(3) History of behavior reflecting extreme moods, suggesting bipolar illness or anxiety disorder

Recommendations

Mr. Williams should be evaluated and treated medically for significantly elevated high blood pressure, which is not likely related to a stressful environment. In addition, dermatologic evaluation for chronic scalp rash and hair loss should be considered. More importantly, given subtle (but likely stable) neurologic abnormalities, including slight asymmetry of eye movements and balance, formal neuropsychiatric evaluation may be helpful. Finally, formal psychiatric evaluation may provide diagnostic evidence of manic-depressive illness or anxiety disorder.

This above opinions are based upon limited information presently available; should there be additional data (particularly that which addresses educational, psychological, or adaptive capabilities) which alter my opinions, I will supplement this report.

David A. Griesemer, M.D.
Professor of Neurosciences and Pediatrics
Medical University of South Carolina
Charleston, SC

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[1] Grabowski TJ, Anderson SW, Cooper GE. Disorders of Cognitive Function. Continuum 8:130-158, 2002

[2] Manual for the Neurobehavioral Cognitive Status Examination. (Fairfax, CA: Northern California Neurobehavioral Group, 1988)

Mauldin, John

From: Mauldin, John
Sent: Wednesday, February 02, 2005 3:15 PM
To: 'Bill Nettles'
Subject: RE: Chris Willams

Bill, Can he not simply look at the images for defects and tell us informally?

-----Original Message-----
From: Bill Nettles [mailto:billn@billnettles.com]
Sent: Wednesday, February 02, 2005 2:27 PM
To: John Mauldin
Subject: Fw: Chris Willams

See below. I emailed him and told him we started trial on Monday and asked him if he had any hunches.
-----Original Message-----
From: David Griesemer <grieseda@musc.edu>
Date: Wed, 02 Feb 2005 13:26:29
To:Bill Nettles <billn@billnettles.com>
Subject: Re: Chris Willams

Sorry to be slow in getting back to you. I'm in the process of finishing my "Atkins examination" report on Daryl Atkins. (Sort of ironic, isn't it?) They head back to court on Monday. As soon as I have this finished, I'll get back to you on Mr. Williams.

DG

--On Monday, January 31, 2005 7:34 PM +0000 Bill Nettles <billn@billnettles.com> wrote:

> Any thoughts?
> Sent from my Blackberry

David A. Griesemer, MD
Departments of Neurosciences and Pediatrics
Medical University of South Carolina

CONFIDENTIALITY NOTICE: This e-mail message, including attachments, is strictly for the use of intended recipient(s) and contains confidential and privileged information. Do not use, disclose, copy or disseminate this information. If you are not the intended recipient, contact the sender by reply email immediately and destroy all copies of the message and all attachments.

Sent from my Blackberry



Mauldin, John

From: Bill Nettles [billn@billnettles.com]
Sent: Saturday, February 05, 2005 3:48 PM
To: John Mauldin
Subject: Fw: Chris Willams



See below and attached

-----Original Message-----
From: "David Griesemer, MD" <grieseda@musc.edu>
Date: Sat, 5 Feb 2005 12:04:42
To:Bill Nettles <billn@billnettles.com>
Cc:grieseda@musc.edu
Subject: Re: Chris Willams

Attached is my report. Several medical issues to follow up on, and some very, very subtle neurologic findings of uncertain significance. Sorry for the delay.

David Griesemer, MD
Professor of Neurosciences and Pediatrics
Medical University of South Carolina
96 Jonathan Lucas Street
Charleston, SC 29425

Telephone: 843-792-3224
Facsimile: 843-792-1763
Paging: 843-792-2123

Sent from my Blackberry

Mauldin, John

From: Bill Nettles [billn@billnettles.com]
Sent: Sunday, February 06, 2005 6:26 PM
To: ccoyle@AKINGUMP.COM; mmacdougall@AKINGUMP.COM; jmauldin@greenvillecounty.org
Subject: Neruologist

I just talked to the neurologist. He said that he would happily testify to the test he ran. The findings he found, most specifically that his testing so that Chris may be bipolar. That if Chris were brought to him he would send him to a psychologist to confirm.

This is significant for us because we can show that both medical and psychological diagnosis of Chris conclude bipolar.

Bill

JEFFREY P. BLOOM
ATTORNEY AT LAW

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LICENSED MEMBER OF THE COLUMBIA, S.C.,
S.C. AND N.C. BAR OFFICE # (803)
E-MAIL:
JPBLOOM803@AOL.COM
CELL # (803) 261-4576

CONFIDENTIAL ATTORNEY-WORK PRODUCT

TO: John Mauldin
Bill Nettles

FROM: Jeff Bloom

DATE: 1/20/05

RE: FOCUS GROUP REPORT OF January 15, 2005 SESSION
CHRIS WILLIAMS

The following information is provided to trial counsel after a review of the materials and other information from the "brainstorm" session with mock jurors, plus their individual surveys and related information.

This comprehensive information summarizes actual juror comments about the case and the evidence. Exact statements by mock jurors are placed in quotation marks. While some comments may restate the obvious, this information is included as confirmation of your parts of your current trial strategy.

At several points in this outline, I refer to "labeling" a fact or using a specific phrase, or in some instances avoiding certain language. I am not suggesting you alter facts. But this simply means that you need to *characterize* a good fact, or conversely a potentially bad fact, in a way that is positive for you. Simply "label" or explain the fact early in your case in a way that you want the juror to perceive it, and keep repeating this "label" or phrase, or explanation throughout your cross-X, direct examination, and at every opportunity in the case. So, tell the jurors what you want them to "hear" or "see" with a particular fact, BEFORE the prosecution does, and it increases the likelihood that the jurors will hear or see the fact the way you want them to and accept your explanation. In other words, tell YOUR story, and repeat the words and phrases that best communicate your story... or else the prosecution will do it before you do. Actual mock juror quotes and other suggested phrases are in **bold** to help you adopt words and phrases that tell your story.

So it is critical that you do this with the store videotape.

I will be glad to talk with you to review any of the issues raised in this memorandum.



1. MAIN REASONS FOR NOT GUILTY OF KIDNAPPING.

- Phone calls in the weeks/months before the incident
  - The calls were longer than a minute, which shows she was not answering then immediately hanging up
  - Mandy called Chris, which shows she was not avoiding him nor always afraid of him

- Videotape
  - Mandy is walking *behind* Chris in many places
  - Chris is not pointing gun
  - No violence or threatening behavior by Chris
  - Chris is NOT pointing the gun at her
  - Long passage of time on the videotape without any violent behavior by Chris
  - Opportunity for Mandy to leave

NOTE as to Videotape:

IT IS CRITICAL that the defense CHARACTERIZE and DESCRIBE this VIDEOTAPE in the WAY THAT YOU WANT THE JURY TO SEE IT BEFORE THEY ACTUALLY SEE IT.

Numerous focus groups have demonstrated the importance of TELLING the jury what they will see/hear BEFORE they actually see/hear it.

In other words, TELL THE JURY WHAT THEY WILL SEE – USING YOUR FAVORABLE WORDS AND TERMS – AND THEN THEY ARE MORE LIKELY TO SEE WHAT YOU WANT THEM TO AND MORE LIKELY TO ADOPT YOUR WORDS & TERMS WHEN TALKING TO EACH OTHER ABOUT IT.

2. MAIN REASONS FOR LWOP / GENERAL OBSERVATIONS.

- Mental Illness
    - Family history of both mother & father
    - Family violence w/ mother & father

- Family History
    - Of mental illness
    - Of domestic abuse/violence: BUT: Why Chris' father did not kill?

- "Institutional" Responsibility
    - Bi-Lo is partly responsible because Chris was a former employee
    - Bi-Lo was aware of their former employee's conduct (ie- Chris) from the prior assault incident in the parking lot
    - Someone had to see Chris go behind the deli-counter and into the manager office to get the schedule. There is *always* an employee behind or near the deli-counter. Someone *had* to see Chris go back there. It should have been immediately reported.

→ While the defense should not try to argue this aggressively, it does provide some fertile ground for questioning on cross-examination, assuming some witnesses from Bi-Lo will be testifying for the State (*empathetic* cross-X for low level Bi-Lo employee/witnesses; but more *suggestive* cross-X for any management/executive Bi-Lo witness).

→ Pro-LWOP jurors "get" this more readily

- Remorse
    - Prior attempted suicide involving pills – BUT: Get more details on how/who else around/etc. to show this was not a "fake" attempt
    - Putting shotgun in mouth after this incident – BUT: Get more details to corroborate and have expert psych. Comment (will State psych. Expert concede this ?)

- Some Carry-Over Residual Doubt as to the Kidnapping

    → Be familiar with the case law on "residual doubt." It generally states:

    - You do NOT get a jury instruction of "residual doubt" as a non-statutory mitigator. *Franklin v. Lynaugh,* 487 U.S. 164, 101 L.Ed.2d 155, 108 S.Ct. 2320 (1988).
    - You cannot argue the words "residual doubt" as a reason not to sentence the defendant to death. *State v. (Robert) Southerland,* 447 S.E.2d 862 (S.C. 1994).
    - But obviously you can argue facts from the guilt phase, or flaws and problems with those facts.

    → So, argue at rhetorical questions at closing:

    - "Is this the QUALITY of evidence to sentence someone to death?"
    - "What if we're wrong?"
    - "For death, don't you want to be sure beyond a *shadow* of a doubt?"

3. ITEMS FOR ACTION: Investigation / Preparation / Follow-Up by Attorneys

- Chris' Diary – You MUST embrace this and make it part of your case because the pro-DP verdict jurors are using it for their case
    - Find ways to *characterize* diary entries to help your case
        - Entries that make Chris look paranoid, crazy
        - Entries that reflect suicidal thinking
    - Find consistencies in the diary with Chris' family history as to domestic disturbance and mental illness

- Chris father's domestic violence history
    - Find the reason that Chris' father did not kill commit a similar act
    - Did someone in the family intervene ? A preacher ? Medication ? Moved away ? Less severe mental illness ?
    - You need to explain the difference between Chris' father and Chris

- Prior attempted suicide involving pills
    - BUT: Get more details on how/who else around/where pills came from/how close he really came to dying/etc.
    - Need to show this was not a "fake" attempt – some jurors assumed Chris did this when his mother was home, meaning that Chris intended to be found and "faked" the while thing.

- Suicidal Thought – Putting shotgun in mouth after this incident
    - Get more details to corroborate
    - Have defense expert psychiatrist comment
    - Will State psych. expert concede this as a real suicidal thought ?
    - You may need a specific expert with a background or experience in "suicide", and/or specifically "suicide by cop" type cases, to testify just on this issue, and how some intended "suicide by cop" defendants don't "succeed" in getting killed or killing themselves
    - If you intend to use this evidence, then address conflicting information and answer these mock juror questions/concerns:
        - If Chris really intended to kill himself at the store, why didn't he keep one shotgun shell in his pocket for later ?
        - How could Chris be counting all the shots during the incident ?
        - Why did Chris believe that he had one more shot for himself left in the gun?
        - If Chris intended "suicide by cop", then why didn't he wave the gun or point it at the police when they came in the store ?

- Abortion
    - Get more info on how/where Chris got this idea from
    - Is it a completely paranoid idea ? Or was there some real basis to it ?
    - Which do you want it to be ?
        - Do you want to show this as evidence that Chris has paranoid ideas that are wholly detached from reality thinking ?
        - Or, do you want this to have some basis in reality ?

      ... because you need to choose which it is and then TELL the jury which it is.

- More information on Nature of the relationship between Mandy & Chris in the months/weeks leading up to the incident, AND the Relationship between Mandy & Mark (father of her child)
    - Did Mandy take steps to end or prolong the relationship with Chris ? ... and with Mark ?
    - Are there similarities in her general relationship with Mark and more specifically how she ended that relationship, as compared with Chris ?

- Shotgun
    - More info on how easy or difficult it is to "trip" the safety off
    - More info on the relevance and/or differences in the ammunition found at Chris' house

4. SPECIAL NOTE on Voir Dire prepartion:

[1] Make sure to ask jurors if:

- They have ever received, or known someone who received, harassing telephone calls
- They have ever had, or known someone who had, a domestic dispute that turned into harassment, stalking, violence, or escalated in any way
- They have ever known someone who was suicidal, attempted suicide, or committed suicide
- They have ever known someone who had a bi-racial relationship, meaning one person was white and the other black or of another race.
    - Did that relationship last ?
    - Was race a problem in the relationship or with others or problems within the community ?

[2] Ask if they know that a person can know right from wrong, and still be mentally ill.

- When defining "murder" and probing for ADP jurors, ask if a defendant knew the difference between right and wrong, and was convicted of murder, would the juror automatically vote DP ?
- Because "right/wrong" test is for insanity. But many jurors confuse "insanity" with mental illness. This means that when they hear testimony about mental illness, unless it meets the "right/wrong" test, then they will discard it altogether.

6. CONCLUSION: Main points motivating Verdicts.

GUILTY & PRO –DEATH verdicts. The jurors voting to convict mainly based on:

- Chris' diary: Shows premeditation for these mock jurors
- Chris knew difference of right from wrong, per the State psychiatrist
- Lack of remorse

PRO – L WOP verdicts. The jurors voting for LWOP did so mainly based on:

1. Mental Illness, especially including mother/father history of mental illness
2. Parent's domestic history, especially father's similar pattern of behavior
3. Prior Attempted suicide
4. Store Videotape calls into question any Kidnapping

Addendum.

I. Common Problem Areas in Capital Trials.

These are areas which I am seeing more and more from numerous focus group sessions and real juries. The lessons are repeated here because they will likely apply in your case. If any mock jurors discussed these topics during their group deliberations, then that is mentioned.

A. "Spin"

At several points in this outline, I refer to "spin." I am not suggesting you alter facts. But this simply means that you need to *characterize* a potentially bad fact in a way that is positive for you. Simply "label" or explain the fact early in your case in a way that you want the juror to perceive it, and keeping repeating this "label" or explanation. In other words, tell the jurors what you want them to "see" with a particular fact, BEFORE the prosecution does, and it increases the likelihood that the jurors will accept your "label" or explanation.

B. Prison – You must emphasize the harshness of prison.

- Even the Pro-Life jurors want to know that the defendant is going to be in a "hard place".

- Get your "prison adjustment witness" to testify how other inmates are tough on those convicted of killing a child. Jurors want to know that life is going to be tough for Clint, as part of his punishment for what he's done.

- BUT Be Alert to this: I am seeing more and more Solicitors use "easy prison conditions" at sentencing, especially on cross-examination of our correctional officers and our prison-expert witnesses.

- The Solicitor asks about things that make prison sound like "Club-Med": air-conditioning; library; dining hall; contact-visitation room with snacks; outdoor recreation; etc. Have your objections prepared for this & object BEFORE the jury can hear the Solicitor's complete cross-examination question to your witnesses, or before he completes such argument in closing. A main objection is that these are conditions, which the inmate has no control over, and state and federal law mandate some of them.

- Jurors believe that all inmates have access to cable TV, free medical care, can walk around outside all day, etc.

- You will see that Group # 1 engaged in a lengthy discussion about all of the presupposed "benefits" that inmates "enjoy."

C. "Right from Wrong"

Jurors confuse a defendant knowing "right from wrong" as evidence in aggravation.

- I am seeing more and more that when pro-DP jurors discuss "mitigation", their focus becomes "if the defendant knew right from wrong." Once they are satisfied he knew "right from wrong" (re: the test for insanity, and not mitigation), then they are comfortable with voting for DP, and use this simple argument to weaken Pro-Life jurors.

- You must address this by objecting to this type of testimony and argument, and make sure you rebut it. In other words, if insanity is not offered as a defense, then the Solicitor should NOT be able to cross-examine the defense mental health experts at sentencing on "whether the defendant knew right from wrong" because: [1] Insanity is not a relevant issue at sentencing; [2] It is cross-examination on an irrelevant, collateral matter; [3] It is confusing to jurors because it "mixes" the standards of insanity as a defense – which is not applicable at sentencing – with valid statutory mitigation factors. Thus, it is a violation of due process and the right to a fundamentally fair sentencing hearing.

II. Actual Jury Selection Issues.

While it may be obvious, and is also probably a part of your experience in jury selection in other cases, it is still worth noting that from the juror's individual questionnaires – even for this mock trial – the jurors who voted pro-DP are those who use some of the below phrases. These jurors are almost always going to vote for death, and need to be weeded out in voir dire. Thus, at actual jury selection, jurors who give these types of responses at voir dire need to be excluded from serving on the actual jury.

- "I believe in an eye for an eye"
- "It's a deterrent"
- "I would focus on the facts of the crime"
- "The facts of the crime would be very important to me"
- "Life in prison costs too much for me as a taxpayer"
- "He (ie-the defendant) had a choice (to not commit this crime)."
- "I believe in personal responsibility"
- "The death penalty sends a strong message."
- "Prisons cost too much in tax dollars"
- "I'd want to know if the person knew right from wrong"
- "A lot of people had a bad childhood."
- "Drugs are just an excuse."

CHRIS WILLIAMS

THEME OR THEORY

1. STATE OF MIND OF THE DEFENDANT AT THE TIME OF THE OFFENSE
[PSYCHOLOGIST/NEUROPSYCHOLOGIST]

ALSO STATE OF MIND OF VICTIM

2. SUBSTANCE ABUSE ??

3. BRAIN DAMAGE

4. JEALOUS BREAKDOWN

5. MURDER / SUICIDE

WHAT IN OUR MITIGATION WILL FOCUS THE JURY AWAY FROM THE HORROR OF THE CRIME AND ON TO SOME ASPECT OF THE LIFE THAT IS WORTHY OF CONCERN (SOCIAL WORKER WITNESS)

STATUTORY AGGRAVATORS
KIDNAPPING

STATUTORY MITIGATORS

(1.) Rules of evidence for penalty

(2.) Scope of voir dire on mitigation imposed.
- Sticky out
- what is sticky out.
- Mitigation Impo
- Pam Crawford
- Journal (word
- plan

FUNDING

FIRST FUNDING	10/6/03	
~~PAIGE TARR~~ Jon Rosebaug		7,500
SUPPLIES		1,500
RECORDS		750
COPIES		1,500
GERALD RAVAN		7,500

PLAINTIFF'S EXHIBIT 18 10-4792

SECOND FUNDING 4/14/04

PRELIM HRING	203
LAW CLERK	3,000
JIM EVANS	2,000
CCL	5,000
JIM AIKEN	5,000

THIRD FUNDING
PATHOLOGIST

FOURTH FUNDING

FIFTH FUNDING

CHECKLIST

TRIAL DATE
FEBRUARY 7, 2005

JUDGE ASSIGNMENT
J. C. "Buddy" NICHOLSON, JR.
P. O. BOX 8002
ANDERSON, S. C. 29622
864-260-4059
864-224-6320
SECRETARY – BETH MILLER
LAW CLERK - BRENT

CO-COUNSEL
WILLIAM N. NETTLES

COLUMBIA, SC
OFFICE
FAX
HOME
CELL
E-MAIL

DAUBERT RESEARCH
ADMISSIBILITY OF EXPERT TESTIMONY
SOCIAL WORKER WITNESS??

JAN VOGELSANG

MARJORIE HAMMOCK

PSYCH - NEUROPSYCH

JIM EVANS, PH D

DAVID BACHMAN, MD

GEOFFREY MCKEE, PH D

JIM AIKEN

NEUROLOGIST

JEFF BLOOM

PATHOLOGIST

CRIMINAL DOMESTIC VIOLENCE EXPERT

SEARCH RECORDS

DSS FILES

CRIMINAL RECORDS

PROBATION RECORDS FOR D

JUVENILE RECORDS FOR D

DETENTION CENTER RECORDS FOR D
SCHOOL RECORDS

HOSPITAL RECORDS

EMPLOYMENT RECORDS

FAMILY COURT RECORDS

DEFENDANT'S FAMILY

AUTOPSY
RECEIVED OCTOBER 2003

BALLISTICS / MURDER WEAPON INVESTIGATION
INFO FROM DEFENDANT

GET VICTIM MEDICAL RECORDS FROM SHOOTING

ER PERSONNEL

EMS PERSONNEL

ANATOMICAL SOFTWARE

MEDICAL RECORDS/AUTOPSY TO PATHOLOGIST

RECUSE ARIAIL'S OFFICE??

BRAINSTORMING

GAG ORDER

ACLU VOLUNTEERS
AMNESTY INTERNATIONAL
COLLEGE STUDENTS

PRISON ADAPTABILITY EXPERT
JIM AIKEN

MOTION TO PREVENT PLANTING A "MOLE"

MOTION TO SEAL VISITORS LIST

MOTION TO DECLARE CASE LWOP
SHAFER CASE
MEMO IN SUPPORT (SEE C.HARRIS)

CHANGE OF VENUE

BRADY MOTION

1ST FILED
OCT 7, 03

2ND FILED

KYLES LETTER

RULE 5

OCT 7, 03

STATE FILE DISCLOSURES
- 2/25/04
- 3/29/04
- 5/24/04
  - VIDEO / AUDIO

MOTIONS HEARING??
- 5/25/04

GRAND JURY MATERIALS
- INDICTED MARCH 2004
- COPY OF INDICTMENTS ???

BATSON RESEARCH

JURY INSTRUCTIONS - GENERAL

TRACE DEFENDANT'S STEPS
- -PRIOR TO SHOOTING

SEARCH WARRANT / THE JOURNAL

PRIOR ABWIK
- RULE 5 ???

BAR CAMERAS IN THE COURTROOM

GATHER NEWS ACCOUNTS

HAS THE D EVER TAKEN A MMPI

VICTIM IMPACT INFORMATION
- MEETING WITH VICTIM'S FAMILY
- FILE VI MOTIONS

NAMES OF CITIZENS WHO HAVE CONTACTED THE SOLICITOR
- LETTERS
- PHONE CALLS
- NEWS ARTICLES OR LETTERS

RESOURCE CENTER
- PRETRIAL MOTIONS
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2.

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1.

2.

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JEFF BLOOM

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Guideline 10.6 Additional Obligations of Counsel Representing a Foreign National

A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

B. Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

History of Guideline

This Guideline is new and reflects developments in law and practice since the original edition.

Related Standards

Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, art. 36, 21 U.S.T. 77, T.I.A.S. 6820.

Commentary

The right to consular assistance is contained in Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty ratified unconditionally by the United States in 1969. Under its provisions, an obligation rests on local authorities to promptly inform detained or arrested foreign nationals of their right to communicate with their consulate. At the request of the foreign national, local authorities must contact the consulate and permit consular communication and access.

There is considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.[191]

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[191] *See* Breard v. Greene, 523 U.S. 371, 380 (1998) (Breyer, J., dissenting) (finding Paraguayan national's argument for stay of execution not wholly without merit where the United States government had submitted an *amicus* brief acknowledging that the Vienna Convention had been violated); Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT. L. 367, 368 (2002) (describing violations as "widespread and uncontested"). *See also* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.) (Order on Request for the Indication of Provisional Remedies) (Feb. 5, 2003) (text accessible at http://www.icj-ij.org/icjwww/idocket/imus/imusorder/imus_order_20030205.PDF)

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Any such failure is likely to have both practical and legal implications. As a practical matter, consuls are empowered to arrange for their nationals' legal representation and to provide a wide range of other services. These include, to name a few, enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (*e.g.*, through *amicus* briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for contact with families and other supportive individuals. As a legal matter, a breach of the obligations of the Vienna Convention or a bilateral consular convention may well give rise to a claim on behalf of the client.

Enlisting the consulate's support after obtaining the client's consent to do so should therefore be viewed by counsel as an important element in defending a foreign national at any stage of a death penalty case,[192] and counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations.

Subsection B(2)(a) recognizes, however, that cases do vary. A range of considerations may make clients reluctant to have their consular office informed of their detentions. In many circumstances, such as those in which clients simply fear embarrassment if word of their plight reaches home, the attorney should counsel the client to overcome the reluctance. But if the client is a political dissident and the likely effect of informing the consulate would be to cause adverse

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(ordering United States to take all necessary measures to insure that three Mexican nationals under state death sentences are not executed pending resolution of Mexico's claim "that the United States has systematically violated the rights of Mexico and its nationals under Article 36 of the Vienna Convention").

Furthermore, counsel should be alert to the fact that the United States has bilateral consular treaties with over 50 countries which may impose obligations additional to those under the Vienna Convention, *see* www.travel.state.gov/notification5.html#provisions (listing treaties). One example is Article 16 of the Consular Convention Between the United States and the United Kingdom, 3 U.S.T. 3426 (1952), which currently covers 32 independent countries around the world that were formerly entities within the British Empire.

192 *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting post-conviction relief because it was ineffective assistance for trial counsel not to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate"); *see also* Breard v. Greene, 523 U.S. 371, 380 (1998); Anne-Marie Slaughter, *Editorial: On a Foreign Death Row*, WASH. POST, Apr. 14, 1998, at A15 (noting that under the Vienna Convention on Consular Relations, "[a] citizen is entitled to the protection and advice of his or her government when caught in a foreign legal system and a foreign language," granting that citizen access to "a translator, local counsel and diplomatic pressure if needed"). Foreign governments often have formal assistance programs in place for nationals facing the death penalty in the United States. *See, e.g.*, Ana Mendieta, *Mexico Will Aid Nationals in US; Fund Will Help 45 Death Row Inmates*, CHICAGO SUN-TIMES, Oct. 6, 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention); *Court Blocks Execution of Canadian in Texas*, WASH. POST, Dec. 10, 1998, at A47 ("Canada . . . regularly seeks clemency for Canadians sentenced to death abroad").

consequences to his relatives without obtaining any assistance with the case, the attorney might reasonably abide by the client's direction to withhold notification. The matter should, however, be kept under continuing review, since conditions may well change over time.

Subsection A is included in the Guideline to emphasize that the determination of nationality may require some effort by counsel. A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g. one grandparent of that nationality) that would not be apparent at first glance.

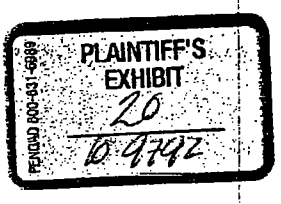
Mauldin, John

From: Mauldin, John
Sent: Wednesday, January 05, 2005 2:21 PM
To: 'sculbertson@culbertsonlaw.com'
Subject: MRI

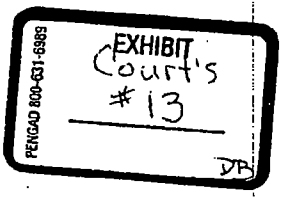
Symmes,

I understand you are going to call your contacts at Orthopaedics & Neurology to determine if they can get us a quick MRI. We've got the funding in the bank to cover the cost. This is obviously a hot potato(e) - let me know by email. Thanks.

John I. Mauldin
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS FOR GREENVILLE COUNTY
COUNTY OF GREENVILLE	)	
	)	CASE NO. 03-130-526
STATE OF SOUTH CAROLINA,	)	
Plaintiff,	)	**DEFENDANT'S PROPOSED JURY INSTRUCTION**
vs.	)	
CHARLES C. WILLIAMS,	)	
Defendant.	)	



DEFENDANT'S PROPOSED JURY INSTRUCTION

Defendant Charles Christopher Williams submits this Proposed Jury Instructions to the Court and respectfully requests that this instruction contained therein be submitted to the jury during the trial of this matter. Defendant reserves the right to amend or supplement its proposed instructions and questions as necessary to address developments during the course of trial.

Respectfully submitted,

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February 15, 2005

Greenville, South Carolina



DEFENDANT'S REQUESTED INSTRUCTION NUMBER 1

FALSE IMPRISONMENT

When a party unlawfully restrains or detains another against his or her will, without the authority of law, by actual force or reasonably apprehended force, he has falsely imprisoned that person.

In order to convict Defendant of false imprisonment of Maranda Williams, the State must prove three things beyond a reasonable doubt:

First, that Defendant did restrain or detain Maranda Williams against her will;

Second, that Defendant acted without the authority of law while doing so; and

Third, that Defendant held Maranda Williams by actual force or reasonably apprehended force. See State v. Berntsen, 295 S.C. 52, 367 S.E.2d 152 (1988).

Honorable J.C. Nicholson, Jr.
Presiding Judge

DEFENDANT'S REQUESTED INSTRUCTION NUMBER 2

PROPOSED JURY DEFINITION ON KIDNAPPING

Whoever shall unlawfully seize, confine inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced to murder as provided in Section 16-3-20. [1]

Inveigle is to entice or to acquire by ingenuity or flattery.[2]

Decoy is to lure or to entice.[3]

Kidnap is defined as to seize and detain or carry away by unlawful force or fraud and often with a demand for ransom. [4]

Abduct is to carry off by force. [5]

Carry away is defined as to carry off. [6]

Honorable J.C. Nicholson, Jr.
Presiding Judge

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[1] S-C-Section 16-3-20.

[2] Webster's Ninth New College Dictionary, 636 (Ninth Ed. 1988).

[3] Id. at 331.

[4] Id. at 661.

[5] Id. at 44.

[6] Id. at 210.

PROPOSED JURY QUESTIONS ON KIDNAPPING

QUESTION #1

Do you find Defendant, Charles C. Williams, Guilty of Kidnapping?

YES _____ **If so, go on to the next question.**

NO _____ **If not, stop here.**

QUESTION #2

What means of Kidnapping do you find Defendant, Charles C. Williams, Guilty of?

Inveigle _____

Seize _____

Decoy _____

Kidnap _____

Abduct _____

Carry Away _____

_____
Honorable J.C. Nicholson, Jr.
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
2010-CP-39-0840

CHARLES CHRISTOPHER WILLIAMS,

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent.

PRE-TRIAL BRIEF FOR PETITIONER

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PRE-TRIAL BRIEF AND APPLICATION

The following pre-trial brief is meant to alert the court and the state on what the petitioner hopes to prove at his post-conviction relief proceeding. While it is impossible to predict the exact testimony that will be presented at trial, the undersigned believes the following, based on information and belief, is an accurate summation of some of the testimony. This brief is not meant to be a complete summation of the petitioner's factual or legal allegations of error and additional briefing is anticipated, including, but not limited to, briefing by the German government.

This brief is also provided to put the attorney general on notice of the facts and law we intend to rely on and while we believe the grounds were sufficiently pled in the application, this brief is also submitted to be incorporated into the original application as an addendum thereto in order that all claims have been specifically pled in advance of the hearing.

SUMMARY OF ARGUMENT

The petitioner's attorneys failed to investigate and present multiple mitigating factors, including, but not limited to, the petitioner's fetal alcohol syndrome. The petitioner's trial also suffered from several constitutional violations, including improper argument of the solicitor, in which the solicitor repeatedly told the jury he had made the decision to seek the death penalty and the legislature had limited the circumstances in which he could even seek the death penalty. This argument was particularly egregious due to the reality that there are no legitimate limiting factors on the solicitor's discretion to seek the death penalty.

STATEMENT OF FACTS

Around 10:00 a.m. on September 3, 2003, petitioner entered a Bi-Lo grocery store in Greenville where he and his former girlfriend, Maranda Williams (Victim), worked. Petitioner accosted Victim and forced her into an office in the bakery/deli area. The petitioner spoke to negotiators several times, but when Victim attempted to escape petitioner chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended petitioner.

Petitioner was tried and found guilty of murder, kidnapping, and possession of a firearm during the commission of a violent crime. The State originally sought to establish two statutory aggravating circumstances: (1) the murder was committed while in the commission of kidnapping; and (2) the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (C)(a)(3) (2003 & Supp. 2007); however, the State withdrew the second aggravating circumstance. ROA 2354. The state's main witness during sentencing was Pam Crawford, a state psychiatrist who petitioner confessed to shortly after the murder. *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010).

The defense called several witnesses to the stand and presented evidence that the defendant suffered from mental illness.

I. THE SOLICITOR CONTINUOUSLY STRAYED FROM THE RECORD AND FAILED TO HEED THE SUPREME COURT'S MANDATE THAT DEATH PENALTY SENTENCINGS AND ARGUMENTS MUST BE FOCUSED ON THE CIRCUMSTANCES OF THE CRIME AND CHARACTER OF THE DEFENDANT.

Our Supreme Court has continuously held that a solicitor's argument must stay within the record, or reasonable inferences therefrom, and that when a solicitor strays from the record, a defendant is put at risk that the jury will base their decision on arbitrary factors, or that it will lessen the jury's responsibility in determining a sentence of death; when such an error happens, the Court must look at the entire record to determine the impropriety of the argument. *State v. Woomer*, 277 S.C. 170, 284. S.E.2d 357 (1981).

In this case, not only were independent parts of the solicitor's argument virtually identical to arguments found improper and reversible by our Supreme Court, the entire argument allowed the jury to return a death sentence based on arbitrary factors. The solicitor did so by injecting his personal opinion into the proceedings by continually talking about his decision to seek the death penalty. He also repeatedly went outside the record, by repeatedly telling the jury that the legislature had limited the times when the death penalty could be sought and by commenting on prison conditions. In telling the jury that the legislature had already limited the cases wherein he could seek the death penalty, and by repeatedly referencing his decision to seek the death penalty, the solicitor was not only going

outside the record, he was limiting the responsibility of the jury; at one point the solicitor went so far as to tell them, "You're not killing anyone." ROA 2367.

A. THE SOLICITOR IMPROPERLY INJECTED HIS PERSONAL OPINION AND HIS DECISION TO SEEK THE DEATH PENALTY INTO THE JURY DELIBERATIONS.

The solicitor repeatedly told the jury he was responsible for making the decision to seek the death penalty, which has been held reversible error in *State v. Butler, State v. Woomer, and State v. Smart*:

> "In vacating these sentences we are governed by our holding in *State v. Woomer, S.C.*, 284 S.E.2d 357, that injection of the solicitor's personal opinion into jury deliberations on the death sentence is impermissible and requires reversal. In his closing argument at the sentencing trial, the solicitor three times made reference to his decision to seek the death penalty. Such reference could divert the attention of jurors from the evidence before them to an improper consideration of the solicitor's personal views."

State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982).

In petitioner's case, the solicitor commented at various times about his decision and injected his personal opinion into the arguments:

> "It's not enjoyable for me or us to ask for you to impose the death penalty. That's not something we like to do. We wish the cases didn't exist. We wish we didn't have a case load, but we do. And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision. " ROA 2369, Line 22.

> "We will agree that the defendant could adapt to prison, because they will make him adapt. But that's not the issue. Because, otherwise, we

would never have the death penalty. There would be no reason for it. And the Solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime." ROA 2374, Line 7

"They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do." ROA 2370, Line 16.

This last portion is particularly egregious because the defense never mentioned the solicitor not being satisfied with a life sentence. Not only was the solicitor again diverging outside the record, he was specifically telling the jury that he would not be satisfied with a life sentence. (See *State v. Smart*, where the Supreme Court notes the solicitor improperly implied that he would disapprove of a life sentence.)

This was almost the identical issue in *State v. Woomer*, where our Supreme Court made it clear that the injection of the Solicitor's own personal opinion into the proceeding was reversible error:

"Finally, [Woomer] alleges the closing argument of the solicitor at the sentencing phase of the trial was so prejudicial that it denied him a fair trial. We addressed this same error by this same solicitor in *State v. Linder, S.C.*, 278 S.E.2d 335 (1981), where we admonished the solicitor in his closing argument to stay "within the record and its reasonable inferences ..." citing *State v. Durden,* 264 S.C. 86, 212 S.E.2d 587 (1975) and 23 CJS, Criminal Law, § 1107. We adhere to our holding in Linder and remand this case for a new trial as to the sentencing phase.

'While the solicitor should prosecute vigorously, *State v. Davis,* 239 S.C. 280, 122 S.E.2d 633, his duty is not to convict a defendant but to see justice done. *State v. Allen,* 266 S.C. 468, 224 S.E.2d 881 (1976). The solicitor's closing argument must, of course, be based

upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. *State v. White,* 246 S.C. 502, 144 S.E.2d 481 (1965). The trial judge is vested with a broad discretion in dealing with the propriety of the argument of the solicitor to the jury. *State v. Durden*, supra. Once the trial judge has allowed the argument to stand, as here, the defendant must bear the burden of demonstrating that the argument in effect denied him a fair determination of his guilt or [277 S.C. 175] innocence. On appeal, this Court will review the alleged impropriety of argument in the context of the entire record.' *State v. Linder*, at page 339.

Here, the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make.

> 'You know, the initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I had the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair. If I didn't want him tried for the electric chair, there is no way the Sheriff or anybody else can make it happen. I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.' (ROA 629, f. 1-12).

When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C.Code § 16-3-25(C)(1), and by the *Eighth Amendment to the United States Constitution. Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Accordingly, the Solicitor's jury arguments in this case require that appellant's sentence of death be set aside."

State v. Woomer, 277 S.C. 170, 284. S.E.2d 357 (1981).

In petitioner's case, the Solicitor repeatedly informed the jury that he had made the decision to seek the death penalty, and he repeatedly used the term "we" when referring to the decision to give the death penalty:

> "Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it. But responsible people make tough decisions all the time. You make tough decisions in your jobs, at your homes, regarding your children, and you make them in your marriage.
>
> The process makes you responsible for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law entrusted it to you and it means we'll do it, just like any other tough decision that we make;"

ROA 2367, Line 12. In addition, as commented above, the solicitor referenced his decision to seek the death penalty and that he would not be satisfied with a life sentence.

> "It's not enjoyable for me or us to ask for you to impose the death penalty. That's not something we like to do.
>
> We wish these cases didn't exist. We wish we didn't have a case load, but we do. And our responsibility is to come to you as the elected prosecutor and present these cases we deem appropriate for the death penalty. It's a necessary decision."

ROA 2369, Line 22.

> "They have said earlier the solicitor is not satisfied with a life sentence. And I agree, I am not. They told you he's going to want the death penalty, and I do. [Defense attorneys never said these things.] Why is the death penalty the appropriate sentence in this case? And that is a fair question for you to ask, ask of us, the State of South Carolina. And I submit to you that this is the reason, is that there are mean and evil people who live in this world who do not deserve to

continue to live with the rest of us regardless of how confined they may be.

The law limits the State's right to seek the death penalty to a very few murders. We seek the death penalty in only a few cases. But the circumstances where it's available are for mean and evil people. The worst of the worst. Christopher Williams and this murder are one of those cases. The worst of the worst."

ROA 2370, Line 16.

"We will agree that the defendant could adapt to prison, because they will make him adapt. But that's not the issue. Because, otherwise, we would never have the death penalty. There would be no reason for it. And the solicitor says there is a reason for it and that it's something you should consider in shaping the punishment to fit the extent of the crime."

ROA 2374, Line 7.

This is similar to *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982) as well:

"Here, as in Woomer, the solicitor attempted to minimize the jury's sense of responsibility for appellant's fate by stressing that he himself had already made the same decision he was asking them to make.

> First, it has to pass over my desk. I make the decision. People elect me to make the decision as to whether or not I think cases ought to be prosecuted. We don't prosecute all the cases. And I think that's one of the **[277 S.C. 546]** hardest impressions sometimes that we have to make, because people think that I am the mouthpiece of the county or the mouthpiece of the police and that everything that comes along Norman Fogle has got to get up there and holler and advocate a position. That is not correct. I have to use my common sense. So I can share with you just to a small degree this morning how each and everyone of you feel, because as I stated yesterday before that in order for this case to get moving as far as the death penalty was concerned I first had to make that decision, you see, and I have in my opinion,

> based upon the evidence in this case, overall, decided that if we are going to have a death penalty law on the books that if there were any facts that could ever justify it this case justifies it, justifies it."

In *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (S.C. 1990) the defendant again argued the solicitor had used an improper argument when he told the jury if this was not the case for the death penalty there was not one. In *Bell*, the Supreme Court found that was not impermissible language and specifically contrasted the decision in *Woomer* by noting, "Nor did the Solicitor comment on his involvement in deciding whether or not to prosecute for the death penalty." *Bell* at 373. In petitioner's case that is exactly what the Solicitor did.

This was no doubt amplified by Dr. Crawford's testimony that she was there to help the solicitor make his decision, suggesting to the jury that both mental health experts and the solicitor had approved the death penalty in this case. Justice Pleicones specifically mentioned the nature of this irrelevant and prejudicial testimony in his concurrence: "Here, however, Dr. Crawford's testimony was offered only to bolster the solicitor's decision that this case warranted a death sentence. Unlike the majority, I do not see how the curative instruction negates the prejudice from Dr. Crawford's irrelevant yet prejudicial testimony." *Williams* at 73. The majority noted Dr. Crawford was the State's "primary witness". *Id* at 64.

Furthermore, the defense should have been on notice that she was potentially going to testify about the irrelevant and prejudicial decision making process of the

solicitor. In a pre-trial hearing, Dr. Crawford and the solicitor both explained that was her number one responsibility. The solicitor asked Dr. Crawfrord about their working relationship in cases and what he was looking for, and she answered, "information about mitigating issues that may lead you to decide, in fact, not to seek the death penalty." And the solicitor continued, "So that the information that you would provide me in these various cases may be relevant as to whether or not, number one, I would seek the death penalty in a particular case." ROA 2696 – 2697.

The defense was on notice that the number one reason for Dr. Crawford's involvement in the case was to assist the solicitor in deciding whether or not to seek the death penalty. The solicitor's decision to seek the death penalty is irrelevant and prejudicial and injected an arbitrary consideration into the proceedings, and the defense should have objected to any such testimony or statements.

B. The Solicitors' Arguments Lessened the Jury's Responsibility and Injected Arbitrary Factors into the Jury's Deliberation Process.

Our Supreme Court has held that part of the problem with injecting the solicitor's opinion into the proceedings is that it lessens the jury's sense of responsibility in determining a death sentence. It is well settled precedent that the jury's sense of responsibility while imposing the death penalty cannot be

diminished. *Caldwell v. Mississippi,* 472 US 320 (1975). The solicitor repeatedly diminished the jury's role in the sentencing phase by referring to the legislature's role in the procedure, by continually telling them that the death penalty could only be sought in very limited circumstances, by telling the jury that, "they weren't killing anyone", by describing their role as "part of our government process", and by injecting conditions of prison life into his closing argument.

From the opening to the closing the solicitors repeatedly told the jury that the legislature had limited the cases that were eligible for the death penalty:

> "Part of that, when the legislature passed the laws, said that the state could not seek the death penalty in every case. We talked a little bit about this. It has to be a murder plus an aggravating circumstance. And I actually went back and looked at the statute. There are 11 aggravating circumstances outlined in the statute. So, if it's murder and we don't have one of those aggravating circumstances, we can't even seek the death penalty.
>
> So it's a very limited situation. There are only limited crimes for which we can even seek the death penalty. And out of those 11 we are going to rely on two. We only have to prove one. We're going to offer to you two different aggravating circumstances for your consideration, your determination."[1]

ROA 2112, Line 7. In closing the solicitor continued go outside the record and tell the jury that the legislature had limited the instances when he could seek the death penalty.

Closing:

[1] The solicitor withdrew the public place aggravator before sentencing arguments. ROA 2354.

"The State is asking you to impose the death penalty. That's what we're here for and what this section is about. This phase of this case, you may hear arguments from the defense. I have to anticipate what they may say. I don't know what they will say. But you may hear arguments from defense counsel that tries [sic] to persuade you that giving the death penalty is somehow wrong or that killing the defendant is somehow wrong. Those phrases you may hear and that try to indicate to you that what you're doing may not be right.

Let me talk a little bit about that. I want to put it in context. The state, represented by the solicitor, can in certain circumstances under our law ask for the imposition of the death penalty. However, it is only in limited circumstances, specifically murder cases, and only those murder cases in which is specifically defined by our statutory law by our legislature. And only in those cases can the state seek to have the death penalty imposed.

So, this is a legal process, a legal penalty enacted by our legislators; and it is a function of government carried out by you, the citizens. And that's the way the process has been initiated and created by our state legislature and approved by our courts. This is a function of you as citizens carrying out part of our government process. You are shaping a lawful punishment to an unlawful act. So, the responsibility is given to you to decide what the appropriate punishment is.

I remember in voir dire we went over this, you are the judge. The judge does not sentence, you sentence. And that's what this process is about. And it is a process which we have entrusted to you as our citizens to carry it out fairly; and there's nothing wrong with what you're doing. *You're not killing anyone* [emphasis added], and you're not making a decision that is in any way wrong.

Now, let's talk a little bit about the fact that this is obviously a difficult decision, that this is not an easy decision. It's not easy for me to ask you to even make it. But responsible people make tough decisions all the time. You make tough decisions in your jobs, at your homes, regarding your children, and you make them in your marriage.

The process makes you responsible for this difficult decision; but we can't run and hide from our responsibilities. The law places it on our shoulders, the law entrusted it to you and it means we'll do it, just like any other tough decision that we make;"

ROA 2366, line 2. This argument repeatedly emphasized that the legislature and the solicitor had already deemed the death penalty appropriate in this case. This not only introduced arbitrary considerations into the deliberations, it must have lessened the jury's responsibility within the system.

Our Supreme Court has been clear and adamant about the scope of sentencing hearings and prosecutor's argument. It should be focused on the nature of the crime and the character of the defendant. Whenever a solicitor strays from these factors, he jeopardizes the jury relying on arbitrary factors when determining death. *State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005).

This argument is similar to the arguments in *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890 (1979), where the solicitor discussed appellate review of the death sentence:

> "These comments by the solicitor suggested to the jury that its responsibility for deciding appellants' fate was lessened. Under our judicial system, the jury is given the heavy responsibility of determining whether a convicted murderer will live or die. It was erroneous and extremely prejudicial for the solicitor to imply to the jury that its burden could be passed on to a higher court. *State v. Rudolph Tyner, S.C.,* 258 S.E.2d 559, Smith's Advance Sheets, August 25, 1979, Op. No. 21040; *Prevatte v. State,* 233 Ga. 929, 214 S.E.2d 365 (1975); *Fleming v. State,* 240 Ga. 142, 240 S.E.2d 37 (1977); *Hawes v. State,* 240 Ga. 327, 240 S.E.2d 833 (1977). See also 75 Am.Jur.2d, Trial, § 230, p. 309."

By describing the jury's role as "part of a government process" and by specifically telling the jury, "you're not killing anyone", the solicitor was lessening the jury's responsibility as to the ultimate decision. There is simply no explanation for the solicitor to ever tell a jury, "you're not killing anyone", except to divert their attention from what our Supreme Court has repeatedly stated is the true focus of deliberations: the circumstances of the crime and the characteristics of the defendant.

Our Supreme Court has also repeatedly held that legislative considerations are inappropriate in the jury room; "[L]egislative determinations are wholly beyond the proper concern of a jury as it weighs the sentence of death." *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982). (Solicitor argued if the jury failed to return death sentence, legislature might repeal death penalty statute). This argument is particularly egregious here where the solicitor goes outside the record to talk about the legislature's actions and misinforms the jury about the reality of the "limited circumstances" in which he can seek the death penalty. As discussed in the section on the arbitrary nature of South Carolina's death penalty statute, there are no limitations on when the solicitor can seek the death penalty.

The Supreme Court relied on the same logic and case law when holding that prison conditions had no place in jury deliberations:

> "We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. *State v. Copeland,* 278 S.C. 572, 300 S.E.2d 63 (1982) . The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. *State v. Johnson,* 293 S.C. 321, 360 S.E.2d 317 (1987) . "Such determinations as the time, place, manner, and conditions of execution *or incarceration* ... are reserved ... to agencies other than the jury." [371 S.C. 488]*State v. Plath (Plath II),* 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (emphasis added)."

State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). This is particularly egregious here because the defense did not introduce conditions of prison, and the solicitor was speaking entirely outside the record when he invited the jury to consider the petitioner's prison conditions when determining punishment.

In petitioner's case, the solicitor suggested that prison was simply a change of address for the defendant:

> "Sure you and I may think going to prison for life is a serious sentence, but what about Chris Williams? Being in prison is like a small city, allow all things of life. Wants. Doctors, hospital take care of him, clothing provided, TV. Contact with family and loved ones. He'll have freedom of movement, a social structure. He'll play cards and games. Go to work if he wants, go to school if he wants. Watch ball games on TV.
>
> Sure, he doesn't have a car and his travel is limited, but it's not really much more than a serious change of address. He will have his family to visit him but Mandy's family won't, and her daughter won't."

ROA 2378, Line 1. The Supreme Court continued in *Burkhart*:

> "This case was tried before our decision in *Bowman* [366 S.C. 485, 623 S.E.2d 378 (2005)]; however, we apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible,[2] and this restriction on the admission of evidence regarding prison life *in general.* We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions."

*State v. Burkhart,*371 S.C. 482, 640 S.E.2d 450 (2007). Trial counsel attempted to negate the solicitor's discussion of prison conditions by asking the jury if they truly believed prison had restaurants. ROA 2380. Whether or not petitioner's trial counsel believed this was an effective strategy, this argument was clearly irrelevant and prejudicial, and allowed the jury to consider arbitrary factors, such as whether or not the petitioner would be allowed to watch TV, play games and cards, exercise and visit loved ones.

> "Here, unlike *Bowman,* appellant objected to the State's evidence regarding general prison conditions. Although appellant attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life, this entire subject matter injected an arbitrary factor into the jury's sentencing considerations. A capital jury may not impose a death sentence under the influence of any arbitrary [371 S.C. 489] factor. S.C.Code Ann. § 16-3-25(C)(1) (2003) . When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated. *State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982) .

> Accordingly, we reverse appellant's death sentence and remand for resentencing."

Id. Petitioner's case is similar in the fact that trial counsel attempted to counter the argument of the solicitor that there were restaurants in prison; however, there was never any counter of the remaining prison conditions the solicitor injected inappropriately.

Furthermore, our Supreme Court has noted that based on the evident impropriety of a solicitor's argument, it may be incumbent to object to the argument, regardless of an attorney's trial strategy:

> "In view of this improper argument, we agree with the PCR judge that it was incumbent upon Brown's trial counsel to object to the solicitor's closing remarks. Furthermore, although we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this " strategy" cannot be construed as a valid one given the evident impropriety of the solicitor's remarks."

Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). Regardless of trial counsels response to the argument, the argument was highly prejudicial, furthermore, it is an example, looking at the closing argument as a whole, of the solicitor's continued willingness to go outside of the record and introduce irrelevant and prejudicial material in front of the jury. Our Supreme Court has also noted that in cases where the jury has absolute discretion in sentencing and the solicitor introduces improper argument, the probability of prejudice is great. *State v. Simmons*, 331 S.C. 333, 503

S.E.2d 164 (1998). (*Simmons* was a burglary case where the jury had to decide whether to recommend mercy.)

II. THE SOUTH CAROLINA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER *FURMAN VERSUS GEORGIA* AND THE SOLICITORS' ARGUMENTS COMPOUNDED THE VERY PROBLEMS THE UNITED STATES SUPREME COURT SOUGHT TO CORRECT WHEN IT REINTRODUCED THE DEATH PENALTY.

In *Furman v. Georgia*, 408 U.S. 238 (1972) the United States Supreme Court found that Georgia's death penalty statute was cruel and unusual based on the fact that it was imposed in an arbitrary and capricious manner:

> "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Id. at 309-310 (STEWART, J., concurring). Four years later, quoting the same language above, the Court approved Georgia's new death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), and relied on three factors: (A) The new statute ensured that the death penalty could only be given under narrow circumstances; (B) The jury had to consider the particular circumstances of the crime and the defendant; and (C) the Georgia supreme court reviewed the sentence to ensure it was appropriate under the circumstances.

The petitioner asserts that South Carolina's death penalty statute does not restrict the circumstances wherein a jury may impose death for a murder. Specifically, because the legislature has increased circumstances wherein the death penalty may be imposed, and because the South Carolina Supreme Court has defined those circumstances in the broadest terms, every murder in this state is eligible for the death penalty. Furthermore, the United States Supreme Court was particularly concerned that the state supreme court in *Gregg* exercised discretionary review of death verdicts thereby mandating sentences were only given for the most egregious cases. While the South Carolina Supreme Court has acknowledged the importance of this proportionality review in *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982), it has never declared a death sentence arbitrary or out of proportion. To the contrary, it has upheld every death sentence regardless of the facts and circumstances of the crime or the nature of the defendant.

The United States Supreme Court re-iterated the requirement that state systems must narrow the circumstances where the death penalty can be sought in *Kansas v. Marsh*, 548 U.S. 163, 173-174, 126 S.Ct. 2516 (2006); Justice Thomas, writing for the majority, noted that *Furman* and *Gregg* "establish that a state capital sentencing system must: '(1) rationally narrow the class of death-eligible defendants[.]'" As discussed above, the solicitor's opening and closing arguments

exacerbate the failure of any legitimate narrowing circumstances, by repeatedly asserting the legislature had restricted the death penalty to a very limited number of circumstances.

THE UNITED STATES SUPREME COURT FACTORS

A. UNDER SOUTH CAROLINA'S STATUTE EVERY MURDER CASE CAN QUALIFY FOR THE DEATH PENALTY RESULTING IN A COMPLETE FAILURE TO NARROW THE CIRCUMSTANCES UNDER WHICH A JURY MAY SENTENCE THE DEFENDANT TO DEATH AND THE SOLICITORS COMPOUNDED THIS PROBLEM BY REPEATEDLY TELLING THE JURY THE LEGISLATURE HAD NARROWED THE CIRCUMSTANCES IN WHICH IT COULD SEEK DEATH.

The death penalty is supposed to be reserved for the "worst of the worst". *Roper v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005): ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution' " (quoting *Atkins v. Virginia,* 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002))). To the contrary, it is impossible to conceive of a murder case in this state where the defendant is not eligible for the death penalty. In order for a jury to return a death penalty verdict, they must find at least one aggravating circumstance; two aggravating circumstances, kidnapping and physical torture (S.C. Code Ann. § 16-3-20(c)(a)(1)(b) and (i) respectively), have been defined so broadly, that every defendant charged with intentional murder qualifies for the death penalty.

Almost all murder cases also involve a "kidnapping". While the traditional view of kidnapping might be an abduction in order to make some type of monetary or personal gain, South Carolina has defined kidnapping far more broadly:

> "South Carolina does not have different levels of crimes involving deprivation of freedom. Instead, the crime of kidnapping in South Carolina is broad in scope. Under our statute, a person is guilty of kidnapping if he should " unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law." S.C.Code Ann. § 16-3-910 (2010). Furthermore, we have interpreted this statute to encompass restraint regardless of duration or whether the victim was moved. *See State v. Tucker,* 334 S.C. 1, 13-14, 512 S.E.2d 99, 105 (1999) (noting that the offense of kidnapping " commences when one is wrongfully deprived of freedom and continues until the freedom is restored" and further finding that proof of kidnapping existed where defendant had bound victim with duct tape in her home)."

Lozada v. South Carolina Law Enforcement Div., 395 S.C. 509, 719 S.E.2d 258 (S.C. 2011). In the *Tucker* case cited above in *Lozada*, the defendant argued he duct-taped the victim to the bed in order to search for things to steal and not to kidnap the victim, and therefore he did not have the *mens rea* to establish kidnapping. The Supreme Court rejected that argument and held, "Further, we have held restraint constitutes kidnapping within the meaning of section 16-3-910, [footnote eliminated] regardless of the fact that the purpose of this seizure was to facilitate the commission of a sexual battery." *State v. Tucker*, 334 S.C. 1, 14, 512 S.E.2d 99, 105 (1998).

If kidnapping can be completed with the above requisite intent and for any

duration, no matter how slight, it would obviously encompass the vast majority of murder cases. Any time a defendant aimed a weapon at a victim, the victim would be immediately kidnapped unless the victim somehow believed they could walk or run away without being shot. Even if the defendant physically assaulted a victim, the victim would be considered "kidnapped" unless the victim was able to leave or believed they were able to leave during the assault.

The only time a victim would not be "kidnapped" is if the victim was unaware of the physical injury of the murder while it took place; however, even that circumstance may constitute kidnapping, because the definition does not require conscious knowledge of the kidnapping based on the definitions of fraud, inveigle and decoy. Petitioner avers that it is almost impossible to commit murder without committing the offense of kidnapping under these definitions. Therefore, South Carolina Code Ann. § 16-3-20 fails to narrow the circumstances wherein one can be subject to the death penalty for murder.

The United States Supreme Court reiterated its position that death should only be available in limited circumstances in *Kennedy v. Louisiana*, 554 U.S. 407, 437, 128 S.Ct. 2641 (2008):

> "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg, supra,* at 187, 184, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.) (because "death as a punishment is unique in its severity and

> irrevocability," capital punishment must be reserved for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death" (citing in part *Furman,* 408 U.S., at 286-291, 92 S.Ct. 2726 (Brennan, J., concurring); *id.,* at 306, 92 S.Ct. 2726 (Stewart, J., concurring))); see also *Roper,* 543 U.S., at 569, 125 S.Ct. 1183 (the Eighth Amendment requires that "the death penalty is reserved for a narrow category of crimes and offenders")."

Even if it is possible to envision a murder case that would not also include kidnapping, it is impossible to define a murder that does not involve physical torture as described in South Carolina. Physical torture is an undefined aggravator in the code. The South Carolina Supreme Court has defined physical torture as "serious physical abuse before death" or "an aggravated battery". *State v. Elmore*, 308 S.E.2d 781, 785 (S.C. 1983). Aggravated battery has been defined as a violent injury accompanied by circumstances of aggravation, "such as the use of a dangerous, or deadly, object; the infliction of serious bodily injury with intent to commit a felony; a great disparity between the ages and physical condition of the parties; a difference in the sexes." *State v. Davis*, 422 S.E. 2d 133 (S.C. 1992). Every murder is committed by a dangerous or deadly object and is the cause of serious bodily injury.

The South Carolina Supreme Court has also held the victim need not be conscious of the torture:

> "[Defendant] contends that conscious awareness of pain is a necessary component of physical torture. We disagree. Physical torture is not

> predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture;"

State v. Johnson, 525 S.E.2d 519 (S.C. 2000). It would seem clear, that any deadly injury would fall into multiple categories of this definition of physical torture. Therefore, any murder would be death eligible. (This was one of the aggravators in *Weik, infra* – the evidence showed the victim was shot and then shot again a few minutes later.)

Furthermore, the State cannot argue that the petitioner's conduct so plainly falls within the definition of the aggravator that the jury's decision is appropriate. The United States Supreme Court addressed this argument in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), and in an unanimous opinion held that such an analysis was not sufficient to make sure the jury was adequately informed what they must consider in deciding a death sentence. *Maynard* at 361-362.

Petitioner's case bears particular scrutiny for three reasons: (1) Trial counsel specifically requested a charge on false imprisonment and asked the court to ask a question about kidnapping to the jury. ROA 2063 – 2067; (2) The solicitor equated murder with kidnapping; and (3) The solicitor repeatedly told the jury in his

opening and closing argument that the death penalty could only be sought in limited circumstances.

1. Failure to define and therefore limit the definition of kidnapping.

Trial counsel requested an additional charge and requested a question regarding the kidnapping.[2] ROA 2067. Trial counsel's request for additional information or charge may have resolved the problem of having such a broad definition of kidnapping, but the trial judge rejected such a charge based on South Carolina case law and refused to have a question regarding kidnapping answered by the jury. ROA 2067.

Instead, the Court charged,

> "The Defendant is charged with kidnapping. The state must prove beyond a reasonable doubt that the defendant knowingly, unlawfully, seized, confined, enveigled, decoyed, kidnapped, abducted, or carried away another person without authority of law. Kidnap is a continuous offense that commences when one is wrongfully deprived of freedom and continues until the freedom is restored. The gravamen of the offense of kidnapping is some form of compulsion.
>
> The law says the requisite force or compulsion need not consist of use of physical force or violence or express threats. Knowingly means with knowledge, consciously, not accidentally. Seize means to hold suddenly or forcefully. Confine means to limit, restrict, or enclose within bounds, imprison, or shut or keep in. Enveigle means to entice or to acquire by ingenuity or flattery. Decoy means to lure by; or if by decoy, a decoy is something to entice a person to a trap.

[2] Petitioner avers that trial counsel preserved this issue, but acknowledges that it was error for either trial counsel or appellate counsel not to preserve and argue this issue before the court.

> Kidnap is to remove a person against his will by unlawful force or by fraud. Induce means to carry off secretly or by force for an illegal purpose. Carry away means to remove.
>
> The State does not have to prove the defendant did all of these things. Instead, if you find beyond a reasonable doubt the defendant did any of these things, you may find the defendant guilty of kidnapping. Something done without authority of law is something which the law does not sanction, permit, allow, condone, or provide justification for.
>
> Kidnapping does not have to be for any personal monetary gain or any legal purpose, but may be for any reason whatsoever."

ROA 2056. The judge did not define kidnapping in the penalty phase, but only charged that the jury had to find that the murder was committed "while in the commission of the crime, act, kidnapping." ROA 2400, Line 11. (See also ROA 2399-2400 for the charge that an aggravating circumstance, kidnapping, must be found.)

Such a broad definition fails to limit the circumstances wherein a jury can sentence a defendant to death.

2. The solicitor compounded this problem by emphasizing this broad definition in their closing argument in the guilt phase.

In the solicitor's trial phase closing argument, she equated murder to kidnapping.

> "[Kidnapping] does not require ransom. That's what a lot of people think. That's what we see on TV. Kidnapping, someone is taken somewhere. They're hidden out in some shed and we start seeing ransom notes. That is a form of kidnapping, it's not the only one. If you confine someone against their will without the authority of law, it is kidnapping. And his honor will tell you that kidnapping

begins when the person's freedom has been taken away. Kidnapping ends when the freedom has been restored. And that's key."

ROA 2022. The State continued,

"Ladies and Gentlemen, as I told you, kidnapping starts when a person's freedom has been taken away. And it ends when the freedom has been restored. Mandy's freedom was never restored. Her kidnapping was the ultimate kidnapping. She never again was free to move, because when she did, when she started fighting for her life, when she began to run away from the defendant, what does he do? What does he do?

Does he say, 'Oh, let me let her go, because I'm going to let her go out anyway?'

They get up here and try to argue to you that he was going to let her go. He told the negotiator he was going to let her go. I submit to you he was lying to the negotiator when he said he was going to let her go. He never intended to let her go. Because if he had, when she started running, all you do is let her run slap out the front door. But that's not what he did.

What does he do?

(Mrs. Strom pumps shotgun four times.)

Her freedom is permanently taken away."

ROA 2024, Line 3. Under the State's argument, anyone who is killed would be guilty of kidnapping, because their "freedom is permanently taken away" and every murder is "the ultimate kidnapping."[3]

3. This constitutional failure is exacerbated by the solicitor's repeated and untrue assertion that they are only allowed to seek the death penalty in limited circumstances.

As discussed, there is no limit as to when the Solicitor can seek the death penalty; by telling the jury there specifically was a limit on his and their actions,

[3] Petitioner would also argue this is improper argument allowing the jury to base their decision on an arbitrary factor.

the solicitor went outside the record and introduced an arbitrary factor into the deliberations; therefore the statute not only fails to narrow these circumstances, the jury was repeatedly misinformed that it did.

B. The Solicitors' Improper Argument Compromised the Jury's Duty to Consider the Particular Circumstances of the Crime and the Characteristics of the Defendant.

The second factor cited in *Gregg v. Georgia*, is that the jury consider the particular circumstances of the crime and characteristics of the defendant. Our Supreme Court has repeatedly warned solicitors to restrict their arguments to these considerations. *Copeland* and *Bowman*, *supra.* This factor is also compromised due to the arbitrary considerations the solicitor injected in the rest of the argument, as noted in Section I and II of this brief.

C. Whether the South Carolina Supreme Court Reviewed the Sentence to Ensure it was Appropriate under the Circumstances, and Whether the Review Procedure is Adequate under *Gregg v. Georgia*?

The third factor the United States Supreme Court relied on in upholding the Georgia death penalty law, was that the state supreme court reviewed the case to make sure it was appropriate under the circumstances.[4] South Carolina has adopted the same proportionality analysis. *State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982).

[4] The United States Supreme Court reaffirmed proportionality in Kennedy v. Louisiana, 554 U.S. 407 (2008).

In the petitioner's case the Supreme Court's analysis consisted of two sentences:

> "Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996)."[5]

State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (S.C. 2010). This is virtually the identical language used in every death penalty "proportionality review" in South Carolina. See *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless, Capital Sentencing Regime of the Pre-Furman Era*, Blume, JH, *et al.* 4 Charleston L. Rev. 479 (2010).

It is impossible to judge the adequacy of this analysis, and regardless, this fails to inform defendants and their counsel what factors may be considered relevant in such a review. Still, Petitioner has attempted to show that his case is not proportional when compared to the case cited, *Tucker*, nor when compared to those actually executed in this state, nor is it proportional to those actually given the death penalty in Greenville County. Finally, petitioner hopes to analyze murder cases in Greenville County in the last ten years in an attempt to show that there is no logical reason his case was noticed as a death penalty case under the statute.

[5] *Tucker* is the identical case discussed above that held any restraint constitutes kidnapping.

Comparision to *Tucker*

To begin with, the Supreme Court's proportionality analysis in petitioner's case is inevitably brief and uninformative. As noted above, it consists of a standard two sentence analysis and a citation to *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). The South Carolina Supreme Court proportionality review consists of comparing the death sentence with similar cases:

> The United States Constitution requires the death penalty to be imposed only if the sentence is "neither excessive nor disproportionate in light of the crime and the defendant." *State v. Copeland,* 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, this court searches for "similar cases" where the death sentence has been upheld. *Id.*"

State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002).

There is no indication in petitioner's case why the Supreme Court cited *Tucker* as a similar case; in most death penalty cases, at least two cases are cited as examples why the defendant's case is proportional. In *Tucker*, the South Carolina Supreme Court described the facts as follows:

> On June 25, 1992, Rosa Lee Dolly Oakley ("Victim") was in her yard when Appellant pulled his car into her driveway. He talked to Victim long enough to make sure she was alone, then pulled out a gun and forced her into the house and her **[324 S.C. 161]** bedroom. He was preparing to tape Victim up when Joe Black rang the doorbell. Black and James Howard (outside in the car) were looking for Victim's husband. Both appellant and Victim went out into the driveway after Black. Victim began screaming, "Don't leave me,

> he's going to kill me," holding on to Black's arm as he sat in Howard's car. Howard panicked and left. Appellant pulled Victim away from the retreating car, dragged her back into the house, took fourteen dollars from her purse, and shot her twice in the head at close range. He testified he shot her the first time when she tried to grab the gun. As he was leaving, he shot her again to "put her out of her misery."
>
> On the run from police, Appellant broke into the Christian Fellowship Church on June 26-27, 1992, and into Kenneth Parker's mobile home between June 27-29, 1992. Appellant then hitched rides under trucks until he got to Calhoun County, where he killed another person while attempting to get a car and money to escape police looking for him on the Oakley murder. Appellant was tried, convicted, and sentenced to death for this subsequent murder ("Mellon murder") before going on trial for the present offenses. Appellant was caught July 10, 1992 in Maggie Valley, North Carolina and gave a detailed confession to police.

Id. at 263. Furthermore, the jury found three aggravating factors in *Tucker*: kidnapping, burglary and robbery. *Id.* at 271.

There is no explanation why petitioner's case is similar to *Tucker* nor why *Tucker* shows the petitioner's case is not "excessive or disproportionate"; however, it seems relevant to point out the dissimilarities. Tucker killed two individuals after he robbed them. He was on the run from police when he committed the second murder. While he was on the run, he broke into two other establishments. Tucker had an extensive criminal record including rape. *Id.* at 269. Evidently, he had previously been convicted of raping an 8 year old boy and an 83 year old woman. http://en.wikipedia.org/wiki/James_Neil_Tucker . The jury found not one, but

three aggravating factors in Tucker's case.[6] There is no reference to any evidence that Tucker was mentally ill, and of course the Supreme Court was unable to include in their analysis, Mr. Williams' inability to conform his actions due to his fetal alcohol syndrome.

While counsel does not make the argument that the murder and kidnapping of an ex-girlfriend is incapable of being a death penalty case, undersigned does argue that an in depth proportionality review has not been done on this case, and if one is done, it is clear that the death penalty is inappropriate in petitioner's case; petitioners case simply does not compare to that of a rapist of children and matrons who murders one woman, runs from the law, burglarizes multiple dwellings, murders another individual in the process, and flees the state; furthermore, when one factors in the petitioners inability to control his behavior, because of brain damage induced *in utero*, it would be cruel and unusual to uphold the death penalty.

The Review is uninformative and plagued by the fact that it continuously relies on multiple cases that do not result in executions.

In the second place, the proportionality review is so undefined it is impossible to determine what factors the Supreme Court has relied on in the past

[6] Based on the fact that the South Carolina Supreme Court cited two statutory aggravating circumstances in petitioner's case without ever noting one was withdrawn, it is possible the Supreme Court was mistaken in believing the number of aggravating circumstances. See *Williams*, page 63.

and it is impossible for defendants to be on notice what factors make their cases disproportionate. For example, the South Carolina Supreme Court refused to find the death penalty disproportionate for a defendant who was found Guilty But Mentally Ill (GBMI) - who because of mental disease or defect could not control his actions. *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992). In *Wilson*, the Court agreed Wilson could not control his actions and was operating under an "irresistible impulse" when he committed the murder, however, the Court declined to declare the death penalty disproportionate.

The Supreme Court reiterated this view in *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002). Weik was a mentally ill defendant who had a child in common with the victim. When the victim told Weik he was no longer going to be able to see his 10 year old son, Weik went out to his truck to get a shotgun and then entered the victim's house and killed her. The Supreme Court held,

> "Further, the death penalty here is proportionate to other cases where the murder resulted from domestic problems. *E.g., State v. Kelly, supra;State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998). Finally, while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the imposition of such a sentence upon a mentally ill person is not disproportionate. *State v. Wilson,* 306 S.C. 498, 413 S.E.2d 19 (1992)."

Part of the problem with this review process is that it bears little resemblance to people who are actually executed. For example, while Jamie Wilson committed his

murders in 1988 and the Supreme Court issued its ruling in 1992, Wilson is currently incompetent and will most likely never be executed. Similiarly *Ard*, 332 S.C. 370 and *Kelly*, 331 S.C. 132, have been overturned - Ard was originally sentenced to death for killing his girlfriend and her unborn fetus. He was later convicted of involuntary manslaughter and sentenced to time served. http://www.wltx.com/news/story.aspx?storyid=196072 . Kelly murdered his estranged wife and his daughter's fiancé and shot his step daughter. He was later granted post conviction relief and is parole eligible in 2014. http://www.goupstate.com/article/20120503/articles/120509864.

Recently, the South Carolina Supreme Court discussed its current proportionality review in *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (S.C. 2011):

> Before the circuit court, Dickerson argued that our current proportionality review is deficient because it fails to examine cases where death was not imposed and cases where death was not even sought. *See State v. Copeland*, 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). He primarily relied upon Justice Stevens's statement regarding the denial of certiorari in *Walker v. Georgia*, 129 S. Ct. 453 (2008) (memorandum opinion), in which he wrote that examining similar cases "assume[s] that the court would consider whether there were 'similarly situated defendants' who had *not* been put to the death because that inquiry is an essential part of any meaningful proportionality review." *Id.* at 454. In his view, this analysis is "judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most

relevant evidence of arbitrariness in the sentence before the court." *Id.* Justice Stevens noted,

> Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment. If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. Cases in both of these categories are eminently relevant to the question of whether a death sentence in a given case is proportionate to the offense. The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.

Id. at 455-56 (citations omitted). This issue is not before us on appeal, and it would require us to overrule our prior decision in *Copeland*. However, we note our concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional."

On the one hand, *Copeland* would seem to suggest that only review of sentences where death was imposed are appropriate for comparison, while *Dickerson* suggests life sentence cases might also be considered. *Copeland* is currently the law of the land, and it therefore is logical to start with death penalty cases. In the case of Williams, no similar death penalty case exists where an individual was actually executed for killing his ex-girlfriend. Nor has any defendant in Greenville

County in the past two decades been noticed with the death penalty for killing his ex-girlfriend. This would seem to be doubly more important when the defendant is under extreme mental duress.

Comparision to Actual Executions

The following is a list of every execution performed in this state since *Furman* and *Gregg* according to the South Carolina Department of Corrections website:

Joseph Carl Shaw – Raped and killed one woman; kidnapped and killed a teenage couple (17&14) and raped the girl over several days after she was dead.

James Terry Roach – Co-Defendant of Joseph Carl Shaw

Ronald Woomer – Robbed and killed 4 people

Donald Henry Gaskins – Murdered numerous people.

Sylvester Adams – Robbed and murdered 16 year old neighbor

Robert South – Drive by slaying of a police officer. The defendant waived his rights and consented to being executed.

Fred Kornahrens – Killed his ex-wife, her father and her 10 year old stepson

Michael Torrence –Killed two men in a robbery (stabbed one and strangled the other) and killed his girlfriend a month later. The defendant waived his rights and consented to being executed.

Larry Gene Bell – Kidnapped, raped and killed 17 year old and 14 year old girls; also taunted the victims' family on the phone.

Doyle Cecil Lucas – Robbed and killed 65 year old couple at their home. The defendant waived his rights and consented to being executed.

Frank Middleton – Kidnapped, raped and suffocated two women days after escaping from prison work crew (originally sentenced for stabbing a 13 year old boy).

Michael Elkins – Robbed and murdered 59 year old lady (stabbed). The defendant waived his rights and consented to being executed. He was dying from liver disease and helped guards find a vein for the needle.

Earl Matthews – Robbed teenage couple and shot both of them. The girl died.

John Arnold – Raped and strangled a black woman, then carved KKK on her forehead.

John Plath – Co-Defendant of John Arnold.

Sammy David Roberts – Robbed and murdered 3 people.

J.D. Gleaton – Robbed and stabbed gas station owner

Larry Gilbert – Co-Defendant of J.D. Gleaton (shot victim)

Louis Truesdale – Raped and murdered an 18 year old girl.

Andy Lavern Smith – Stabbed 86 year old man 27 times and his wife, 82, 17 times. Both died.

Ronnie Howard – While on parole for bank robbery, carjacked and killed woman and then admitted to killing another woman. He ultimately confessed to over 70 robberies.

Joseph Atkins – He murdered his father and 13 year old neighbor, 5 years after being paroled for murdering his brother.

Leroy Drayton – He kidnapped and murdered a 19 year old girl/gas station attendant.

David Rocheville – He robbed a theater and killed the 19 and 24 year old employees. He kidnapped one.

Kevin Dean Young – He robbed, shot and killed 35 year old school principle. He had a long criminal history and was on parole at the time.

Richard Johnson – He shot and killed a man who picked him up hitchhiking, then shot a trooper who pulled him over.

Anthony Green – He robbed and killed a woman at a mall by shooting her in the face. Green had a long history of robberies and had previously robbed and shot another woman in the face, and had shot another woman in the back at a mall, who still had the bullet in her head.

Michael Passaro – He doused his car with gasoline with his 2 year old daughter inside. The defendant waived his rights and consented to being executed.

David Clayton Hill – Murdered a police officer on duty.

Jerry McWee – Robbed, shot and killed store clerk and then killed his boss a week later.

Jason Byram – Robbed and stabbed a mother with a butcher knife in her own home with husband and children in the house.

James N. Tucker – Killed two women. Had been sentenced to prison before for raping 83 and 8 year old and had escaped.

Richard Longworth – He robbed a theater and killed the 19 and 24 year old employees. He kidnapped one. Co-Defendant of Rocheville.

Arthur Hastings Wise – Ex-Con. Killed 4 co-workers out of revenge. The defendant waived his rights and consented to being executed.

Shawn Humphries – Robbed and killed store clerk. Had several prior convictions.

William Downs, Jr. – Raped and killed 6 year old boy. Had previously raped and killed 10 year old boy. He pled guilty and waived his rights and consented to being executed.

Calvin Alphonso Shuler – Shuler planned the robbery of an armored car weeks in advance after working for the same company. He laid in wait with a pistol and automatic rifle, removed the driver and passenger and shot the guard in the back numerous times before driving off with the victim.

David Mark Hill – He killed 3 DSS workers. The defendant waived his rights and consented to being executed.

James Reed – Killed parents of his ex-girlfriend after being released from prison for assault on officer trying to help his girlfriend.

Joseph Gardner – Tortured, raped, and shot woman in face 5 times. Was AWOL from army.

Luke Williams, III – Killed his wife and 12 year old son to collect insurance.

Thomas Ivey – Ivey escaped from jail in Alabama for murder; he then kidnapped and murdered a businessman in SC and shot a police officer 5 times killing him.

Jeffrey Motts – While already serving life for 2 murders, Motts killed his cellmate. The defendant waived his rights and consented to being executed.

Of the 43 executions above, 25 of them killed more than one person. Of the remaining 18, 2 killed police officers and 2 waived their rights to appeal. Of the remaining, 3 raped their victims, and the remaining robbed their victims which would obviously necessitate committing kidnapping as well. There was no execution involving kidnapping as a sole aggravator.

It would be impossible for the undersigned counsel to review every death penalty case in the state, however, the undersigned has asked the Clerk of Court for every death noticed murder case since 1997[7]. If we consider these cases, no other defendant in Greenville County in the past two decades has received the death penalty for killing his ex-girlfriend.

[7] Undersigned believes there are a few missing cases and he will attempt to include every case during the trial week.

The following list is every case that was served with notice to seek the death penalty in the County of Greenville.

Vincent Raymond Allen – 2004; One victim; 30 year sentence

Raymond Lewis Carter – 1998; murder; armed robbery; kidnapping; LWOP

Benjamin Erik Case – 2006; murder; armed robbery; LWOP. (Also sentenced to ABWIK; Burglary 1st; GL; Burg 1st; Burg 1st; ABWIK).

David Edens – 2004; murder; kidnapping; Sentenced to LWOP by jury.

Britney Emanuel Ervin – 2003; 2 murders; ABWIK; GL. 30 years + 5 years consecutive GL; (Co-Defendant – Mattison).

Dwayne Lamar Farmer – Accessory after fact murder; 15 + 15 consecutive.

Steven Andra Golden – 1997; manslaughter; armed robbery; 28 years; (co-defendant Freddie Eugene Owens).

William Looper Hunter, Jr. – 1987; Murdered Ronald Tyner by shooting him in the head during burglary; Also Burglary Mike Watkins; also murdered John Gutman after breaking into his house; Life with aggravating circ; sentence to run consecutive to burglary and consecutive to armed robbery.

Troy Lee Kilgore – 2001; Murdered Jeanne Anne Kilgore; ABWIK Sylvia Anne Wright; 30 years.

Amos Lamont Mattison – 2003; Two murders; withdrew DP notice 2006; GL; ABWIK; (co-defendant Ervin). Also had priors: Burg First; Burg First; Burg First.

Michael Torlando Robinson – 2001; Two murders; Life consecutive to burglary; The notice to seek the death penalty lists burglary; 2 murders; prior criminal history; character of Defendant and circumstances of crime and future dangerousness as aggravators.

Patrick Nicole Scott – 1993; robbed Western Family Steak House and Pizza Hut.

Joseph R. Sheppard – 1996; Murdered a police officer; Jury sentenced him to LWOP.

Brad Sigmon – 2001; Two murders with baseball bat (parents of his girlfriend, who he also tried to find and kill); Burglary; Sentenced to death.

James William Spoone – 2004; Murder; Burglary; LWOP.

Dana Ricardo Weldon – 1985; murder and armed robbery of a lady on the highway; had previously robbed Taco Cid twice in Jan and July, Pizza Hut and Mazzio's Pizza Twice (once in Aug once in September). ????

John Richard Wood – 2000; Murdered a police officer; Sentenced to death.

Many of the above murders include double homicides, additional assault and batteries with intent to kill, armed robberies, burglaries, kidnappings and lengthy prior records. Only two of them received the death penalty and many of them received sentences of less than life without parole. Considering petitioner's case, there is no logical reason his case was proportionally worse than the above.

III. TRIAL COUNSEL COMMITTED PREJUDICIAL EERROR IN ITS FAILURE TO IDENTIFY AND PRESENT EVIDENCE OF FETAL ALCOHOL SYNDROME.

Because this section relies so heavily on testimony and publications, the following portion of the brief is not as extensive as the above sections. Undersigned has prepared an appendix of governmental and scientific publications that will assist the Court in understanding the complexities of Fetal Alcohol Syndrome and its effects on the petitioner. It will be necessary to have an extensive familiarity with these publications in order to combine it with the testimony to understand the complete nature of this neurological damage.

Fetal Alcohol Syndrome

It was no secret to trial counsel that violence and alcohol were in the petitioner's home every night. ROA 2331. Furthermore, it was clear that the petitioner's mother was an alcoholic long before and after he was born. While trial counsel presented evidence of mental illness, they failed to investigate fetal alcohol syndrome, despite overwhelming evidence of maternal ingestion of alcohol during pregnancy. The petitioner's mental illness is simply a small symptom of this organic brain damage.

The most relevant difference can be seen in an *Atkins* type analysis. *Atkins v. Virginia,* 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Atkins* requires three factors to be established for immunity to the death penalty. The petitioner meets two of those factors, and the experts will testify that the other factor, his IQ, actually makes him at higher risk than if he had a lower IQ.

Petitioner believes his experts will testify that due to petitioner's fetal alcohol syndrome disorder, petitioner was Guilty But Mentally Ill (GBMI). Petitioner would argue it is unconstitutional to execute an individual who is GBMI[8] and he further argues that petitioner's mental defect is as severe or more severe than the requirements of *Atkins*. But the first prong of this analysis is whether trial

[8] In contra to *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992)

counsel committed error in their failure to investigate fetal alcohol syndrome. Our Supreme Court has made it clear that when deciding whether counsel committed error, the ABA standards are the prevailing norms of practice for death penalty defense:

> "In *Strickland,* the United States Supreme Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining" whether counsel's performance is reasonable. *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. 2052. More recently, the Supreme Court again clearly enunciated that the reasonableness of counsel's conduct may be measured by the ABA's guidelines for capital defense. *Wiggins v.Smith,* 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) . Additionally, "[t]he ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984." *Hamblin v. Mitchell,* 354 F.3d 482, 487 (6th Cir.2003).

Ard v. Catoe, 642 S.E.2d 590, 372 S.C. 318 (S.C. 2007).

Recenlty, the American Bar Association passed a resolution urging the legal community and others to help identify and respond effectively to Fetal Alcohol Spectrum Disorders (FASD). American Bar Association Resolution, August 7, 2012. Appendix 308. It notes that the United States Senate has passed a resolution designating September 9, as National Fetal Alcohol Spectrum Disorders Awareness Day since 2004. The ABA resolution notes that individuals with FASD are at high risk of getting in trouble with the law, and one study found that there

are, "among youth in juvenile facilities, an astounding 40 times the expected rate of individuals with FASD." The resolution continues to note that because of these individuals' executive functioning problems, they may not have the capacity to commit deliberate intentional crimes and that these issues should be considered in both guilt and sentencing phases of the trial; furthermore, it notes that a diagnosis of FASD has been persuasive to juries as an explanation for otherwise inexplicable behavior.

But this is not the first time the ABA has alerted death penalty defense lawyers to the significance of fetal alcohol syndrome. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [ABA Guidelines], which our Supreme Court references in *Ard*, specifically warn attorneys that investigation into the client's life begins at conception; but the guidelines do not stop there, they specifically cite Fetal Alcohol Syndrome at least three times. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L.Rev. pages 956, 1022, 1061 (2003).

> "Because the sentencer in a capital case must consider in mitigation, anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. [Quotations and Footnotes omitted]. At least in the case of the client, this begins with the moment of conception." 211 [Footnote 211 -

> "Mitigation begins with the onset of the defendant's life because many defendants' problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy."[Quotations omitted]].

Id at 1022.

Furthermore, the defense knew that the petitioner's mother drank constantly, including during pregnancy. There was testimony that the petitioner's mother had 9-10 glasses of wine a night. ROA 1769. The transcript is replete with indications that the mother was an alcoholic and was intoxicated before and after petitioner was born:

> Question: "His mother was an alcoholic for 30 years.
>
> Answer: Yes.
>
> Question: That she was intoxicated much of the time that he was a child.
>
> Answer: Yes.

ROA 2180, Line 5. Dr. Crawford acknowledged that petitioner's sister verified the mother was an alcoholic. ROA 2182, Line 8. And the trial transcript is replete with references to the mother's drinking. ROA 1877, 1978, 2179, 2214, 2236, 2237, 2252, 2262, 2331, 2336.

Furthermore, as will be seen by the testimony, the attorneys' files contain references that petitioner's mother drank and smoked throughout her pregnancy. Finally, the mother freely admits she drank throughout the entire pregnancy.

It would be impossible to adequately condense the massive amounts of research and publications done on this subject, but the following presents a brief history and explanation why this testimony is so important. Modern investigation into the effects of Fetal Alcohol Syndrome began in the 1970s. The United States Congress mandated that the Institute of Medicine (IOM) of the National Academy of Sciences conduct a study of FAS and related birth defects in Section 705 of Public Law 102-321, the ADAMHA Reorganization Act. Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment: Page 1. National Academy Press. (1996). (NAP) (While the IOM manual will be cited as NAP, page x, the undersigned notes that page numbers come from the official publication from the National Academy Press, and the undersigned cannot confirm whether the online publication conforms to those page numbers. Undersigned has two copies of the manual, one of which it has delivered to the court; additional copies can be ordered from the National Academy Press.)

While society often uses the term Fetal Alcohol Syndrome (FAS) to encompass any *in utero* damage due to alcohol, it would be more correct in using the term, fetal alcohol spectrum disorder (FASD) to encompass all of the diagnoses possible due to maternal ingestion of alcohol. South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan, State Fiscal Years 2011-2013. Appendix 73. Confusing this even more is the fact that numerous authors and studies initialy

used the term Fetal Alcohol Effects to describe conditions that met all FAS diagnostic criteria except for the full array of facial abnormalities. NAP, page 63. Indeed, the IOM publication consistently references simply FAS. To be precise, the IOM set forth criteria for five diagnoses: Fetal Alcohol Syndrome confirmed with maternal alcohol exposure, Fetal Alcohol Syndrome without confirmed maternal alcohol exposure, Partial Fetal Alcohol Syndrome with maternal alcohol exposure, Alcohol Related Birth Defects, and Alcohol Related Nuerodevelopmental Disorder. NAP, page 76.

One reason FAS is often used to describe all FASD diagnoses is the fact that they all have the same signs and symptoms except for the face, which develops during a very small window of time in early pregnancy and may not be as affected as the brain, which develops throughout the pregnancy. NAP, page 78. The IOM committee also had concerns about the other labels being seen as somehow less serious than an FAS diagnosis, and specifically the IOM had reservations about the term Partial Fetal Alcohol Syndrome because, "'Partial' denotes, to some people, that the condition might not be as severe, which the committee did not wish to imply." NAP, page 78. "This diagnosis could be particularly useful, for example, for some patients who present for diagnosis as an adult. The natural history of FAS is such that some of the 'hallmark' indicators used in infancy or childhood are not maintained into adolescence or adulthood." NAP, page 75.

While petitioner has been diagnosed with Partial Fetal Alcohol Syndrome (PFAS), it is likely the term FAS will be used as well to describe his condition as well as to describe all of the conditions related to problems resulting from maternal ingestion of alcohol during pregnancy. Furthermore, it is important to realize that PFAS does not suggest the petitioner's condition is less severe than FAS; in fact, in some circumstances, PFAS can put an individual at much higher risk for adverse life course outcomes (e.g. criminal conduct) due to his condition not being recognized and his ability to mask his cognitive deficits.

After Congress mandated the IOM to establish official FASD diagnostic categories, Congress continued to appropriate resources to further research and assistance; in 2002, they mandated that the Centers for Disease Control and Prevention (CDC), acting through the National Center on Birth Defects and Developmental Disabilities Fetal Alcohol Syndrome Prevention Team and in coordination with the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect, develop guidelines for the diagnosis of FAS and other negative birth outcomes from prenatal exposure to alcohol. Appendix 17.

The CDC published *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* in July of 2004 and as part of that publication noted, "We now recognize that FAS represents the tip of the iceberg and there is a continuum of outcomes associated with prenatal exposure to alcohol." CDC, page V; Appendix 15. While

the CDC did not complete the congressional mandate to define all FASD disorders, it more specifically defined the criteria and symptoms the IOM relied on in its diagnostic criteria for all FASD conditions.

Regardless of the specific diagnosis, organizations and agencies have been clear that prenatal exposure to alcohol creates a destructive condition that puts children and adults into a high risk category of not being able to conform to society's norms due to significant cognitive deficits that impair executive and adaptive functioning. The South Carolina Fetal Alcohol Spectrum Disorders Strategic Plan for State Fiscal Years 2011-2013 notes the problems associated with individuals with FASD: "Resulting impairments may include, but are not limited to, intellectual disability; learning disabilities; attention deficits; hyperactivity; and problems with impulse control, language, memory and social skills." SCFASD, page 2. Appendix 74. They also note it is the leading cause of intellectual disability and,

> "Individuals (especially youth) with FASD are at high risk of engaging in criminal activity. They face many challenges that make them vulnerable, such as being easily influenced by peer pressure; lacking impulse control; not understanding cause and effect; not learning from mistakes; making poor decisions; having memory problems; and having difficulty understanding future consequences. Researchers at the University of Washington estimate that 35% of individuals with an FASD have been in jail or prison, and more than half of the individuals diagnosed with an FASD have been in trouble with the law."

Id.

Petitioner believes his experts will testify that his organic brain damage was severe and that FASD explains several factors in this death penalty case, including his poor impulse control, inability to learn from his mistakes, inability to conform to societal norms, and complete failure to logically deal with the end of a romantic relationship, resulting in this horrendous crime. All of these attached publications [Except the article on morphometrics, Appendix 283] note these conditions are caused by FASD. Appendix 5, 9, 35-37, 74, 81-82, 83, 88, 109-110, 115-119, 141-144, 153-156, 184, 212-213, 248-257, 259-260, 308-318.

Reviewing the attached publications, there can be no doubt that organic brain damage from prenatal exposure to alcohol is incredibly damaging to an individual's brain and therefore is powerful mitigating evidence in explaining why this individual committed such a terrible crime.

IV. RIGHT TO PLEA GUILTY

Petitioner desired to plea guilty to the murder charge in order to show acceptance of responsibility. Our Supreme Court has held that a defendant does not have a right to plea guilty and still receive a sentencing hearing by a jury: "See *State v. Allen,* 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied,* --- U.S. ----, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16-3-20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also

did not violate the Eighth and Fourteenth Amendments; noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005) (adhering to *Downs* and rejecting claims that section 16-3-20(B) was unconstitutional); *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004) (citing *Downs* and concluding section 16-3-20(B) was constitutional); *Downs,* 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of section 16-3-20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing)." *State v. Inman*, 359 S.C. 539, 720 S.E.2d 31 (2011). Petitioner believes this issue was preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel and petitioner desires to preserve this issue for further review, despite the overwhelming case law in South Carolina against the petitioner.

V. AGGRAVATORS IN THE INDICTMENT

In its return, the State noted that trial counsel objected to the fact that the circumstances of aggravation were not included in the indictment and that the trial court ruled on this issue. State's Return to the First Amended Application, Page 83. Petitioner also agrees that the South Carolina Supreme Court has previously ruled on this issue. *State v. Laney,* 367 S.C. 639, 649-650, 627 S.E.2d 726, 732 (2006);

State v. Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-381 (2004). Petitioner believes this issue was preserved by trial counsel, but regardless, either it was not preserved by trial counsel or appellate counsel and petitioner desires to preserve this issue for further review, despite the overwhelming case law in South Carolina against the petitioner.

CONCLUSION

Petitioner believes that many of these errors standing alone entitle him to relief and the combination of all of these errors demands relief.

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