

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Court of Common Pleas

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge

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Case No. 2010-CP-23-09792  
Appellate Case No. 2013-001945

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Charles Christopher Williams,

Petitioner,

v.

The State of South Carolina

Respondent.

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**BRIEF OF *AMICUS CURIAE***  
**THE FEDERAL REPUBLIC OF GERMANY**

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American Bar Association, ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, reprinted in 36 HOFSTRA L. REV. 677 (2008)..... passim

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## I. INTEREST OF AMICUS CURIAE

The Federal Republic of Germany (“Germany”) respectfully submits this brief as *amicus curiae* in support of a petition for certiorari to review post-conviction relief, pursuant to Rule 243, SCACR.<sup>1</sup>

Charles Christopher Williams, a dual citizen of Germany and the United States, is on death row in South Carolina. Following his arrest, Mr. Williams was unaware of his entitlement as a German citizen to full consular assistance from the German government. Unfortunately, his defense counsel did not inform the German Consulate of his arrest and did not investigate the significant assistance available to him. Mr. Williams suffers from cognitive and social disabilities—the effects of Fetal Alcohol Syndrome—which also were not uncovered and explored as mitigating factors by his defense counsel at trial, and which Germany’s involvement would have revealed and advanced. Likewise, Germany’s presence at Mr. Williams’ trial and sentencing would likely have preempted the Solicitor’s egregiously improper comments on Mr. Williams’ potential sentencing conditions, which injected arbitrary, reversible-error factors into the jury’s death sentence considerations.

Germany has a constitutional obligation to assist German citizens who face the death penalty in foreign jurisdictions.<sup>2</sup> The German government is opposed to capital punishment and has routinely become involved in cases where its citizens face a death

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<sup>1</sup> All required procedures have been followed. Rule 243, SCACR. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared by White & Case LLP on a *pro bono* basis. Correspondingly, no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation and submission. This brief was shown to defense counsel, Derek Enderlin, to ensure that it contains an accurate representation of the facts.

<sup>2</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 1980, 90 ILR 386, 396-97 (Ger.).

sentence. The international community, including the United States, has recognized a nation's interest in assisting citizens charged with crimes in foreign jurisdictions. Both the United States and Germany are signatories to the Vienna Convention on Consular Relations, an agreement that ensures access to detained citizens on foreign soil and allows foreign governments to secure legal representation and assistance for their citizens. The United States and Germany have also entered into a bilateral agreement reinforcing those rights. Here, respected members of the bar, acting as court-appointed counsel, did not take steps to verify relevant aspects of their client's history, despite strong clues demonstrating his German nationality. Therefore, the German government was denied the opportunity to provide consular services and to seek appropriate legal support for Mr. Williams prior to his trial and sentence. Mr. Williams was, as a result, denied the considerable consular assistance afforded by Germany to German nationals facing capital punishment and thus substantially prejudiced at his trial and sentencing hearing.

The Federal Republic of Germany's interest in this case is also animated by the great importance it places on human rights and the principle of equality before the law. Germany has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Convention for the Elimination of All Forms of Racial Discrimination.<sup>3</sup> Germany is, then, dedicated to ensuring that a fair trial

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<sup>3</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the goal of "the maintenance and further realization of human rights and fundamental freedoms." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("Convention for the Protection of Human Rights"). Among those fundamental freedoms is the right to a fair trial. *Id.* at Sec. I, Art. VI. The Convention for the Protection of Human Rights was later amended to "take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination." *Id.* at

is afforded to its nationals, particularly where those nationals are, as Mr. Williams is, indigents from disadvantaged groups.

The Federal Republic of Germany is also deeply committed to South Carolina as an economic partner, as demonstrated by an investment of approximately \$13 billion in the State, and annual German purchases of South Carolina's goods valued at several billion dollars. Germany therefore has a keen interest in this and all cases affecting German nationals in South Carolina.

The Federal Republic of Germany submits this brief to assist the Court by demonstrating the significant effect that German assistance would have had on Mr. Williams' trial and sentencing, had it been made available to him.

## II. SUMMARY OF ARGUMENT AND STATEMENT OF THE CASE

Charles Christopher Williams is a German national currently sentenced to death in the State of South Carolina. During the preparation and conduct of his trial, sentencing, and appellate hearings, Mr. Williams' counsel did not conduct an adequate investigation of Mr. Williams' family history, which would quickly have made apparent his ties to Germany as a citizen by parentage.<sup>4</sup> Mr. Williams was therefore deprived of

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Protocol No. 12, Nov. 4, 2000. Similarly, signatories of the International Convention on the Elimination of All Forms of Racial Discrimination agree that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966) ("CERD"). Specifically, state parties to CERD "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee . . . equality before the law, notably in the enjoyment of . . . (a) [the] right to equal treatment before the tribunals and all other organs administering justice." CERD at Art. V.

<sup>4</sup> Specifically, Mr. Williams was born to a mother of German citizenship. Under German law, every descendant of a German is *ex lege* also a German. *See, e.g.*, Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, art. 3, 4, last amended by Article 5 of the Act on the Implementation of Residence- and Asylum-Related Directives of the European Union of Aug. 19,

the significant consular assistance that Germany provides as a matter of longstanding practice and policy to German nationals facing capital punishment. Crucial mitigating factors were also not brought to light at the time of the trial, to Mr. Williams' detriment. As a result, the jury was afforded an incomplete picture of the young man it was sentencing to death, one that did not adequately describe the hardship he has endured and the toxic effects of his mother's alcohol abuse, not only on the environment of his upbringing, but also on his physical, cognitive, and emotional development. In particular, his counsel did not learn that Mr. Williams has Fetal Alcohol Syndrome until after his conviction and death sentence. A child born with Fetal Alcohol Syndrome can suffer lifelong impairments because of his mother's consumption of alcohol during her pregnancy.<sup>5</sup> At no time during his trial was the jury made aware of this critical mitigating information.

What is more, it was only during the post-conviction relief stage of his case that Mr. Williams' new counsel began, in line with his duties as Mr. Williams' legal representative, to investigate Mr. Williams' status as a German national. Because trial counsel missed this issue, the German government did not become aware of Mr. Williams' case until after he had been sentenced to die; Germany was not, then, able to render its usual extensive support in aid of his defense. These services would have included, among other things, assessing the quality of Mr. Williams' trial counsel;

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2007. Even though Mr. Williams obtained German documents only later in his life, he was a German citizen from the moment he was born. See Ex. A, Certificate of German Citizenship.

<sup>5</sup> According to the National Organization on Fetal Alcohol Syndrome, fetal exposure to alcohol can lead to "physical, mental, behavioral, and/or learning disabilities with possible lifelong implications." National Organization on Fetal Alcohol Syndrome, About NOFAS, <http://www.nofas.org/wp-content/uploads/2012/10/About-NOFAS-2012.pdf>.

funding investigators and experts to develop key evidence, if necessary; providing archival and other information; and monitoring the progress of the case through the trial and appellate review. Given the Solicitor's highly improper comments in his closing argument regarding Mr. Williams' potential conditions in prison, Germany's presence at trial and sentencing would have made a difference in preventing such inflammatory lapses.

In brief, had the German government known of Mr. Williams' German citizenship, it would have harnessed the considerable resources at its disposal to assist in his defense, and thus ensured that Mr. Williams obtained the best resources in order to obtain a fair process and a just outcome.

### **III. ARGUMENT**

Charles Christopher Williams was born on December 11, 1982 to Dwight Williams, an American, and Daisy Huberth Williams, a German citizen. Record on Appeal pp. 2248, lines 18-24; 2249, line 14. His parents met and married in Germany. His older sister, Maureen, was born in Germany. R. p. 2251, line 24. Mr. Williams' parents later moved to the United States, where he was born. They divorced when Mr. Williams was eight years old. R. p. 2210, lines 5-7.

Mr. Williams' own father acknowledged at trial that the home in which Mr. Williams grew up was not a healthy place for children. R. p. 2211, lines 19-22. Mr. Williams' mother was an alcoholic, and had turbulent relationships with Mr. Williams' father and with the man with whom she later lived, Hans Seifert. R. pp. 2180, lines 4-5; 2246-65. Mr. Williams did poorly in school and reportedly had few friends. R. p. 2212, lines 15-19. He had a short attention span, was easily distracted, and was immature for

his age. R. pp. 2224-26. An expert at trial testified that Mr. Williams' mother ignored evidence of her son's special needs, and did not respond to recommendations for help and resources from educational professionals. R. pp. 2231-32.

On March 23, 2004, Mr. Williams, who is black, was indicted by the Court of General Sessions for Greenville County for the murder of Maranda Williams, who is white. The State gave notice of intent to seek the death penalty on August 30, 2004. A jury found him guilty of kidnapping, murder, and possession of a firearm during a violent crime and on February 19, 2005, recommended the death penalty. On February 8, 2010, the South Carolina Supreme Court entered its opinion affirming the conviction and death sentence. Mr. Williams applied for Post-Conviction Relief on November 30, 2010; this relief was denied by the Court of Common Pleas on July 24, 2013, and Mr. Williams now seeks permission to appeal that decision.

Mr. Williams was twenty years old when he committed the acts that set in motion these proceedings. A clinical forensic psychologist who specializes in violence risk-assessment concluded at trial that Mr. Williams poses very little risk of future violence, his greatest risk factor being his youth at the time of the offenses. R. p. 2281, line 22.

**A. CONTRARY TO THE COURT OF COMMON PLEAS' ASSESSMENT, FAILURE TO NOTIFY THE GERMAN CONSULATE OF MR. WILLIAMS' ARREST DEPRIVED HIM OF OUTCOME-DETERMINATIVE ASSISTANCE FROM THE GERMAN GOVERNMENT AND WAS INCONSISTENT WITH HIS RIGHT TO A FAIR TRIAL**

**1. The Failure to Perform Minimal Diligence That Would Have Led to the Discovery of Mr. Williams' German Nationality Constitutes Ineffective Assistance of Counsel**

Under well-established United States constitutional law, to show ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently

and that this deficiency prejudiced the outcome of the defendant's case. Strickland v. Washington, 466 U.S. 668, 687-87, 691-92 (1984); Gibbs v. State, 403 S.C. 484, 492, 744 S.E.2d 170, 174 (2013). Defense counsel's performance is deficient when it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88; Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Prejudice is established in a death penalty case where "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

The performance of defense counsel "is deficient if he fails to make a reasonable investigation for possible mitigating evidence." Matthews v. Evatt, 105 F.3d 907, 919 (4th Cir. 1997); see also Wiggins v. Smith, 539 U.S. 510 (2003) (death sentence vacated where trial counsel's mitigation investigation proved wanting). Both the United States Supreme Court and this Court have indicated that the guidelines provided by the American Bar Association ("ABA") regarding defense counsel's performance in death penalty cases should be used to measure "the reasonableness of counsel's conduct." Ard v. Catoe, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2007) (citing Wiggins, 539 U.S. at 524); Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in 31 HOFSTRA L. REV. 913 (2003) ("ABA Guidelines"). Under the ABA Guidelines, "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Id. at 1015. Moreover, "[b]arring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to

... members of the client's immediate and extended family.” Id. at 1019 (Commentary to the ABA Guidelines).

With respect to the investigation and development of mitigating factors, the ABA is even more explicit in its supplementary guidelines for defense counsel's performance in death penalty cases.<sup>6</sup> Am. Bar Ass'n, ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, reprinted in 36 HOFSTRA L. REV. 677 (2008) (“ABA Supplementary Guidelines”). Specifically, the ABA directs that the following are “requisite mitigation functions” of defense counsel:

- “The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and . . . other factors. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to . . . multi-generational family history.”
- “[Defense counsel] must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence of less than death.”
- “It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to . . . [t]he client's family, extending at least three generations back, and those familiar with the client.”

ABA Supplementary Guidelines at 688-91 (emphasis added). Far from being an obscure rule, the requirement that an investigation extend to at least three generations in death penalty cases has been repeatedly cited. See State v. Santiago, 305 Conn. 101, 231-33, 49 A.3d 566, 648-50 (Conn. 2012) (citing the ABA Supplementary Guidelines' emphasis on a mitigation investigation that includes a family history search spanning at least three

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<sup>6</sup> The ABA expressed its goal for the ABA Supplementary Guidelines, stating that they “will provide useful guidance to judges . . . . Following the [Supplementary] Guidelines will help ensure effective assistance of counsel for all persons charged with or convicted of capital crimes.” ABA Supplementary Guidelines at 678.

generations); Sean D. O'Brien, When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 693, 725 (2008) (citing the ABA's Supplementary Guidelines and explaining that, in order to perform a competent and thorough mitigation investigation, counsel must conduct a family history search going back at least three generations); see also Daniel J. Wattendorf & Donald W. Hadley, Family History: The Three-Generation Pedigree, 72 AM. FAM. PHYSICIAN 441, 447 (2005) (stating that it is essential to review the history of three generations of relatives in order to properly diagnose and assess the risks for certain diseases, even common ones).

Case law, the ABA Guidelines, and the ABA Supplementary Guidelines demonstrate that all mitigating circumstances, no matter how remote or minute, can be important in avoiding a death sentence. In this instance, it should have been a straightforward matter for defense counsel to determine, after speaking with Mr. Williams' mother, that she was foreign-born: Daisy Williams was born, raised, and lived until adulthood in Germany, and to this day speaks with a German accent. Any reasonable investigation into Mr. Williams' family history, especially a three-generational investigation, would have readily revealed his German citizenship.

**2. Defense Counsel's Failure to Perform Minimal Diligence Deprived Mr. Williams of Assistance Offered by the German Government, Which Is Widely Recognized as Vital to Preserving the Right to a Fair Trial**

Consular assistance is internationally recognized as both an essential element of due process and as an indispensable guarantee of other due process rights, including the fundamental right to an effective defense. See, e.g., Advisory Opinion OC 16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the

Due Process of Law, Inter-Am. Ct. H.R. (Ser. A) No. 16, ¶¶ 122, 137 (Oct. 1, 1999); Eur. Comm'n, Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union, COM (2004) 328 final, ¶ 7 (April 28, 2004).

In cases of the detention of a national of a State other than the arresting State, involving consular representatives is the starting point for a defendant to obtain the range of consular services and the consular help to get appropriate legal assistance. Access to such assistance has been widely recognized as vital to ensuring a fair trial. The universal acceptance of these standards is reflected in the 1963 Vienna Convention on Consular Relations (the "Convention"), signed by the United States and Germany, along with 171 other States. The Convention to a large extent codifies customary international law and thus represents the most basic principles concerning consular functions.

The Convention recognizes that nations have a strong interest in protecting the rights of their citizens detained in foreign countries, an interest that does not abate when they are dual citizens. The Convention not only provides that a country detaining the citizen of a foreign nation must, if the detainee so requests, "without delay, inform the consular post of the [detainee's country]," but also asserts that "consular officers shall have the right to visit a national . . . who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention on Consular Relations art. 36(1)(b)-(c), April 24, 1963, 596 U.N.T.S. 261.

The United States and Germany have entered into a bilateral agreement reinforcing these interests. That agreement provides that "if, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular

representative of his country . . . shall have the right to visit and communicate with such national.” Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, Art. III (July 14, 1956).

While the United States has interpreted Art. 36(1)(b) to exclude dual nationals from the ambit of its protection, narrowly applying this article only to “foreign nationals,” this is not a universally accepted position and is not persuasive here. Moreover, although as noted by the Court below, Mr. Williams may not be a “foreign national” for the purposes of U.S. law, the United States recognizes the concept of dual nationality. U.S. Dep’t of State, Dual Nationality (noting that “[t]he U.S. Government recognizes that dual nationality exists,” and “U.S. law does not . . . require a person to choose one nationality or another”).<sup>7</sup> Mr. Williams’ U.S. citizenship does not, therefore, deprive him of his German nationality under U.S. law. The U.S. Department of State also recognizes that “dual nationals owe allegiance to both the United States and the foreign country,” *id.*, and this allegiance comes with corresponding benefits, such as consular assistance where necessary.

German consular officials, therefore, retain the right and constitutional obligation to assist their nationals detained outside of Germany regardless of what other citizenships they may hold. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 1980, 90 ILR 386, 396-97 (Ger.). Regardless of a technical interpretation that Mr. Williams was not a “foreign national” because he was also a United States citizen, he was at all times a German citizen, to whom Germany was obliged to provide significant, potentially outcome-altering support. It is defense counsel’s failure to avail itself of this

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<sup>7</sup> U.S. Dep’t of State, Dual Nationality, <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/citizenship-and-dual-nationality/dual-nationality.html>.

significant resource that constitutes the gravamen of amicus' argument. Under an ineffective-assistance analysis, Mr. Williams was still entitled to the assistance that Germany could have and would have offered him because it would have unearthed sufficient mitigating evidence such that the "sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

Due to the ineffective assistance accorded by trial counsel, the German Consulate could not offer, and Mr. Williams did not receive, the extensive assistance that was available to him. Mr. Williams has multiple cognitive and psychological impairments due to Fetal Alcohol Syndrome, which may well have prevented him from understanding the consequences for his trial and sentencing of his and his mother's German citizenship, and the potential benefits of consular assistance. More significantly, Mr. Williams was deprived of this assistance because his attorneys did not seek to verify Mr. Williams' foreign nationality and consequently inform the German government of his situation and solicit its assistance.<sup>8</sup>

The United States Supreme Court has left open, and indeed, in some circumstances, has cited with approval the proposition that international treaties involving consular assistance can be given meaning in the context of ineffective assistance of counsel. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 364 n.3 (2006) (Ginsburg, J., concurring in judgment); Medellin v. Texas, 552 U.S. 491, 537 (2008) (Stevens, J., concurring in judgment). Counsel's failure to take advantage of consular

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<sup>8</sup> Trial counsel should have been well aware that Mr. Williams' mother is a German citizen. In fact, defense expert Marjorie Hammock testified during trial that Mr. Williams' mother was born in Germany. R. p. 2249, line 14 (responding to defense counsel question regarding Mr. Williams' family history with "Well, Daisy is from Germany. She was born there.").

resources is especially glaring where the consulate “would have intervened in the case, assisted with [the] defense, and provided resources to ensure that [the defendant] received a fair trial and sentencing hearing.” Valdez v. Oklahoma, 46 P.3d 703, 710 (Okla. Crim. App. 2002). In light of this, defense counsel has a duty to inquire into the potential foreign citizenship of his client, particularly in capital cases where consular assistance can be indispensable.

Mr. Williams’ trial counsel did not do so. Had counsel performed an adequate investigation of its client’s background and circumstances, it would have learned that Mr. Williams was a German national and that extensive, outcome-changing assistance was available.

**B. HAD THE GERMAN GOVERNMENT BEEN NOTIFIED OF MR. WILLIAMS’ ARREST AND TRIAL, IT WOULD HAVE PROVIDED FULL CONSULAR ASSISTANCE THAT WOULD HAVE CHANGED THE SENTENCING OUTCOME**

**1. As a Matter of Practice and State Policy, the German Government Assists Its Citizens Facing Capital Punishment in Foreign Jurisdictions**

For many decades, German consular officers have been dedicated to providing assistance to German nationals incarcerated outside Germany. Germany closely monitors cases of German nationals facing the death penalty and is committed to assisting German nationals facing capital charges in the United States and elsewhere, including by expending significant resources to help them obtain a fair trial.

German law requires that the country’s consular authorities render services to German citizens imprisoned abroad, where those services are deemed necessary for the defense of its nationals. Article 7 of the German Consular Law provides that “[c]onsular

officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons.” Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) [KonsG] [Consular Law], § 7 (Sept. 11, 1974).<sup>9</sup> Whenever the German government is made aware that one of its citizens is imprisoned in a foreign country, it undertakes a thorough evaluation of the case and determines what specific services are required in each circumstance. The German government then monitors these cases and provides assistance to the extent possible.

When informed that a German national is imprisoned, the German Consulate General assesses the conditions of imprisonment and prepares a report on the prisoner and the circumstances of his case. The German government establishes regular contact with the prisoner and his counsel and evaluates counsel’s competence to handle the case. This ongoing contact and monitoring of the case ensures that trial counsel is providing all necessary services to allow for a thorough and vigorous defense. The German government also tries to connect prisoners with relatives, wherever they may be located, so that they may receive family support. Of great significance for many indigent defendants like Mr. Williams, the German government marshals support for investigators and expert witnesses, when needed.

Germany is categorically opposed to capital punishment. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I at art. 102 (“Die Todesstrafe ist abgeschafft.” [tr.“Capital punishment is abolished”]); see

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<sup>9</sup> A certified translation of the pertinent parts of the Act is attached hereto as Ex. B.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocols No. 6 and 13 (concerning the abolition of the death penalty); see also Charter of Fundamental Rights of the European Union, March 30, 2010, OJ of the EU (2010/C 83/02). In 1997, the Council of Europe, of which Germany is a member, first called for the “universal abolition of the death penalty.” See Council of Europe, Final Declaration and Action Plan of Second Summit of Heads of State and Government, 11 October 1997. Today, the European Union (of which Germany is also a member) and the Council of Europe “share the common overarching objective to consolidate the abolition within and beyond its borders.” See Joint Declaration by Thorbjørn Jagland and Catherine Ashton on the European and World Day against the Death Penalty, October 10, 2013. The European Union regularly restates its “strong and unequivocal opposition to the death penalty in all times and in all circumstances.” See Council of the European Union, EU Guidelines on the Death Penalty: Revised and Updated Version, para. I(i), Apr. 12, 2013.

The abolition of the death penalty is a fundamental value of the EU and one of the conditions imposed on the countries aspiring to join it. See Guidelines, para. I(iv). As a member of the EU, Germany has agreed to that body’s Guidelines on the Death Penalty (the “Guidelines”), the most detailed document issued by the EU on this topic. The Guidelines were first adopted in 1998, when the EU countries decided to strengthen their activities in opposition to the death penalty, and have been regularly updated since.

The Guidelines state that the EU “considers that abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights.” The objective of the EU, as stated in the Guidelines, is therefore to “work

towards universal abolition of the death penalty as a strongly held policy view agreed by all Member States.” In countries where the death penalty continues to be practiced, the EU “call[s] for its use to be progressively restricted” and “advocate[s] that it be applied respecting the minimum standards.” These standards should be in line with “international human rights law and other international standards.” Among these minimum standards is a requirement that the death penalty should not be imposed on persons “suffering from any mental illness or having an intellectual disability.”

Against this background, it is not surprising that, on October 10, 2012, Germany’s Minister of Foreign Affairs joined his counterparts from several other European countries in signing a call for the abolition of the death penalty. See Joint Call for the Abolition of the Death Penalty, October 10, 2012. The EU also regularly issues statements opposing individual cases of death sentences or executions. In the course of 2012 and during the first half of 2013, the EU issued 54 such statements. See EEAS; Press Release, European and World Day against the Death Penalty, October 10, 2013.

Cases in which German nationals are facing the death penalty are therefore of special concern to the German government. In these cases, Germany takes steps and devotes resources beyond those available in the average case, which are able to change the outcome of cases and sentencing hearings. For instance, in LaGrand, a case that has left an indelible mark on international law, the German government demonstrated its commitment to pursuing every available avenue to assist German nationals facing the death penalty, and to securing its right to defend their interests. LaGrand Case (Germany v. United States of America), International Court of Justice (ICJ), 27 June 2001. In LaGrand, the German government became aware of the case of brothers Walter and Karl

LaGrand only after they were sentenced to death in Arizona. Though the brothers had been raised in the United States since the ages of three and five respectively, they were German citizens, and Germany moved swiftly to intercede on their behalf. High-level officials, including the German Foreign Minister, the Minister of Justice, the German Chancellor, Germany's President and its Ambassador to the United States, made overtures to U.S. federal and state government authorities, seeking a lesser sentence. *Id.* at 478-79. After exhausting all legal recourse in the United States, Germany then pursued a complaint under international law before the ICJ. *Id.*

The consular resources of a country like Germany can make a significant difference in the preparation of the defense and the development of mitigation evidence in death penalty cases. In *LaGrand*, as here, the German government was deprived of the opportunity to access its nationals early in their case, when consular assistance can have the greatest effect. In *Ledezma v. State*, 626 N.W.2d 134 (Iowa 2001), the Iowa Supreme Court found trial counsel ineffective, in part because counsel failed to investigate and present potentially exculpatory evidence, and ordered a new trial. The court noted that trial counsel had failed to avail himself of consular assistance:

When representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws. . . . [A]ll criminal defense attorneys representing foreign nationals should be aware of the right to consular access . . . and should advise their clients of this right. Criminal defense attorneys are not equipped to provide the same services as the local consulate. . . . [C]onsular access may very well make the difference to a foreign national, in a way that trial counsel is unable to provide.

*Id.* at 152 (citations omitted; emphasis added). See also *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 980 (N.D. Ill. 2002) (“[C]onsular functions are particularly significant during penalty proceedings in which courts determine whether

capital punishment is applied. Particularly in this case, where trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the [government] could possibly have made a difference.") (citations omitted).

**2. Had the German Government Been Properly Informed of Mr. Williams' Arrest and Trial, It Would Have Provided Him with Essential Assistance**

Contrary to the assessment of the court below, the consular resources the German government could muster are not equivalent to the additional time and preparation every defense counsel wishes it could have, Order of Dismissal at 35. The German government has resources at its disposal well beyond those of defense counsel, resources it would have and should have been able to employ in this case that may well have led to a different outcome for Mr. Williams. See, e.g., Ledezma, 626 N.W.2d 134.

Had the German government been aware of the charges against Mr. Williams, it would have provided him important assistance from trial preparation, through sentencing and beyond. With its considerable resources, Germany would have assisted Mr. Williams in four principal ways. First, the German government would have monitored his appointed counsel's strategy prior to trial and sentencing. Second, if necessary, Germany would have assisted Mr. Williams by securing alternative trial counsel for him. Third, German representatives would have attended Mr. Williams' trial to ensure, among other things, that the State understood that its presentation was being monitored internationally. Fourth, the presence of the German government at critical points prior to and during trial would have led to intangible benefits that may well have been outcome-

determinative regarding the decision to charge Mr. Williams with the death penalty and the jury's decision to sentence him to it.

**a. Germany Would Have Monitored and Assisted Trial Counsel**

Had the German government been involved from the outset of Mr. Williams' case, it would have reviewed the qualifications and experience of Mr. Williams' appointed trial counsel. Were Germany concerned with the competence or diligence of trial counsel, it would have assisted with securing different attorneys to conduct the trial and sentencing hearing. The German government would have constantly monitored the case, frequently consulted with trial counsel, and further intervened where needed. Germany would also have consulted with experienced death-penalty counsel about what is expected of effective capital-defense attorneys.

Germany's continuous monitoring would have made a material difference to Mr. Williams' case. Notably, Mr. Williams' attorneys did not request additional funds from the court to conduct thorough investigations into his family history and psychological condition. Had Germany been able to supervise the case, it would have been aware of this deficiency, and would have reviewed strategic matters with counsel, to remind counsel of the standards established under the ABA Guidelines for investigations in capital cases, and, where appropriate, would have provided significant assistance in securing the means needed to conduct adequate investigations. Perhaps more importantly, Germany's early contribution to the case's development could have, from the beginning, shed light on aspects of Mr. Williams' family and medical history that plainly needed further examination and which would have served, if developed, as important explanatory and mitigating factors. These factors would have been

particularly important in this case, where the jury announced it was deadlocked on the sentence of death and the trial court believed itself obliged to charge the jury pursuant to Allen v. United States, 164 U.S. 492 (1896). This issue was a central portion of Mr. Williams' direct appeal, State v. Williams, 386 S.C. 503, 509-16, 690 S.E.2d 62, 65-68 (2010), and illustrates the skepticism and division among the jurors as to whether Mr. Williams truly deserved the death penalty. German assistance in developing evidence of mitigating factors would have been instrumental to enabling the defense to present influential evidence to a divided jury, which could be swayed.

Indeed, Germany's monitoring would have made a significant contribution by recognizing a specific mitigating factor: Mr. Williams' Fetal Alcohol Syndrome ("FAS") and Fetal Alcohol Spectrum Disorders ("FASD"). Defense counsel is able to identify such conditions only when the mitigation investigation "begins with the onset of the [defendant's] life." Andrea D. Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 MERCER L. REV. 695 (1990) (cited by ABA Guidelines at 1022 n.211). The ABA Guidelines recognize the potential significance of FASD as a mitigating factor, explaining that investigations into mitigating factors should begin so early precisely "because many defendants' problems start with things like fetal alcohol syndrome . . . ." 31 HOFSTRA L. REV. 913, 1022.

Contrary to the court's assertions below, we are not "just beginning to understand the role" of FAS. Order of Dismissal at 37. Courts have seen FASD as an important factor worthy of consideration for over ten years. See, e.g., Dilbeck v. State, 643 So. 2d 1027, 1029 (Fla. 1994) (holding that FASD should be considered a relevant mitigating factor during the sentencing phase of a case because it is a "specific, commonly

recognized condition[] that [is] beyond [the defendant's] control” like other commonly considered conditions such as epilepsy).

Moreover, the ABA recently passed a resolution on FASD, stating that “[c]ourts should also be considering [Fetal Alcohol Syndrome] as a factor in mitigation with juvenile and adult offenders during sentencing, particularly where the death penalty is an option,” because individuals suffering the effects of this condition are significantly more likely to commit crimes. Am. Bar Ass’n, Resolution 112B at 8, Aug. 6-7, 2012.<sup>10</sup> The resolution urges criminal attorneys to better understand the effects and symptoms of Fetal Alcohol Syndrome. Id. As noted above, the resolutions and guidelines of the ABA are considered good indicators of the benchmarks for adequate representation, Ard, 372 S.C. at 332 n.14, 642 S.E.2d at 597 n.14 (citing Wiggins, 539 U.S. at 524), and therefore it is unclear why the court below disregarded the ABA’s clear guidance with respect to FASD.

While Mr. Williams was diagnosed with FASD only after his conviction and sentencing, that diagnosis was based on symptoms known to counsel prior to trial. From interviews with Mr. Williams’ family members, defense counsel was aware that Mr. Williams’ German-born mother consumed alcohol during her pregnancy. R. pp. 2180, lines 5-9; 2182, lines 8-9. Despite this knowledge, defense counsel failed to pursue a proper diagnosis, if any at all. As a result, the jury had no knowledge of the role Mr. Williams’ mental impairments played in the tragic events of this case, knowledge that Germany’s involvement in the case would have developed.

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<sup>10</sup> Am. Bar Ass’n, Resolution 112B (Aug. 6-7, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/Resolution\\_112B.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_112B.authcheckdam.pdf).

As explained above, to satisfy the Strickland standard for ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, absent counsel's deficiency, there is a reasonable probability that the sentencer would not have favored a sentence of death. Strickland, 466 U.S. at 687-88, 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694. The court below found counsel's performance not deficient because the jury heard evidence of Mrs. Williams' alcohol use during pregnancy and Mr. Williams' bipolar disorder and obsessive compulsive disorder. PCR Transcript of Record at 44-45. Analogizing to Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998), and Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006), the court found that evidence of FASD would not have offered the jury significantly different mitigating evidence, just a vehicle for crafting a "fancier" package. Order of Dismissal at 41-42, July 24, 2013.

Inexplicably, the court also found that counsel "made a strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome." Order of Dismissal at 44. This position was maintained despite defense counsel's testimony at the PCR hearing that demonstrated the defense team had simply missed the Fetal Alcohol Syndrome issue altogether:

- Defense Counsel: "[Alcohol use by an expectant mother] . . . would clearly be a red flag for me today. And I honestly cannot say why it wasn't a red flag for me eight years ago." PCR Tr. of R. at 158.
- Defense Counsel: "[O]ne of the things that I would want to be conscious of is brain damage. . . . And if you're asking me if that's something that I would think would be a good thing for the Defense of a capital case to have in their case, the answer is yes." PCR Tr. of R. at 159-60.

- Question: “So if you’d had organic brain damage with pictures and so forth, potentially evidence of guilty but mentally ill because of that, you would have put it in the same place, in the trial phase?” PCR Tr. of R. at 160.
- Defense Counsel: “If I had that, I would have put it in at that point.” PCR Tr. of R. at 158.

In Mr. Williams’ case, evidence of the effects of Fetal Alcohol Syndrome would have provided the jury with information directly related to culpability, information otherwise unavailable to it. Because of deficits in his executive functioning and impulse control, and his child-like social skills, Mr. Williams could not draw on sufficient coping mechanisms when a woman he was involved with rejected him. PCR Tr. of R. at 701, 704. For instance, deficits in his perceptual skills led him to fixate on the false conclusion that his ex-girlfriend had aborted their child. PCR Tr. of R. 701-02. Further, his inability to comprehend the ramifications of his behavior seemingly led him to believe that after cornering his victim, she would simply admit she had been wrong and the situation would be remedied. PCR Tr. of R. 705-06. Unlike bipolar disorder and obsessive compulsive disorder, FASD impaired the very skills an average-functioning person would use to cope with an emotionally charged situation like the end of a romantic relationship: mastery over one’s mental and emotional capacities, impulse control, and an ability to conceptualize the impact one’s behavior has on others.<sup>11</sup> Because evidence of FASD would have offered a meaningful new explanation for why Mr. Williams’ actions did not warrant death—not just a new label to describe evidence

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<sup>11</sup> Individuals who suffer from FASD, while often appearing outwardly normal, tend to demonstrate reduced impulse control and have difficulty functioning in society. Kathryn Page, The Invisible Havoc of Prenatal Alcohol Damage, J. CENTER FOR FAM. CHILD. & CTS. 1, 10-12 (2002).

already presented—the trial court’s reliance on Jones v. State and Simpson v. Moore is misplaced.

Trial counsel’s failure to offer the jury this explanation proves an especially keen miscarriage of justice where a man with mental and emotional impairments receives the death penalty. Indeed, the United States Supreme Court has recently signaled its continued concern regarding death sentences for the mentally impaired. Cautioning against an overly formulaic approach towards determining who suffers from a mental disability, the Court warned that “[i]ntellectual disability is a condition, not a number.” Hall v. Florida, 572 U. S. \_\_\_ (2014), slip op. at 21 (rejecting formulaic reliance on IQ threshold above which execution of mentally deficient defendant is permissible). Expert testimony shows that though Mr. Williams has an average IQ, other deficiencies in his intellectual abilities prevent him from utilizing his full intellect. PCR Tr. of R. at 337. In fact, people with FASD may function at a mentally retarded level despite an average IQ. PCR Tr. of R. at 300. Here, to Mr. Williams’ grave injury, his jurors had no information about his mental disabilities resulting from FASD; they were denied the opportunity to judge Mr. Williams’ culpability in the context of the mental and emotional impairments that helped explain his failure to control his behavior.

The omission of FASD mitigation evidence presents an injustice that could and should have been avoided. The German government’s early involvement would have ensured that Mr. Williams’ condition would have been recognized and formally diagnosed, and that this crucial and highly pertinent mitigating factor would have been presented to the jury during the sentencing phase of his trial. See Am. Bar Ass’n, Resolution 112B, at 8 Aug. 6-7, 2012 (noting that “[c]ourts should . . . be considering

[Fetal Alcohol Syndrome] as a factor in mitigation . . . during sentencing, particularly where the death penalty is an option”).<sup>12</sup>

**b. Germany Would Have Assisted With Investigating Other Potentially Mitigating Factors**

Germany was, and is, well placed to provide significant investigative assistance to Mr. Williams. The German government has the institutional capacity to provide ready access to vast information resources, including ancestral records, which would have greatly benefited Mr. Williams’ defense.

Prior to his trial, Mr. Williams’ appointed counsel did not delve adequately into Mr. Williams’ family history. As has been outlined above, the guidelines published by the ABA require defense counsel in capital cases to investigate, at a minimum, three generations of a defendant’s family to find potentially mitigating factors. ABA Supplementary Guidelines at 688-91. This did not happen.

An investigation spanning three generations of Mr. Williams’ family encompasses relatives in Germany. Had the German government been involved in Mr. Williams’ case from the start, Germany would have presented a more complete picture of Mr. Williams’ family history by accessing population records and archives to thoroughly research it. It is instructive to note that, shortly after learning of Mr. Williams’ case, the German government contacted authorities in Nuremburg, who were able to locate in a matter of days documents in local archives used to prove Mr. Williams’ citizenship. See Ex. A, German Citizenship Doc. of Christopher Williams. Germany’s administrative

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<sup>12</sup> Am. Bar Ass’n, Resolution 112B (Aug. 6-7, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/Resolution\\_112B.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_112B.authcheckdam.pdf).

infrastructure and the considerable information resources at its disposal could have been deployed to strengthen Mr. Williams' defense, and ultimately assure him a fair trial—had trial counsel pursued this essential avenue.

Germany also could have been instrumental in gathering powerful mitigating evidence, which likely would have been onerous for defense counsel to collect, by helping to track down and interview Mr. Williams' relatives, many of whom live out of state or outside the United States. Since becoming involved in Mr. Williams' case at the post-conviction relief stage, Germany has provided and ensured invaluable assistance in investigating Mr. Williams' family history, for example by locating his maternal uncle in Germany, a relative whom Mr. Williams' trial counsel did not contact during pre-trial preparation. In addition to helping uncover Mr. Williams' German nationality, researching Mr. Williams' family history was particularly important, as evidence has emerged of devastating effects on his maternal family during World War II, providing a context to the domestic violence and dysfunctional home life Mr. Williams experienced as a youngster.

In addition to assisting with gathering evidence, the German government would have mobilized its experience and skills to more thoroughly investigate Mr. Williams' psychological condition. Given the multiple red flags in Mr. Williams' history—most notably, his mother's known alcoholism, and his struggle with psychosocial difficulties throughout his young life—German authorities would have recommended, and, in absence of other available resources, provided access to financial assistance for additional medical assessments of Mr. Williams' condition; ensured that trial counsel obtained an MRI to analyze resulting brain damage; and consulted with Fetal Alcohol

Syndrome experts—as has recently been done in connection with the present proceeding since Germany’s involvement. This more thorough psychological investigation, had it been requested by trial counsel, would have ensured the jury knew about and weighed critical mitigating evidence prior to making its sentencing decision.

**c. Germany Would Have Attended Williams’ Trial to Ensure Any Prosecutorial Misconduct Was Preempted or Addressed**

Consistent with its obligations to German citizens, the German consulate attended Mr. Williams’ hearing for post-conviction relief. The consulate would also have attended his trial and sentencing had it been aware of the proceedings. Prosecutors’ awareness of Germany’s involvement in the case, and the very presence of German officials in the courtroom, may have tempered the State’s lapses into impropriety with comments to the jury regarding Mr. Williams’ potential prison conditions.

The South Carolina Supreme Court has 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. Burkhart, 371 S.C. 482, 640 S.E.2d 450, 453 (2007). “Generally, questions regarding . . . prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole.” State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005), abrogated by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006).<sup>13</sup> For instance, in Burkhart, the South Carolina Supreme Court reversed a death sentence because the prosecution introduced evidence of inmate privileges, including “access to the yard,

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<sup>13</sup> Evans abrogated Bowman based on an unrelated holding. Bowman’s caution against evidence of prison conditions remains influential and is cited in the trial court’s order of dismissal. Order of Dismissal at 22.

work, education, meals, canteen, phone, library, recreation, mail, television and outside visitors.” 371 S.C. at 487, 640 S.E.2d at 453. Because the prosecutor made parallel comments in Mr. Williams’ case, his death sentence deserves additional scrutiny and the PCR court’s decision cannot stand.

Despite settled law, the Solicitor in Mr. Williams’ trial included the following comments in his closing statement:

Being in prison is like a small city, allow [sic] 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 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.

Order of Dismissal at 21. Such comments run afoul of South Carolina law by inviting a capital jury to rely on arbitrary factors when imposing a death sentence. S.C. Code Ann. § 16-3-25(C)(1). Justice requires that the jury consider only the characteristics of the defendant and the circumstances of the crime, not irrelevant or arbitrary factors. Using misrepresentations about prison life to minimize the suffering associated with a life sentence is a blatantly unjust strategy to convince a jury to impose a death sentence.

In part because Mr. Williams’ attorney attempted to counter these improper statements in his closing argument, the trial court found no basis for post-conviction relief. Order of Dismissal at 25. However, such efforts by defense counsel do not remedy the error and miss the point that the German government’s presence in the courtroom could likely have precluded the State’s patently improper comments. Burkhart, 371 S.C. at 453 (reversing death sentence due to prison-condition evidence, despite defense counsel’s attempt to counter the evidence, because “this entire subject matter injected an arbitrary factor into the jury’s sentencing considerations”). This bell

cannot be unrung and this Court should closely examine the trial court's dismissal of Williams' application for post-conviction relief on this serious point.

**d. Germany Was Denied the Opportunity to Assist Its Citizen in Additional, More Subtle Ways**

Mr. Williams' trial counsel's failure to avail itself of Germany's extensive support also prevented amicus from assisting Mr. Williams in additional, important, and intangible ways.

The decision to seek the death penalty lies within the discretion of South Carolina's state prosecutor. S.C. Code Ann. § 16-3-20. In Mr. Williams' case, this decision was made without knowledge of highly relevant mitigating circumstances, most critically, Mr. Williams' diagnosis of FASD. Since the failure to offer evidence of defendant's mental disabilities can result in extreme prejudice to the defendant, State v. Perez, 148 Ill.2d 168, 193 (Ill. 1992), Germany would have been keen to delve into Mr. Williams' life history and mental health and share its findings, through defense counsel, with the prosecution. On the strength of this evidence, the prosecutor may well have decided, in his discretion, not to seek the death penalty and instead to offer a sentence of life in prison without parole, as being more consonant with the acts of a young man struggling with mental illness than those of a vicious and incorrigible felon. Indeed, the South Carolina Code of Laws specifically provides for a "guilty but mentally ill" plea "if, at the time of the commission of the act constituting the offense, [the defendant] had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . but because of a mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20. Prosecutors in South Carolina have agreed to refrain from seeking the death penalty in exchange for

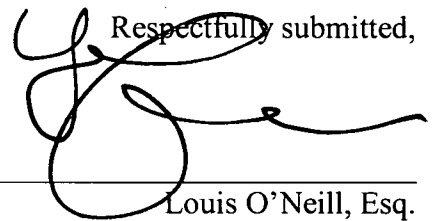
this plea many times,<sup>14</sup> but the failure to promptly identify Mr. Williams' mental illness prevented the State from considering such an outcome here.

Had Germany been informed by counsel of Mr. Williams' plight from the start, it would have taken every opportunity, at every stage of the proceedings, with every actor involved in them, to provide him with the important assistance needed to prevent a death sentence. See generally LaGrand. Such efforts may well have affected both the State's calculus in seeking the death penalty and its behavior throughout the process required to obtain it.

#### IV. CONCLUSION

For the foregoing reasons, *amicus curiae* the Federal Republic of Germany respectfully urges the Court to grant Mr. Williams' application for a new trial.

Respectfully submitted,



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<sup>14</sup> For instance, after Brian Daniels was indicted for murder in 1989, South Carolina offered him 30 years of imprisonment in exchange for a plea of "guilty but mentally ill" to the lesser included charge of voluntary manslaughter. Order at 1, Daniels v. Padula, No. 0:09-755 (D.S.C. March 19, 2010), ECF No. 36. A similar plea deal was recently accepted by Joshua Jones, who killed a police officer in South Carolina after murdering his girlfriend in Georgia. State v. Jones, No. 2012-A-0210200025 (Aiken Cnty. Feb. 3, 2012) (unpublished). See also, Meg Mirshak, Joshua Jones' Mental Health, Family History Documented in Court Evidence, Augusta Chron., Feb. 2, 2014, available at <http://chronicle.augusta.com/news/crime-courts/2014-02-15/joshua-jones-mental-health-family-history-documented-court-evidence>.

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# **EXHIBIT**

**A**



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From the desk of: Kerstin Haken Flautt

TEL-direct 404-979-6419

rk-s1@atla.diplo.de

Certificate of Citizenship for Charles Christopher Gerard Williams  
File no. (please quote in reply): Rk 531 SE Williams  
Atlanta, August 23, 2012

Dear Mr. Enderlin,

Attached please find certificate of citizenship for your client Charles Christopher Gerard Williams.

Sincerely

Kerstin Flautt

# BUNDESREPUBLIK DEUTSCHLAND



## Staatsangehörigkeitsausweis

Vorname(n), Familienname, Geburtsname

Charles Christopher Gerard Williams

geboren am

11. Dezember 1982

in

Greenville, South Carolina

Wohnort

Ridgeville, South Carolina

ist deutsche(r) Staatsangehörige(r).

Dieser Ausweis gilt bis zum  
entfällt

Ort, Datum

Köln, 16. Juli 2012

BUNDESVERWALTUNGSAMT  
Az.: IIB3-201110280057-F

Im Auftrag

  
Hachel



# **EXHIBIT**

## **B**

**TRANSLATION CERTIFICATE**

I, Anna Diehn, swear that I am a fluent reader of the German and English languages and that I created the attached English translation of the Title and Article 7 of the Law on Consular Officers, Their Functions and Powers, located on pages 1 and 3, respectively, of the original German legislation. To the best of my knowledge and belief, this is a true and accurate translation from German into English.

Dated: 1/17/2013

Anna Diehn  
Anna Diehn

Sworn to and subscribed before me on  
This 17 day of January, 2013

Mary Helen Perkins  
Notary Public

MARY HELEN PERKINS  
Notary Public, State of New York  
No. 01PE6267086  
Qualified in New York County  
Commission Expires Aug. 13.2016

Translation (Partial)

**Law on Consular Officers, their Functions and Powers (Consular Law)**

KonsG

Date: September 11, 1974

Full Citation:

“Consular Law from September 11, 1974 (BGBl. I S. 2317), last amended by Article 20 of the Act of December 17, 2008 (BGBl. I. S 2586).”

**Version:** Last amended by Article 20 of the Act of December 17, 2008 (2586)

**Preamble**

The Bundestag has, with the approval of the Bundesrat, adopted the following law:

....

**§ 7 Assistance to Prisoners**

Consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons.

# Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz)

KonsG

Ausfertigungsdatum: 11.09.1974

Vollzitat:

"Konsulargesetz vom 11. September 1974 (BGBl. I S. 2317), das zuletzt durch Artikel 20 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586) geändert worden ist"

**Stand:** Zuletzt geändert durch Art. 20 G v. 17.12.2008 I 2586

## Fußnote

(+++ Textnachweis ab: 15.12.1974 +++)

## Eingangsformel

Der Bundestag hat mit Zustimmung des Bundesrates das folgende Gesetz beschlossen:

## 1. Abschnitt Allgemeine Vorschriften

### § 1 Die konsularischen Aufgaben im allgemeinen

Die Konsularbeamten (Berufskonsularbeamte oder Honorarkonsularbeamte) sind berufen,

- bei der Zusammenarbeit zwischen der Bundesrepublik Deutschland und dem Empfangsstaat, namentlich auf den Gebieten außenwirtschaftlicher und developmentspolitischer Beziehungen, des Verkehrs, der Kultur und der Rechtspflege mitzuwirken,
- Deutschen sowie inländischen juristischen Personen nach pflichtgemäßem Ermessen Rat und Beistand zu gewähren.

### § 2 Übertragene konsularische Aufgaben

Die Konsularbeamten sind berufen, die Aufgaben und Befugnisse wahrzunehmen, die ihnen durch dieses Gesetz oder andere Rechts- und Verwaltungsvorschriften übertragen werden, insbesondere auf folgenden Gebieten,

- Staatsangehörigkeitsangelegenheiten,
- Paß- und Sichtvermerksangelegenheiten,
- Personenstandsangelegenheiten,
- Mitwirkung bei der Erledigung von Familiensachen, Angelegenheiten der freiwilligen Gerichtsbarkeit und bei Nachlaßangelegenheiten,
- Beurkundungen, Legalisation ausländischer und Echtheitsbestätigung inländischer öffentlicher Urkunden,
- Schiffahrtssachen und Seemannsangelegenheiten,
- Erledigung oder Übermittlung von Rechtshilfeersuchen,
- Zustellungen,
- Überwachung der Einhaltung von Verträgen.

### § 3 Wahrnehmung konsularischer Aufgaben

(1) Für die Wahrnehmung konsularischer Aufgaben gelten die allgemeinen Rechtsvorschriften, soweit dieses Gesetz keine besonderen Regelungen enthält.

(3) Um in den in Absatz 1 genannten Fällen sofort wirksam helfen zu können, sollen die Konsularbeamten eine Liste der in ihrem Konsularbezirk ansässigen Deutschen und anderer Schutzbefohler sowie ihrer Familienangehörigen erstellen und auf dem laufenden halten.

## **§ 7 Hilfe für Gefangene**

Die Konsularbeamten sollen in ihrem Konsularbezirk deutsche Untersuchungs- und Strafgefangene auf deren Verlangen betreuen und ihnen insbesondere Rechtsschutz vermitteln.

## **§ 8 Antrag auf Beurkundung der Geburt oder des Todes eines Deutschen**

Die Konsularbeamten sind befugt, Anträge auf Beurkundung der Geburt oder des Todes eines Deutschen entgegenzunehmen, wenn sich der Personenstandsfall im Ausland ereignet hat. Der Antrag ist mit den vorgelegten Unterlagen dem nach § 36 Abs. 2 des Personenstandsgesetzes zuständigen Standesamt zu übersenden.

## **§ 9 Überführung Verstorbener und Nachlaßfürsorge**

(1) Sofern andere Möglichkeiten nicht gegeben sind, sollen die Konsularbeamten umgehend die Angehörigen der im Konsularbezirk verstorbenen Deutschen benachrichtigen und bei einer verlangten Überführung der Verstorbenen mitwirken.

(2) Die Konsularbeamten sind berufen, sich der in ihrem Konsularbezirk befindlichen Nachlässe von Deutschen anzunehmen, wenn die Erben unbekannt oder abwesend sind oder aus anderen Gründen ein Bedürfnis für ein amtliches Einschreiten besteht. Sie können dabei insbesondere Siegel anlegen, ein Nachlaßverzeichnis aufnehmen und bewegliche Nachlaßgegenstände, soweit die Umstände es erfordern, in Verwahrung nehmen oder veräußern. Sie können ferner Zahlungen von Nachlaßschuldern entgegennehmen und Mittel aus dem Nachlaß zur Regelung feststehender Nachlaßverbindlichkeiten sowie von Verpflichtungen verwenden, die bei der Fürsorge für den Nachlaß entstanden sind.

(3) Können Erben oder sonstige Berechtigte nicht ermittelt werden, so können Nachlaßgegenstände oder Erlös aus deren Veräußerung an das Gericht des letzten Wohnsitzes des Erblassers im Inland oder - wenn sich ein solcher Wohnsitz nicht feststellen läßt - an das Amtsgericht Schöneberg in Berlin als Nachlaßgericht übergeben werden.

## **§ 10 Beurkundungen im allgemeinen**

(1) Die Konsularbeamten sind befugt, über Tatsachen und Vorgänge, die sie in Ausübung ihres Amtes wahrgenommen haben, Niederschriften oder Vermerke aufzunehmen, insbesondere

1. vor ihnen abgegebene Willenserklärungen und Versicherungen an Eides statt zu beurkunden,
2. Unterschriften, Handzeichen sowie Abschriften zu beglaubigen oder sonstige einfache Zeugnisse (z.B. Lebensbescheinigungen) auszustellen.

(2) Die von einem Konsularbeamten aufgenommenen Urkunden stehen den von einem inländischen Notar aufgenommenen gleich.

(3) Für das Verfahren bei der Beurkundung gelten die Vorschriften des Beurkundungsgesetzes vom 28. August 1969 (Bundesgesetzbl. I S. 1513) mit folgenden Abweichungen:

1. Urkunden können auf Verlangen auch in einer anderen als der deutschen Sprache errichtet werden.
2. Dolmetscher brauchen nicht vereidigt zu werden.
3. Die Abschrift einer nicht beglaubigten Abschrift soll nicht beglaubigt werden.
4. Die Urschrift einer Niederschrift soll den Beteiligten ausgehändigt werden, wenn nicht einer von ihnen amtliche Verwahrung verlangt. In diesem Fall soll die Urschrift dem Amtsgericht Schöneberg in Berlin zur amtlichen Verwahrung übersandt werden. Hat sich einer der Beteiligten der Zwangsvollstreckung unterworfen, so soll die Urschrift der Niederschrift dem Gläubiger ausgehändigt werden, wenn die Beteiligten keine anderweitige Bestimmung getroffen haben und auch keiner von ihnen amtliche Verwahrung verlangt hat.