No. 11-8303

In The Supreme Court of the United States

JEFFERY LYNN BORDEN,

Petitioner,

v.

KIM T. THOMAS,
INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, ALABAMA CHAPTER, AND MENTAL HEALTH AMERICA IN SUPPORT OF PETITIONER

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STATEMENT REGARDING INTEREST OF *AMICI*[1]

The National Association of Social Workers ("NASW") is the world's largest association of professional social workers, with approximately 145,000 members throughout the United States, Puerto Rico, Guam, the Virgin Islands, and Europe. NASW's Alabama Chapter has 1,073 members. NASW provides continuing education, enforces a *Code of Ethics,* conducts and publishes research, promulgates professional criteria, and develops policy statements on issues of importance to the profession. Social workers act as expert witnesses in a variety of proceedings, such as child abuse and neglect, rape trauma, post-traumatic stress disorder, and the penalty stage of capital murder cases.

Mental Health America (MHA) is a leading advocacy organization addressing the full spectrum of mental and substance use conditions and their effects, working to inform, advocate and enable access to quality behavioral health services for all Americans. MHA has an established record of effective national and grassroots actions promoting mental

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this Brief, and granted written consent for its filing. Letters of consent are submitted to the Clerk of Court contemporaneously herewith. No counsel for a party authored any portion of this Brief, and no counsel or party, other than *amici* or their counsel, made any financial contribution toward the preparation or submission of this Brief.

health, and addressing mental and substance use issues with compassionate and concrete solutions. MHA's actions inform, support and enable mental wellness, and emphasize recovery from mental illness. MHA's over 300 affiliates in the United States represent a potent voice for healthy communities.

SUMMARY OF ARGUMENT

Jeffery Lynn Borden was convicted of capital murder in the shooting deaths of his estranged wife and her father, and sentenced to death. Borden was 32 years old at the time of the shootings on December 24, 1993. Exhibiting signs of mental illness since childhood, he had been diagnosed with and unsuccessfully treated for serious mental illnesses for twelve years. Despite this history, counsel failed to present testimony from any treating professionals, and presented no expert mental health testimony at the sentencing phase.

Borden pleaded not guilty by reason of insanity. During the guilt phase, counsel presented testimony from a psychologist engaged to evaluate competence to stand trial and ability to differentiate right from wrong, and a psychiatrist who conducted neurological testing prior to trial, but not from any of at least eleven psychiatrists, psychologists and physicians who actually treated Borden over many years. These witnesses concerning mental health discussed their diagnoses based on brief evaluations, and limited aspects of Borden's treatment history, but ultimately

directed their testimony to questions pertinent to guilt. *Borden v. Allen,* 646 F.3d 783, 792-95 (11th Cir. 2011).

Eleven hundred pages of medical and psychiatric records were introduced, but testimony concerning their content was cursory. Other mental health evidence during the guilt phase comprised brief testimony from Borden's mother and sister. They described, in exceedingly general terms, Borden's childhood depression after his brother died, changes in personality after a head injury, hospitalizations, and behavior in the period before the shootings. *Id.* at 791-92.

At sentencing, counsel failed to call *any* mental health professional to explain how Borden's history of mental illness and treatments, together with his life history, brought him to the point at which the shootings occurred. Brief testimony from Borden's mother and sisters earlier repeated general statements, adding no real details about Borden's troubled life. *Id.* at 797-98; R. 1106-30. Counsel failed to investigate, collect or present available details that would humanize him and offer jurors crucial information needed to choose life over death. The jury voted 10-2 to recommend death.

A true picture of Borden's life would have produced a different choice, particularly since only one additional juror needed to choose life. ALA. CODE § 13A-5-46(f). Contrary to the bland portrayal presented by counsel, Borden's life story is a harrowing

tale that would easily persuade jurors he should not die for acts resulting from mental illness and years of failed treatments. *Cf. Wiggins v. Smith,* 539 U.S. 510, 537 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.")

Conducting the thorough investigation that should have been done before trial, Borden's post-conviction counsel uncovered evidence of physical, emotional and sexual abuse in Borden's childhood home, and that Borden had been suicidal for many years. Some such evidence came from family members with whom trial counsel met only briefly, failing to establish the relationship of trust necessary to elicit such painful information. Other indications of abuse, never investigated by trial counsel, were contained within voluminous medical records dumped on the jury without expert assistance to interpret them. Without such help, jurors were left with an incomplete picture, leading them to view Borden simply as an angry man who became violent when he didn't get his way, rather than a seriously ill person in need of help.

ARGUMENT

I. SOCIAL AND MENTAL HEALTH HISTORY, TOGETHER WITH TESTIMONY OF PROPERLY TRAINED EXPERTS, ARE VITAL EVIDENCE CRITICAL TO MITIGATION, THE NECESSITY OF WHICH WAS WELL KNOWN AT THE TIME OF TRIAL.

Detailed social and mental health histories, and interpretation by qualified experts, are vital evidence used routinely in capital cases. They also can provide a basis for trial counsel's informed choices about mitigation strategy. *See, e.g., United States v. Hall,* 455 F.3d 508, 517-18 (5th Cir. 2006) (decision not to present certain evidence not deficient where counsel conducted "objectively reasonable" investigation, including mitigation expert); *Ringo v. State,* 120 S.W.3d 743, 748-49 (Mo. 2003) (decision not to present expert evidence of post-traumatic stress disorder not deficient where counsel engaged experts, including social worker, to investigate background).

Evidence concerning defendant's history is presented to allow the sentencer to make the individualized assessment of the appropriateness of the death penalty required by the Constitution. *Moore v. Reynolds*, 153 F.3d 1086, 1110 (10th Cir. 1998); *Castro v. Oklahoma*, 71 F.3d 1502, 1510-14 (10th Cir. 1998); *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995); *Guy v. Cockrell*, 343 F.3d 348, 354-55 (5th Cir. 2003); *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003). This Court has confirmed the vital importance

of such evidence. In *Wiggins,* the Court reversed denial of post-conviction relief and vacated the death sentence due to trial counsel's failure to properly investigate and present mitigating life history evidence.[2] The Court relied on post-conviction testimony of a social worker who prepared a detailed social history report. Based upon the report and testimony detailing severe deprivation and abuse, the Court held there was "a reasonable probability that a competent attorney, aware of this history, would have introduced it," and "[the jury] would have returned a different sentence." *Wiggins*, 539 U.S. at 535-36. *See also California v. Brown*, 479 U.S. 538, 545 (1987) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (consideration of life history "part of the process of inflicting the death penalty"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (invalidating law not permitting consideration of aspects of defendant's background).

Lower courts emphasize the importance of social and mental health histories when weighing sentencing

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[2] Wiggins' trial was in 1989. During the habeas hearing, the district judge recognized that failure "to do a social history, at least to see what you have got, to me is absolute error." *Wiggins*, 539 U.S. at 517.

decisions in capital cases. In *Moore v. Reynolds*, 153 F.3d 1086, 1110 (10th Cir. 1998), the court relied on a mental health report by a psychologist and social history report by a social worker. These "arguably suggest[ed] if Moore were to receive proper psychiatric treatment for his mental disorders, he would be less likely to commit future crimes and, in short, would be less dangerous to society." *Id*. The court determined that petitioner "established a likelihood that his mental condition could have been a mitigating factor at the sentencing phase." *Id*. *See also Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995); *Guy v. Cockrell*, 343 F.3d 348, 354-55 (5th Cir. 2003); *Douglas v. Woolford*, 316 F.3d 1079, 1090 (9th Cir. 2003).

II. COUNSEL'S UNREASONABLY INEFFECTIVE PREPARATION FAILED TO UNCOVER CRITICAL MITIGATION EVIDENCE.

Evidence collected by post-conviction counsel for the Ala. R. Crim. P. 32 hearing Borden was never afforded shows he endured childhood abuse, and his mental illnesses, often untreated, were debilitating throughout most of his life.

Trial counsel made no effort to have Borden or family members interviewed by a social worker, investigator, or other expert whose professional training would provide greater ability to elicit difficult information, like childhood abuse. Borden's trial counsel rendered constitutionally inadequate assistance by failing to conduct an adequate background investigation. Had counsel done so, or engaged a qualified

mitigation expert to do so, evidence obtained in post-conviction would have been uncovered. The most basic social history includes in-depth interviews with all available family members, and relevant records from schools, law enforcement, and social service agencies. Borden's true story is far more compelling than the few meager facts presented to jurors. They heard no hint of available evidence that Borden grew up in an unstable home with an alcoholic father and cold, manipulative and neglectful mother, and suffered physical and sexual abuse. Petition for Writ of Habeas Corpus ("Pet.") at 27-28; *Defendant's Trial Exhibits* ("*DX*") *7, 8.* They were not told how Borden was devastated by his brother's death and his behavior thereafter, even before the automobile accident that left him comatose, demonstrated a depressive and suicidal state. *DX 2, 3*.

Substantial evidence concerning Borden's mental health and childhood was available. Together with testimony by an expert trained in interpreting these critical facts and explaining how they shaped Borden's life and conduct, it was the vital missing link that would have persuaded jurors not to recommend death. "Friends, family members, teachers, coaches and even prison officials can testify to facts, but are not able to explain to the jury about how the family background, education, and environmental conditions interplayed in the defendant's life and related to the crime. It is the role of the expert to communicate this integration to the jury...." *Death*

Penalty Mitigation and the Role of the Forensic Psychologist, 27 Law & Psychol. Review 55, 63 (2003).

Trial counsel had not interviewed Borden's treating mental health professionals, nor many relatives, neighbors and friends who could detail Borden's family life and increasingly disturbed behavior over many years. *Borden*, 646 F.3d at 791-92. Immediate family members with whom trial counsel did speak, shortly before trial, failed to reveal the true facts about Borden's childhood. Borden's mother and sisters testified in vague terms that Borden had a normal childhood but was upset by his brother's death when Borden was eleven. They testified about Borden's accident at age 17, which left him comatose for several days, but gave few details about its devastating impact on personality and behavior. *Id.*

Trial counsel's failure to engage appropriate experts robbed Borden of the opportunity to fully and fairly present these details. *See Castro v. Oklahoma*, 71 F.3d 1502, 1510-14 (10th Cir. 1998) (vacating death sentence where trial court denied funds for psychiatrist to assist at sentencing). In concluding that Castro "established the likelihood that his mental condition could have been a significant mitigating factor," the court cited a social worker's affidavit "describ[ing] significant emotional and development impairments which pertain directly to [petitioner's] relative culpability for murder" and noted that, although petitioner and a relative testified at sentencing, "neither could frame the existing mitigating evidence in nearly as coherent a fashion as [the social

worker] presumably could have done.... Her expertise presumably would have allowed her to relate past instances from [petitioner's] childhood to his crime."

A trained mental health professional would weave together details of Borden's life, vital facts extracted from medical records, and knowledge obtained from education, training and review of scientific literature to present a complete and humanizing portrait. Such an expert could explain crucial mitigation elements, creating more than a reasonable probability the jury would recommend life.

The expert would relate evidence indicating childhood abuse and its likely impact on adult behavior. Scientific literature reveals childhood abuse is correlated with psychological consequences, including violent and antisocial behaviors, in adults. *E.g.*, Fergusson and Lynskey, *Physical Punishment/ Maltreatment During Childhood and Adjustment in Young Adulthood*, 21 Child Abuse & Neglect 617, 627 (1997) ("clear and significant associations between physical abuse and risks of violent offending"); Shore, *Rethinking the Brain: New Insights into Early Development* (Families and Work Institute 1997) (Children experiencing parental rejection or neglect more likely to exhibit antisocial traits and violent behavior); English, Widom & Branford, *Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior, Final Report to National Institute of Justice* (2004) (Abused, neglected children 2.7 times more likely to be arrested for violent criminal

behavior as adults, and 3.1 times more likely to be arrested for violent crime as juveniles or adults).

An expert would explain dynamics often resulting in even severe abuse going unreported. Silence surrounding child abuse is common and can reasonably be anticipated. Five out of six rape victims do not report the crime to authorities (*Rape in America*, Medical Center of the University of South Carolina, 1994). "Child victims and victims who knew their perpetrators are least likely to report their victimization." *The Containment Approach to Managing Sex Offenders,* 34 SETON HALL L. REV. 1255 (2004).

Courts recognize that a defendant who suffered abuse may have difficulty revealing or actively deny it. In *Harris v. State,* 947 So.2d 1079 (Ala. Crim. App. 2004), the Alabama Court of Criminal Appeals held Harris' counsel ineffective for failing to investigate and present evidence, obtained post-conviction, of abuse suffered by defendant over many years. The court relied in part on testimony of a social worker who testified Harris suffered post-traumatic stress disorder as a result of abuse. One symptom was "the characteristic of avoidance: Harris tried to avoid traumatic memories and found it difficult to talk about them and her feelings about them." *Id.* at 1125. Testimony of the social worker and psychologist confirmed Harris "tried to minimize the traumatic events she had gone through." *Id.* at 1125-26.

That medical records were available to jurors considering whether Borden should live or die is a

wholly inadequate substitute for critical interpretive and explanatory testimony of a qualified mental health professional. An expert would be able to tell the story of Borden's struggle with mental illness, a compelling story that lay buried in over a thousand pages of complicated medical jargon. Those pages reveal, to the trained eye, that Borden was mentally ill, and probably suicidal, long before his first hospitalization for a suicide attempt in 1981. The expert could explain that the extreme recklessness and drug and alcohol abuse that marked Borden's teen years (about which jurors were not told) indicated burgeoning mental illness and depression, and repeated car and motorcycle accidents were likely early suicide attempts. Studies indicate many suicide attempts, particularly in younger males, are disguised as vehicle accidents. *E.g., Suicidal Behavior By Motor Vehicle Collision,* Traffic Injury Prevention, 8:244-247 2007; *Adolescent Suicide: A Comparison of Attempters and Nonattempters in an Emergency Room Population,* 21 Clinical Pediatrics 5, 266-270 (1982). Borden's medical records note "numerous psychiatric hospitalizations and suicidal attempts since 1981 with pill overdoses and self-cuttings." *DX 7.*

Also hidden away in the stack of medical records were mental illness diagnoses not shared with jurors. In determining whether to sentence Borden to death, jurors would have wanted to know the following information an expert would extract and explain:

- Borden was diagnosed with post-traumatic stress disorder, depression and suicidal ideation

as early as June 1981. Borden was "extremely disturbed and ... a serious suicide risk." Two weeks later, Borden attempted suicide by overdose of prescription medications. *DX 2.*

- Borden's injuries in the late 1980s and early 1990s resulted in severe back, neck and leg pain and headaches, and chronic pain and medications to treat it further exacerbated mental illness. Professionals treating Borden's physical ailments found that a "significant psychological problem" was interfering with treatment so profoundly that physical therapy had to be discontinued. *DX 5.*

- Borden's July 1992 hospitalization resulted in diagnosis of an acute psychotic episode, accompanied by delusions, paranoia, and suicidal thoughts. Borden believed he was the antichrist, government agents and doctors were trying to kill him, and his wife was working against him with his boss. *DX 3.*

- Borden was diagnosed with "paranoid delusional disorder," "major depression," and a "significant psychotic state" in July 1992, again hospitalized in October 1992 with an acute psychotic episode after a violent outburst, and continued having hallucinations and delusions. *DX 3.*

- By early 1993, after divorce proceedings began, Borden's contact with reality was "highly compromised." He continued suffering suicidal thoughts, severe depression, hallucinations, paranoia, and chronic pain. Borden remained suicidal during his May 1993 hospitalization and numerous electric shock treatments. Discharged

after nearly two months, Borden was hospitalized again less than two weeks later after being found "catatonic." Delusions worsened to the point that in July 1993 he was considered a potential danger to himself and others.

- There was a history of mental illness on both sides of Borden's family. A paternal aunt and a maternal grandmother both had been treated for depression, and a paternal uncle and aunt had both been diagnosed with schizophrenia. *DX 7, 9.*

- Medical records confirmed Borden's history of failing to take psychiatric medications and this was due in part to family members, primarily his mother, telling him not to take them. Failure to take prescribed medications was documented in November 1992 and March 1993. *DX 3.* Borden again attempted suicide by overdose in May 1993. During this hospitalization, he "refused all meds ordered on admission," and was "profoundly occupied with his desire to die." *DX 7.* Doctors noted Borden was fearful of medications. Borden again was not taking all his prescribed medications in October 1993 *and in the last recorded entry in November 1993, just a few weeks before the shootings*. *DX 10.* These records corroborate what trial counsel could have learned from family and friends that Borden was consistently off of his medication during the week before Christmas 1993 when he had physical custody of his three children. Pet. 27, 30.

These diagnoses, and explanation of how they impacted Borden in the weeks, days and hours before the shootings, would have been invaluable to jurors

determining whether he deserved to die, and would have done far more than merely "shed light on evidence already produced for the [jury's] review." *Borden,* 646 F.3d at 823. Studies show jurors are much less likely to recommend death when presented with multiple mental illness diagnoses. One study found jurors "were more lenient in sentencing and less likely to vote for death when evidence suggested that the defendant suffered from an increased number of psychosocial and psychological problems." *More is Sometimes Better: Increased Mitigating Evidence and Sentencing Leniency,* Journal of Forensic Psychology Practice, 7:79-84 (2007). Diagnoses of psychotic disorders, delusions, hallucinations, and unmedicated mental illness contribute significantly to jurors' recommendations of life over death. *Mitigating Murder at Capital Sentencing: An Empirical and Practical Psycho-Legal Strategy,* Journal of Forensic Psychology Practice, 9:1-34 2009. *See also, Differential Impact of Mitigating Evidence in Capital Case Sentencing,* Journal of Forensic Psychology Practice, 7:39-45 (2007).

Jurors should have learned that scientific literature confirms traumatic brain injury, which Borden suffered at 17, is known to trigger mental illnesses of the types diagnosed. *E.g., Psychiatric Illness Following Traumatic Brain Injury in an Adult Health Maintenance Organization Population,* 61 Arch. Gen. Psychiatry 53 (2004); *The Association Between Head Injuries and Psychiatric Disorders: Findings from the New Haven NIMH Epidemiologic Catchment Area*

Study, 15 Brain Injury 11, 935-45 (2001). Had this objective research been explained, jurors would have understood that Borden's extensive mental illnesses were greatly exacerbated by his injury.

Borden's trial counsel did not present evidence supporting the foregoing findings as mitigation. They had not discovered most of the information and were unaware it was available. They failed to understand the crucial differences between presentation of mental illness as a defense and its vital role in convincing a jury that defendant's "human frailties" warrant a sentence of life imprisonment rather than death.

In a capital case, "an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary,* 14 F.3d 554, 557 (11th Cir), *cert. denied,* 513 U.S. 1009 (1994). While counsel may make strategic choices about which areas of possible mitigation evidence are worthy of pursuit, choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... [C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington,* 466 U.S. 668, 690-91 (1984). As recognized in *Wiggins*, counsel cannot make a reasonable strategic decision about mitigation evidence without performing a thorough investigation and knowing what is available. *Id.* at 522-23.

Trial counsel's investigation was certainly "less than complete." *Strickland, supra.* A wealth of powerful mitigation evidence was readily available, and could have been discovered in many ways. Trial counsel cannot have made a reasonable decision that further investigation was unnecessary, because their efforts were ineffectual.

This Court recognized before Borden's trial that this evidence is vitally important in capital cases. *See Brown,* 479 U.S. at 545. In 1992, the Eleventh Circuit held counsel ineffective for failure to present evidence of defendant's mental health problems, low intelligence, paranoia and depression. *Blanco v. Singletary,* 943 F.2d 1477 (11th Cir. 1991), *cert. denied,* 504 U.S. 943 (1992).

The American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[3] (hereinafter "ABA *Guidelines*") were promulgated in 1989, years before Borden's trial, and are recognized by this Court as "standards to which we long have referred as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing *Strickland v. Washington,* 466 U.S. 668, 688 (1984)); *Williams v. Taylor,* 529 U.S. 362, 396 (2000). The 1989 Guidelines advised that mitigation investigation must begin as soon as

[3] Available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/20110325_aba_122.authcheckdam.pdf, visited February 12, 2012.

counsel is appointed. *Guidelines* ¶ 11.4.1(A). It is vital for capital defense counsel to meet with their client often to develop a good rapport and relationship of trust. *Id.* The Guidelines further provide that counsel's investigation of mitigation evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor," *Id.* at 11.4.1(C), 93. Counsel should consider presenting medical history, educational history, employment and training history, and cultural influences. *Id.* at 11.8.6, 133.

Also available in 1995 were other resources outlining effective representation, including *The Alabama Capital Defense Trial Manual* (2d ed. 1992); and *Defending a Capital Case in Alabama* (1988). These references confirmed that pretrial investigation and preparation in capital cases must be far more extensive and cover areas not normally considered in other cases. *Defending a Capital Case in Alabama*, at 336. "The life and background of the client is a critical component of effective preparation for a capital trial...." Mitigation investigation "cannot be done in a few weeks before trial. It will take several months.... An investigation will include in-depth interviews with the client and all the people in his or her life."

Long before trial, the important contributions of social workers and other mitigation experts in criminal cases were well recognized. In 1984, the ABA House of Delegates approved Criminal Justice Mental

Health Standard § 7-1.1,[4] stating that these professionals "serve the administration of criminal justice" by "evaluating and offering expert opinions and testimony on the mental condition of defendants," and "providing consultation to the prosecution or defense concerning the conduct of individual cases." *Id.*

Evidence of abuse obtained by Borden's post-conviction counsel is entirely consistent with the type of evidence frequently held to support a finding of prejudice under *Strickland.* In *Rompilla v. Beard,* 125 S. Ct. 2456 (2005), this Court found trial counsel ineffective for failing to discover evidence that defendant was raised by alcoholic parents who physically and emotionally abused him, and suffered fetal alcohol syndrome and a very low I.Q. The Court held failure to present this evidence at sentencing resulted in prejudice, requiring reversal:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, *that is not the test*. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of

[4] Later published as 2 ABA *Standards for Criminal Justice* § 7-1.1 American Bar Association, 2d ed. 1986, available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html, visited February 13, 2012.

> [Rompilla's] culpability," *Wiggins,* 539 U.S. at 538, 123 S. Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S. at 398, 120 S. Ct. 1495), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052.

Rompilla, 125 S. Ct. at 2469 (emphasis added).

III. ALABAMA'S GROSSLY INADEQUATE FUNDING FOR EXPERTS AND INVESTIGATIONS RENDERS DEFENSES FOR INDIGENT CAPITAL DEFENDANTS CONSTITUTIONALLY INADEQUATE.

In 1995, Alabama's statute governing indigent defense fees and expenses contained no specific provision for experts. "Counsel shall [ ] be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." ALA. CODE § 15-12-21 (1984). The broad discretion vested in trial judges was an insurmountable impediment for most indigent defendants. Expert fees, including psychiatric evaluations, could not exceed $500.00. *See Bailey v. State*, 421 So.2d 1364, 1367 (Ala. Crim. App. 1982). A mental health professional testified Bailey exhibited " 'psychotic like behavior' involving hallucinations and a poor understanding of reality," and would have difficulty understanding and working with counsel. An "in-depth psychiatric evaluation" was recommended. *Id*. at 1364. A fellow

inmate testified Bailey "realized what he had done." Based on this testimony, the trial court denied funds for a mental examination and was affirmed.

A $500.00 cap is inadequate for mental evaluation and expert testimony, and violates an indigent defendant's rights to Due Process under the Fourteenth Amendment and effective counsel under the Sixth Amendment of the United States Constitution. Defendant is denied constitutional rights if denied the opportunity to offer social history to demonstrate mental status at the guilt or penalty phase. It is not enough to provide a mental evaluation. Defendant must be granted resources to obtain and use a meaningful evaluation in his defense. "Justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (indigent capital defendant has right under Fourteenth Amendment to psychiatric evaluation to use in defense if needed.)

The inadequacy of Alabama's provision for mental evaluation and social history resulted in an unconstitutional conviction here. During the penalty phase, counsel offered no social history or expert testimony regarding mental health, choosing to adopt wholly inadequate testimony offered during the guilt phase. R. 1098.

Inadequacy of funding for expert assistance is indicative of Alabama's broken indigent defense system,

rendering many criminal convictions unjust and unconstitutional. Alabama has no statewide indigent defense system. The most common method of providing indigent defense is for judges to appoint attorneys for an hourly fee. *Id*. at 100. The ABA offers a disturbing assessment:

> "'The state's indigent defense systems are not fully independent from undue political and judicial influence.'[5] Elected judges are responsible for deciding upon the type of indigent defense system each judicial circuit will use....[6] [I]n the twenty-seven judicial circuits that use court-appointment systems, judges are responsible for making appointments in individual cases. All of this highlights the reality that the State of Alabama's indigent defense system not only fails to be independent of the judiciary, but is wholly dependent on it."[7]

Alabama sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial. *Maples v. Thomas*, 2012 WL 125438 at *4 (U.S. Jan. 18, 2012). Alabama has only two requirements of appointed counsel: they must be licensed members of the Alabama bar; and have five

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[5] ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) at 121.

[6] ALA. CODE § 15-12-2(a)(1), (2) (2007); ALA. CODE § 15-12-3 (2006); ALA. R. JUD. ADMIN. 8(a) (2007).

[7] Assessment Report at 121.

years criminal experience. Consequently, many are not skilled in the unique, complex demands of a capital trial. In *Maples*, court-appointed counsel told the jury they were "stumbling around in the dark." Br. of Petitioner at 1 (May 18, 2011). Likewise, Borden's counsel not only failed to uncover available evidence of abuse and mental illness, but told jurors that Borden had a normal, uneventful childhood.

Death penalty cases require a unique repertoire of knowledge, and are "so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases."[8]

> "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. [It] is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in

[8] ABA *Guidelines* at 3, *citing McFarland v. Scott*, 512 U.S. 849, 855 (1994); *see 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).

> keeping abreast of new developments in a volatile and highly nuanced area of the law."

Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995). One author described the demands of a capital case as "the legal equivalent of neurosurgery."[9] Given the degree of specialization required, it is critical that appointed counsel representing the indigent be adequately skilled and trained. In Alabama, experience with capital cases is not required, nor does the State provide or require capital-case-specific education or training. *Maples*, 2012 WL 125438 at *4.

"The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1,[10] an investigator, and a mitigation specialist." ABA *Guidelines* at 28. In *Whitehead v. State*, the Alabama Court of Criminal Appeals held Whitehead was only entitled to one attorney with five years' experience in the active practice of criminal law, because ALA. CODE § 13A-5-54 (2007) does not provide for two. *Whitehead v. State*, 777 So.2d 781, 851 (Ala. Crim. App. 1999). One might expect the

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[9] Scott Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1945 (2006).

[10] The ABA *Guidelines* indicate attorneys appointed in a capital case should have substantial training in capital representation.

State to require that attorney to complete some training in capital cases. Alabama requires ***none*** beyond the State Bar requirement of twelve hours of continuing legal education per year to maintain licensure. ALA. CODE § 40-12-49 (2007). Thus "capital defendants are often represented by attorneys who are unfamiliar with death penalty litigation, do not know how to prepare or present a capital case, and make numerous avoidable mistakes during the course of a trial."[11]

Appointed counsel in Alabama death penalty cases are grossly undercompensated. *Maples*, 2012 WL 125438 at *4. In 1995, appointed attorneys received $40 hourly for in-court time and $20 for out-of-court work. ALA. CODE § 15-12-21 (1984), and "could not be compensated more than $1,000 for out-of-court work for each phase of the capital trial, based on a $20 hourly rate." *Hyde v. State*, 950 So.2d 344, 359-60 (Ala. Crim. App. 2006). In 2006, 70% of Alabama death row inmates were convicted with this limitation in place. *See, Assessment Report* at 126 (citing Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005). The demands of capital cases are significantly more time-consuming than a typical criminal trial. "[S]tudies indicate that several thousand hours are typically required to provide appropriate representation. An examination of federal capital trials from 1990 to 1997 for the Judicial Conference of the

[11] Ruth Friedman & Bryan Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 5 (1992).

United States found total attorney hours in cases proceeding to trial averaged 1,480." ABA *Guidelines* at 40. In Alabama in 1995, indigent defendants were entitled to 50. Counsel representing inmates either had to foot the bill themselves after reaching the cap, or stop vigorously defending their clients. Many condemned inmates, including Borden, were represented by counsel whose performance was constrained by unreasonably low rates.

IV. COMPETENT COUNSEL AND RESOURCES ARE INDISPENSABLE

> "*[The layman] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.*"

Powell v. Alabama, 287 U.S. 45, 69 (1932).

"Without true advocacy for the defense, the prosecution's case is never put to the proper test," and "appellate courts [are] faced with reviewing sentences of death without the security of knowing that a defendant has truly had his day in court." *Id.*

"There should be equality between indigents and those who possess the means to protect their rights." *Ex parte Moody*, 684 So.2d 114, 120 (Ala. 1996), *quoting United States v. Tate*, 419 F.2d 131 (6th Cir. 1969). At the least, equality must mean indigent defendants should not suffer because they lack means to retain well-trained representation. The Alabama process is fraught with difficulties and challenges only known to Alabama. In 2005, Alabama sentenced more people to death than Georgia, Mississippi, Louisiana and Tennessee combined.[12]

"[D]efense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty." *Assessment Report* at 97. This was born out in Borden's case, where failure of competent representation led inexorably to death row. During the penalty phase, counsel did little more than adopt inadequate evidence offered during the guilt phase, and failed to object to the prosecutor doing the same. R. 1098. Lacking presentation of substantial available evidence, the penalty phase lasted less than an afternoon. The only witnesses were a handful of family members. R. 1097. Counsel offered *no* expert testimony explaining Borden's significant mental illnesses. R. 1098. Borden's defense was hampered by *grossly inadequate* compensation and expense caps.

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[12] Thomas Spencer, *EU Ambassador Hails Alabama's Evolving Image*, THE BIRMINGHAM NEWS, April 26, 2007.

CONCLUSION

For these reasons, we urge the United States Supreme Court to grant the petition for writ of certiorari.

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