

No. _____

IN THE SUPREME COURT OF ALABAMA

_____)	
JIMMY DAVIS, JR.,)	DEATH PENALTY CASE
Petitioner,)	
))	Court of Criminal Appeals
))	CR-03-2086
))	
))	On appeal from the Calhoun
STATE OF ALABAMA,)	County Circuit Court
Respondent.)	CC-93-534.60
))	
_____)	

Review of Court of Criminal Appeals
Decision Dated April 4, 2008
Application for Rehearing Denied June 13, 2008

BRIEF AMICI CURIAE OF THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS
AND NATIONAL ASSOCIATION OF SOCIAL WORKERS,
ALABAMA CHAPTER, ON BEHALF OF PETITIONER

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NO ORAL ARGUMENT IS REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

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SUMMARY OF THE ARGUMENT

Petitioner Jimmy Davis, Jr. received ineffective assistance of counsel in this case, and should be granted a new sentencing hearing. Davis's trial counsel's preparation for Davis's sentencing did not include even a minimally adequate investigation of Davis's background. Trial counsel conducted only brief and cursory discussions with Davis, his mother, and two other relatives shortly before trial and made no effort to obtain publicly available records concerning Davis or to otherwise investigate his background. Trial counsel also did not engage the services of an investigator, or a social worker or other mitigation specialist, to pursue such information.

If Davis's trial counsel had made any meaningful efforts to investigate Davis's background, they would have discovered a great deal of valuable mitigation evidence. The evidence presented at Davis's Rule 32 hearing shows that he was severely abused as a child, and that the facts of his abusive childhood were readily discoverable.

The fact that Davis and the few family members who were briefly interviewed did not inform trial counsel of Davis's abuse does not in any way diminish the severity of the

abuse he suffered or the mitigating impact of that abuse, nor does it excuse trial counsel's failure to conduct any investigation to obtain mitigation evidence. The trial court and Court of Criminal Appeals are gravely mistaken in concluding that Davis and his family are to blame for trial counsel's failures. It is well recognized, in both case law and scientific literature, that victims of abuse and their families have great difficulty in disclosing the abuse and often actively try to avoid disclosing it.

Clinical social workers often play a vital role in the defense of a capital case. Preparation and presentation of the defendant's social history by a social worker is often at the heart of the mitigation case, and the important and reliable evidence provided by the social worker's testimony is well recognized by the United States Supreme Court and by lower courts throughout the nation.

The facts of Davis's horrific childhood abuse are powerful and would have been vitally important at his sentencing proceeding. The conclusion of the trial court and Court of Criminal Appeals that trial counsel's failure to obtain and present this evidence was not grounds for reversal is plainly wrong. The background evidence that

was available to trial counsel is precisely the type of mitigation evidence that has been found to support a finding of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Davis has established a "reasonable probability" that, had this evidence been presented at sentencing, the result would have been different.

ARGUMENT

I. TRIAL COUNSEL FAILED TO UNCOVER CRITICAL MITIGATION EVIDENCE AS A RESULT OF UNREASONABLY INEFFECTIVE TRIAL PREPARATION.

The evidence presented by Davis at his Rule 32 hearing demonstrated that he endured a childhood of horrific physical and emotional abuse. As summarized by the Court of Criminal Appeals in a March 8, 2006 opinion, the evidence showed that Davis and his siblings were "regularly beat[en] with switches, extension cords, and brooms," and that one second grade beating of Davis had left him with a swollen head and a nearly severed ear. *Davis v. State*, 2006 WL 510508 at *5. While beating Davis, his mother also inflicted verbal emotional abuse, calling him a "black bastard." *Id.* One DHR social worker who had investigated a complaint that Davis was being abused at age ten testified that his mother had admitted beating him for

being a bed-wetter. The social worker personally observed 25 to 30 marks on Davis's back and testified that she had never seen worse injuries to a person's back. *Id.*

A. The failure to discover evidence of Davis's abusive childhood resulted from constitutionally inadequate investigation by trial counsel.

Davis's trial counsel did not present any of the evidence supporting the foregoing findings as mitigation at Davis's sentencing hearing, because trial counsel had not discovered the information and were therefore unaware that it was available to be presented.¹ Instead, the only mitigation evidence presented by trial counsel at the sentencing hearing consisted of pleas for mercy by Davis's mother and a cousin (*Davis v. State*, 2006 WL 510508 at *7,

¹ Trial counsel's ineffectiveness in failing to adequately pursue background evidence may have been attributable, in part, to a lack of understanding as to its vital importance. Lead trial counsel Giddens testified at the Rule 32 hearing that his understanding of non-statutory mitigation consisted of presenting pleas for mercy by family members and presenting evidence of the defendant's good character. Giddens had never presented evidence of childhood abuse in mitigation and would have considered doing so only "if it was somehow related to the crime...." (R. 75-76). The Court of Criminal Appeals correctly noted in the March 8, 2006 opinion that "evidence of child abuse is a classic example of mitigating evidence" whose admission is not dependent on whether it was related to the crime. (*Davis v. State*, 2006 WL 510508 at *7, fn. 11.

together with testimony from a psychometrist that Davis's full scale IQ was 77, within the borderline range of intelligence functioning that would have made it difficult for him to perform ordinary tasks. *Id.*

Although trial counsel was initially appointed for Davis in April 1993, little preparation for trial was conducted until November 1993, just two weeks before trial. (Giddens 112/20-25). Indeed, trial counsel's testimony and time records show that trial counsel met with Davis himself only twice before the November 1993 trial (once in June 1993 and again in November 1993), with each meeting lasting only about one hour. (P.Ex.1, 31; Giddens 35/6-25). Trial counsel briefly interviewed Davis's mother one week before trial, and also briefly interviewed two siblings (RR. 863). (P.Ex. 31, p.3). Trial counsel did not seek the appointment of an investigator, nor of a social worker or other mitigation specialist (Giddens 40/14-17), and did not seek to obtain law enforcement, school, Department of Human Resources, or other public records concerning Davis or his family. (Giddens 61/11-19, 80/19-82/6).

In denying Davis's postconviction claims for ineffective assistance with respect to trial counsel's

failure to uncover and present evidence of Davis's severely abusive childhood, the trial court found that blame for the failure of trial counsel to discover this evidence lay with Davis and his family and could not be attributed to trial counsel's failure to conduct a reasonably sufficient investigation.² *Davis v. State*, 2008 WL 902884 at *12-17. The trial court reasoned that, because neither Davis nor the few family members who were contacted informed trial counsel of Davis's childhood abuse during their brief interviews, it would be inappropriate to "shift the blame" to trial counsel for failing to uncover it. *Id.* at *12. In the trial court's view, Davis and his family were themselves to blame for that failure, because they did not provide the pertinent information to counsel. *Id.* at *12-17. Further, the trial court found that because Davis and his family did not provide these facts, trial counsel were not under any obligation to pursue information about Davis's background or upbringing through other means. *Id.*

² The trial court's findings were adopted by the Court of Criminal Appeals in its April 2008 opinion. *Davis v. State*, 2008 WL 902884 (Ala. Crim. App. April 4, 2008). References to the trial court's opinion herein are from the portions of that opinion quoted by the Court of Criminal Appeals.

The Court of Criminal Appeals concluded that the trial court did not abuse its discretion in rejecting Davis's claims that counsel were ineffective for failing to conduct a reasonably sufficient investigation to discover the evidence of his childhood abuse, and for failing to engage appropriate experts, including a social worker, to obtain background information that would have lead to the discovery of this evidence. *Id.* at *15.

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 trial counsel may, of course, make strategic choices about which areas of possible mitigation evidence are worthy of pursuit, such choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel 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

the U.S. Supreme Court recognized in *Wiggins v. Smith*, 539 U.S. 510 (2003), counsel cannot make a reasonable strategic decision about how to present mitigation evidence when counsel has not performed a thorough investigation and therefore does not know what mitigation evidence is available. *Id.* at 522-23.

Here, there is no question that the investigation conducted by trial counsel for Davis was "less than complete." *Strickland, supra*. Indeed, it was virtually non-existent. A wealth of powerful mitigation evidence was readily available to be discovered and presented, and it could have been discovered in a variety of ways. Trial counsel for Davis cannot have made a reasonable decision that further investigation of Davis's background was unnecessary, because their perfunctory, last-minute information gathering efforts were so ineffectual that they were destined to fail.

Although the trial court in its findings repeatedly castigates Davis (and the few members of his family who were briefly interviewed by trial counsel) for not having been forthcoming about the horrific facts of his childhood abuse, *Davis v. State*, 2008 WL 902884 at *12-17, it is well

established in scientific literature that silence surrounding child and familial abuse is quite common and, indeed, can reasonably be anticipated. For example, according to a 1994 study entitled "Rape in America," conducted by the Medical Center of the University of South Carolina, five out of six rape victims do not report the crime to authorities, and "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 considering death penalty cases, including Alabama courts, recognize that a defendant who has been the victim of abuse may have difficulty revealing the facts of the abuse or may actively deny it.³ These courts also recognize that this is among the psychological effects of

³ In a somewhat different context, the U.S. Supreme Court recently noted studies that show that "underreporting is a common problem with respect to child sexual abuse." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008) citing Hanson, Resnick, Saunders, Kilpatrick & Best, *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 564 (1999). The *Kennedy* court went on to note that "one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member." *Id.* at 2644 (citations omitted).

the abuse suffered by the defendant, and not any willful dishonesty or lack of cooperativeness on the defendant's part. In *Harris v. State*, 947 So. 2d 1079 (Ala. Crim. App. 2004), the Alabama Court of Criminal Appeals discussed at length the postconviction evidence of domestic abuse suffered by the defendant over many years. In holding that Harris's trial counsel was ineffective for failing to investigate and present evidence of her abuse at trial, the court relied in part on the testimony of Martha Loring, a clinical social worker. Loring testified that Harris suffered from post-traumatic stress disorder as a result of her history of abuse and that one of the symptoms of her PTSD was that she "displayed 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. The testimony of both Loring and Dr. Robert Shaffer, a clinical psychologist, confirmed that Harris "tried to minimize the traumatic events she had gone through." *Id.* at 1125-26.

The circumstances that often force victims of abuse to remain silent appear to be further exacerbated by race -

some studies show that parental abuse of black children is particularly likely to be kept secret:

Undoubtedly, conflicting demands are made on black children who are placed in a paradoxical position. They are not only trying to make sense of their parents' mistreatment of them, but in a climate of racism, depending on the child's age and cognitive understanding, they may be aware of the negative attributes associated with their families. In light of this situation, public voicing of abusive events in their families becomes even more difficult. Hence, finding their voice creates a tension for children, because they are wracked with conflict, guilt and ambivalence about loyalty and betrayal. In particular, the fear of undermining their family in a racist society will exert a powerful influence on them to remain silent.

. . .

For black children living with abusive parents the inherent tension is that they have to form primary attachments to caregivers who are dangerous, negligent, and generally unfit. Paradoxically, underlying these contradictory processes for black children is the supposition that their families are a primary source of safety from a hostile racist world, when it is in fact their parents who may pose the main threat to their safety. Thus, children are encumbered by a complex loyalty to family secrets.

. . . Children's attempts to voice experiences as maltreatment may be met with resistance and denial. In this regard, children may be encouraged to deny what they genuinely feel and experience, and ultimately accept their parents' distorted version of events. Their capacity to give meaning to traumatic events, name their experiences as abusive, and essentially call

mistreatment by its rightful name and define their own "truths" will then be seriously hampered.

Giving Voice to Experiences: Parental Mistreatment of Black Children in the Context of Societal Racism, Child and Family Social Work 2002, Vol. 7, 239, 242-44 (2002), citing Herman, L.J., *Trauma and Recovery: From Domestic Abuse to Political Terror* (Pandora, 1992), and Mitchell, S., *Relational Concepts in Psychoanalysis*, (Harvard University Press, 1988).

Like the defendant in *Harris*, even during postconviction proceedings, when the facts of the abuse he suffered were known, Davis exhibited reluctance to talk about the details of the abuse. The trial court noted that

[E]ven in the timeframe immediately before the [Rule 32] evidentiary hearing, Davis did not speak in detail of the abuse inflicted on him as a child, instead generalizing that his background "wasn't rosy" and that he didn't have any privileges, only "every day survival." (RR. 863). When specifically questioned about abuse, Davis only acknowledged that he was disciplined with a switch, in stark contrast to the evidence that Davis was, in fact, hit with belts, electrical cords, and with an open hand. (RR. 863-864). Thus, the record supports a finding that even Davis continued to participate in the family's conspiracy of silence, even on the eve of his evidentiary hearing.

Davis v. State, 2008 WL 902884 at *12. These findings are precisely consistent with the case law and scientific

literature recognizing that the infliction of emotional and physical abuse on a child often renders the victim unable to communicate the facts of his own abuse, and is often accompanied by silence on the part of the abuser and other family members.⁴ Contrary to the holdings of the trial court and the Court of Criminal Appeals, however, they do not support the conclusion that it is acceptable for trial counsel in a death penalty case to abandon background investigation after a few brief and fruitless conversations with the defendant or members of his family. Instead, these findings, as well as the case law and scientific literature, point up the vital importance of not stopping there, since to do so is to virtually guarantee failure.

Thus, while both the trial court and the Court of Criminal Appeals declined to hold trial counsel's

⁴ It can hardly be considered surprising that Davis's mother did not readily reveal her abuse of her children. The fact that child abusers attempt to keep their despicable behavior secret has been well known for a very long time. A July 1962 *Time* magazine article, reporting on a then-recent American Medical Association report on "battered child syndrome," noted that "parents deny any responsibility" when children are brought to the emergency room for treatment of an abuse-inflicted injury, and that doctors themselves were often reluctant to attribute injuries to parental abuse. *Time*, "Battered Child Syndrome" (July 20, 1962).

performance ineffective for failing to uncover Davis's childhood abuse, the fact is that counsel's meager and belated communications with Davis, his mother, and two siblings, which were very brief and which occurred only in the days before trial, were virtually assured of failing to obtain the crucial facts. At the very least, counsel themselves would have had to spend enough time talking with Davis (or any of his family members) to establish a sufficient relationship of trust before Davis could have been expected to even begin discussing information concerning familial abuse. Two one-hour interviews with Davis, five months apart, can hardly be deemed even a minimally diligent effort to investigate Davis's background.⁵

Counsel made no effort to have Davis or his family members interviewed by a clinical social worker, an investigator, or any other expert whose professional training would provide a greater ability to elicit

⁵ In the *Harris* case, social worker Loring testified that she spent more than thirty hours examining Harris, in addition to conducting numerous other interviews with family members and friends, and examining documents. *Harris*, 947 So.2d at 1125.

difficult information, such as childhood abuse, from a person such as Davis, a poor, uneducated person who was under the significant stress of being in jail charged with a capital crime. As more fully discussed in Section II below, clinical social workers possess the education, training, and experience needed to break through the psychological barriers that frequently prevent victims of abuse from freely providing information about their experiences. Moreover, their testimony frequently provides the vital evidence that makes the difference between life and death.

The trial court opines that trial counsel had no obligation to obtain DHR, school, or other public records on Davis because Davis and his family had not informed trial counsel that these records might contain useful information. *Davis v. State*, 2008 WL 902884 at *15. Contrary to the import of the trial court's finding, it is incorrect that trial counsel in a capital proceeding can never be deemed ineffective when he has relied solely upon the input of his client to discover and present mitigating evidence. Many courts have recognized that a reasonably competent attorney does not abandon his pursuit

of mitigation simply because his client has not handed it to him on a silver platter, or even because his client has been actively uncooperative in obtaining that evidence. *See, e.g., Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994) ("An attorney cannot blindly follow a client's demand that his [mental condition] not be challenged...and end further inquiry regarding the client's mental fitness when [the client] refused to submit to psychiatric examination); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir.), cert. denied, 537 U.S. 942 (2002) ("If a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial.")

Davis's trial counsel rendered constitutionally inadequate assistance by failing, utterly, to conduct an investigation into his background. Had counsel conducted such an investigation, or engaged a qualified social worker or other mitigation specialist to do so, there is no reason to doubt that the evidence that was ultimately presented in postconviction proceedings would have been uncovered. Even the most basic, competently prepared, social history would

have included conducting in-depth interviews with all available family members, as well as obtaining relevant records from schools, law enforcement, and social service agencies.

B. Trial counsel's investigation for mitigation evidence did not comport with prevailing professional standards at the time of trial.

The trial court also found that prevailing professional standards at the time of Davis's trial in late 1993 do not establish that counsel were ineffective for failing to obtain a social history or available public records on Davis, or for failing to engage a social worker, investigator, or other mitigation specialist to pursue such evidence. *Davis v. State*, 2008 WL 902884 at *15. This is simply incorrect.

The U.S. Supreme Court had recognized prior to 1993 that the sort of evidence Davis was able to adduce at his Rule 32 hearing is vitally important in capital cases. In *California v. Brown*, 479 U.S. 538 (1987), the Court stated that "evidence 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, or to

emotional and mental problems, may be less culpable than defendants who have no such excuse." *Id.* at 545. In 1992, the Eleventh Circuit held counsel ineffective for failure to present evidence that defendant had mental health problems, low intelligence, and had suffered from paranoia and depression. *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), *cert. denied*, 504 U.S. 943 (1992).

The American Bar Association Guidelines for the Appointment and Performance of counsel in Death Penalty Cases were promulgated in 1989, and thus had been in place for several years before Davis's trial. The ABA Guidelines have been recognized by the United States Supreme 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 ABA Guidelines advised in 1989 that mitigation investigation must begin as soon as counsel is appointed. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, ¶ 11.4.1(A). Additionally, the ABA Guidelines note that it is vital for capital defense counsel to meet with their client often to

develop a good rapport and relationship of trust. *Id.* As noted in the previously cited scientific literature, and as recognized by the Court of Criminal Appeals in *Harris, supra*, the experience of abuse may be difficult for a client to disclose and discuss because it involves painful memories and other emotions relating to traumatic past events. Thus, the guidelines direct capital defense counsel to meet with their client immediately upon being appointed and to meet with him regularly. *Id.*

The ABA 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), p. 93, and note that matters counsel should consider presenting include medical history, educational history, employment and training history, *family and social history*, and cultural influences. *Id.* at 11.8.6, p. 133.

Also available at the time of Davis's 1993 trial were a number of other manuals and resources outlining effective representation, including The Alabama Capital Defense Trial Manual (2nd ed. 1992) (P.Ex. 29); and Defending a Capital

Case in Alabama (1988) (P.Ex. 30). These references confirmed, at the time of trial, that much more than a few brief conversations in the waning days before trial were necessary to constitute effective representation with respect to mitigation. *E.g.*, Defending a Capital Case in Alabama, pp. 336 (P.Ex. 30) (pretrial investigation and preparation must be far more extensive and cover areas not normally considered in other cases. The life and background of the client is a critical component of effective preparation for a capital trial.... The mitigation investigation "cannot be done in a few weeks before trial. It will take several months.... Thus, counsel should commence investigation into the client's background and mitigating factors immediately.... An investigation will include in-depth interviews with the client and all the people in his or her life.")

Long before Davis's 1993 trial, the important contributions to be made by social workers and other mitigation specialists in litigating criminal cases were well recognized. In 1984, the ABA House of Delegates approved ABA Criminal Justice Mental Health Standard § 7-1.1 (later published as 2 ABA Standards for Criminal

Justice § 7-1.1 (American Bar Association, 2d ed. 1986) (history available on ABA website at http://www.abanet.org/crimjust/standards/mentalhealth_toc.html 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 also by "providing consultation to the prosecution or defense concerning the conduct of individual cases." *Id.* The commentary noted that "[t]he criminal justice system needs the expertise of mental health and mental retardation professionals," specifically including clinical social workers as well as psychologists, psychiatrists, and nurses. Counsel in earlier Alabama capital cases have been held ineffective for failure to obtain and present evidence of familial abuse. The original trial in *Harris, supra*, took place in 1989, more than four years before Davis's trial. Davis also presented the testimony of an expert witness, John Mays, on the 1993 legal standards for Alabama capital murder defense representation. Mays' testimony confirmed that Davis's counsel's performance with respect to investigation and presentation of mitigating evidence fell below the norms of

capital murder defense practice in Alabama in 1993
(R.573/2-11).

II. SOCIAL HISTORIES AND THE TESTIMONY OF CLINICAL SOCIAL WORKERS WOULD HAVE PROVIDED IMPORTANT AND RELIABLE EVIDENCE OF THE KIND THAT IS DIRECTLY RELEVANT IN CAPITAL CASES, AND THE AVAILABILITY OF SUCH EVIDENCE WAS WELL KNOWN AT THE TIME OF TRIAL.

The trial court's finding that "the use of a social worker [is] less than an ideal procedure," *Davis v. State*, 2008 WL 902884 at *17, reveals a misapprehension of not only the role of social histories in capital cases, but of the function of social workers in such cases, and of expert witnesses in general.

Social histories and testimony by clinical social workers contain important and reliable evidence that is routinely and widely used in capital cases. The social history can serve as 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) (counsel's decision not to present certain family background evidence was not deficient where counsel conducted an "objectively reasonable" investigation, including use of a mitigation expert).; *Ringo v. State*, 120 S.W.3d 743, 748-49 (Mo. 2003) (decision not to present

expert evidence of defendant's post-traumatic stress disorder was not deficient where counsel engaged four experts, including a social worker, to investigate his background).

Evidence and testimony concerning the defendant's social history is frequently 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. Woolford*, 316 F.3d 1079, 1090 (9th Cir. 2003).

Social workers are uniquely qualified to prepare and present the social histories of defendants. The typical master's-level clinical social worker responsible for preparing social histories and/or testifying at sentencing has completed graduate courses in cognitive, psychological, and bio-psychosocial development and major theoretical explanations of personality development and human behavior, as well as 900 hours of clinical training in the field

before graduating. Indeed, in Alabama, licensed clinical social workers -- in addition to having a master's degree in social work from an accredited program -- also must pass a licensing examination and have at least two years of post-master or doctoral experience in the practice of social work under the supervision of a licensed certified social worker. ALA. CODE § 34-30-22.

In at least thirty-three states and the District of Columbia, by virtue of their educational background, training, experience, and professional accreditation, clinical social workers with master's degrees are authorized to render diagnoses of psychiatric, psychosocial, and psychological disorders.⁶ This overwhelming recognition that clinical social workers are eminently capable of diagnosing and treating such disorders

⁶ See *In re Adoption/Guardianship No. CCJ14746 in the Circuit Ct. for Wash. County*, 759 A.2d 755, 762 n.9 (Md. 2000) (collecting statutes). Similarly, clinical social workers licensed or certified under state law meet the definition of "clinical social worker" for purposes of federal Medicare reimbursement. Significantly, "clinical social worker services" means services performed by a clinical social worker "for the diagnosis and treatment of mental illness...which the clinical social worker is legally authorized to perform under State law." 42 U.S.C. 1395x(hh)(2).

reflects a "consistent body of policy determinations by state legislatures" that clinical social workers are an essential part of the provision of clinical mental health treatment in the United States. *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (internal citation omitted). Moreover, this broad acceptance of licensed clinical social workers as qualified providers of mental health services speaks volumes about the reliability and effectiveness of those services.

Regulations promulgated by the Alabama State Board of Social Work Examiners confirm that Alabama, too, recognizes the wide range of professional work that clinical social workers perform in the field of mental health:

Chapter 850-X-2 Social Work(i) Clinical social work shares with all social work practice the goal of enhancement and maintenance of psychosocial functioning of individuals, families, and small groups. Clinical social work practice is the professional application of social work theory and methods to the treatment and prevention of psychosocial dysfunction, disability, or impairment, including emotional and mental disorders. It is based on knowledge of one or more theories of human development within a psychosocial context. The perspective of person-in-situation is central to clinical social work practice. Clinical social work includes interventions directed to interpersonal interactions, intrapsychic dynamics, and life-support and management issues.

(ii) Clinical social work services consist of assessment; diagnostic impression; treatment, including psychotherapy and counseling; client-centered advocacy; and evaluation. It includes direct client intervention, client centered supervision and client centered consultation. It involves the scientific, artful, ethical application of social work theories and methods of assessment, diagnostic impression, prevention and treatment. Assessment of interpersonal relationships, mental health status, family dynamics, environmental stresses and supports, social systems and the impact of physical, emotional and mental illness and disability on functioning are the emphasis of clinical social work practice.

(iii) Clinical social work also includes crisis intervention, case management and client centered advocacy. Treatment methods are designed to provide the client an opportunity to express himself or herself, and foster an atmosphere of candid self observation, expectations of change and amenability to the social worker's efforts to facilitate such change.

Based on this expertise, courts have not only relied on expert testimony by clinical social workers, but have also routinely relied on social histories⁷ prepared by clinical social workers.

⁷ Alabama's regulations describe "psychosocial assessment," such as that conducted in postconviction proceedings here, as follows: "The determination of psychosocial functioning involves a comprehensive process, assessment and evaluation conducted by the social worker in order to learn about the client. It includes four levels of analysis: the individual; the interpersonal system; the family unit and the family's interchange with its social network; and other

The United States Supreme Court has confirmed the vital importance of such social histories in capital proceedings. In *Wiggins*, 539 U.S. 510, the Court reversed the Fourth Circuit's denial of post-conviction relief and vacated the petitioner's sentence of death on the basis of his trial counsel's failure to properly investigate and present mitigating evidence of the petitioner's life history.⁸ In so doing, the Court relied heavily upon the expert testimony, presented during post-conviction proceedings, of a licensed social worker who had prepared a detailed social history report on the petitioner. Based upon the social worker's report and testimony detailing the severe deprivation and abuse suffered by the petitioner, the Supreme Court held that there was "a reasonable probability

environmental or ecological factors. Interviewing is the major tool of psychosocial assessment. Psychosocial assessment does not include making diagnoses, nor interpreting of psychological tests." Chapter 850-X-2.01(4).

⁸ During the habeas hearing in the district court, the judge had expressly recognized that failure "to do a social history, at least to see what you have got, to me is absolute error." The district court had nevertheless denied the petition, believing that trial counsel's explanation that his failure to conduct a social history had been a deliberate, strategic decision barred relief. *Wiggins*, 539 U.S. at 517.

that a competent attorney, aware of this history, would have introduced it," and that there was also "a reasonable probability that [the jury] would have returned a different sentence." *Wiggins*, 539 U.S. at 535-36.

The *Wiggins* Court made clear its reliance upon the social history prepared by the petitioner's expert witness:

The mitigating evidence counsel failed to discover and present in this case is powerful. As Selvog [the expert social worker witness] reported based on his conversations with Wiggins and members of his family, Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.

Wiggins, 539 U.S. at 534. See also *California v. Brown*, 479 U.S. at 545 ("[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) (noting that consideration of the offender's life

history is a "part of the process of inflicting the death penalty"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

Lower courts, both before and after *Wiggins*, have often emphasized the importance of social histories when weighing the propriety of sentencing decisions in capital cases. For example, in *Moore v. Reynolds*, 153 F.3d 1086, 1110 (10th Cir. 1998), the court of appeals relied on two documents submitted to the district court: a psychological report prepared by a psychologist and a social history investigation report prepared by a social worker. The court noted that "[a]lthough many of her conclusions are general, rather than focused specifically on Moore's situation, [the social worker's] report arguably suggests 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.* Based on the psychological report and the social history, the court of appeals determined that the petitioner had "established a likelihood that his mental condition could have been a mitigating factor at the

sentencing phase." *Id.*⁹ 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).

Reliance on social history is consistent with Alabama's sensitivity to any impediment to the consideration of any type of mitigating evidence in a death sentencing hearing. See *Harris*, 947 So.2d 1079, 1115 (noting that "'Alabama's sentencing scheme broadly allows the accused to present evidence in mitigation,'" and reversing the lower court's finding that evidence of the petitioner's background was too remote in time to be admissible in mitigation).

⁹ See also *Castro v. Oklahoma*, 71 F.3d 1502, 1510-14 (10th Cir. 1998) (vacating death sentence when state trial court rejected request for funds for expert psychiatrist to assist at sentencing; in concluding that petitioner had "established the likelihood that his mental condition could have been a significant mitigating factor," court cites affidavit from forensic social worker that "describes significant emotional and development impairments which pertain directly to [petitioner's] relative culpability for murder" and notes that, although both petitioner and 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.").

"Recognizing that 'the imposition of death by public authority is . . . profoundly different from all other penalties,'" the United States Supreme Court has repeatedly held that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion)).

Following cases such as *Eddings*, *Lockett*, and *Green v. Georgia*, 442 U.S. 95 (1979), in which the Supreme Court found that the exclusion of testimony as hearsay at the guilt phase of a capital trial violated the Due Process Clause, courts of appeals have emphasized that mitigation evidence proffered by a capital defendant should generally be admitted when it is "reliable and relevant." *E.g.*, *Sallahdin v. Gibson*, 275 F.3d 1211, 1237 (10th Cir. 2002).

Despite the well-established role of social workers as expert witnesses in capital cases, and of the vital evidence provided by the social histories they prepare and

present, the trial court in Davis's postconviction proceeding found that such testimony "pushes the envelope of permissible evidence," and would have been entitled to "lessened weight" because the sentencing jury would have been asked "to accept facts [concerning Davis's background] as interpreted and sifted by a third-party in reaching a conclusion." (April 4, 2008 Opinion at 38).

This is a startling, and potentially dangerous, precedent that must not be permitted to stand. In effect, the trial court (and the Court of Criminal Appeals, through its adoption of the trial court's findings) held that the opinion testimony of an expert witness in a recognized field of expertise is to be accorded lesser weight because it is supported by the extensive facts upon which the expert based her conclusions, and some of those facts are not presented directly by their sources.

The very purpose of expert testimony is for a person who possesses particularized knowledge, education, and experience in a field to examine the facts and circumstances of a case, to analyze those facts in light of her specialized knowledge, and to form and present to the judge or jury the conclusions she draws from that analysis.

See, e.g., Ala. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.") Expert witnesses frequently provide testimony, together with reports and visual aids, that compile and summarize the voluminous information upon which their learned conclusions are based.

At Davis's Rule 32 evidentiary hearing, social worker Jan Vogelsang testified at length concerning the methods she applied in gathering the social history information reflected both in her Notebook and in her testimony, and the purposes for which that social history information is used. (896/12-897/3; 899/1-900/14; 903/9-905/7). She laboriously detailed the specific sources of information for each independent conclusion, naming those she had interviewed, identifying the records she had reviewed, and describing the information that lead her to her conclusions. (930/7-1056/10). She also described in detail the sources from which that information was drawn. (912/4-914/21). Vogelsang was permitted to testify

concerning her conclusions and the bases for those conclusions.

The summarizations and compilations of facts employed by the expert are important for a number of reasons. As Vogelsang testified at Davis's Rule 32 evidentiary hearing, testimony and exhibits compiling and summarizing the voluminous information and conclusions derived from a social history are necessary to help the viewer understand how that information is important to the situation at hand and, in particular, how a person's "history . . . might be contributing to their current behavior and their current problems." Vogelsang testimony (905/21-906/5). Vogelsang also offered an additional reason that the social worker's synthesis and summarization of the bases for her conclusions are a vital component of expert testimony in her field:

In terms of court, especially in a case such as this one, to bring in every document, to bring in every single person you've interviewed would keep us here possibly for weeks. So it's a way of pulling all of the findings together, all of the information together, and using it to assist the Court in the disposition of the case.

Vogelsang testimony (906/6-11).

To accept the erroneous conclusion that an expert's testimony must somehow be discounted, precisely because the expert has performed the function of analyzing and compiling a plethora of relevant facts in order to arrive at her opinions and conclusions, and presented them in order to assist the trier of fact in understanding the evidence, is to eviscerate the function, and the usefulness, of expert witnesses.

III. COUNSEL'S INEFFECTIVENESS IN FAILING TO DISCOVER AND PRESENT IMPORTANT SOCIAL HISTORY EVIDENCE IS CLEARLY PREJUDICIAL TO THE PETITIONER.

The trial court found, and the Court of Criminal Appeals agreed, that Davis was not prejudiced by trial counsel's failure to present the available evidence of childhood abuse. *Davis v. State*, 2008 WL 902884 at *20. This erroneous conclusion appears to have proceeded primarily from two flawed premises concerning the substantive evidence of abuse: that the abuse was not sufficiently severe to establish a "reasonable probability" that the result would have been different if the evidence had been presented at sentencing, *Strickland*, 466 U.S. at 694, and that the incidents of abuse were too remote in

time to support such a probability. *Davis v. State*, 2008 WL 902884 at *20-22.

In its opinion denying Davis's claims, the trial court stated:

the substantive evidence presented at the evidentiary hearing does not establish prejudice under *Strickland*. Although it is clear that Davis suffered some abuse as a child, he was never hospitalized, DHR did not remove him from the home, and the abuse by Lillie Bell was remote in time to the murder of Hazle.... The abuse suffered by Davis was remote in time, about five or six years, to the commission of this offense. (RR. 512).... Another aspect of these facts that decreases the weight this mitigation evidence would have is the fact that the abuse DID NOT lead any of Davis's family members to report Lillie Bell's actions to authorities, to tell people outside of the family, or otherwise remedy the situation.... When combined with the fact that Davis's family members were comfortable with keeping this information secret, this abuse becomes much less powerful as evidence. Davis's family must not have thought his life was in danger during his adolescence, as they did nothing to protect him from further abuse. The abuse of Davis obviously did not impact Davis's own family to a degree great enough where they were motivated to seek assistance from authorities in dealing with the issue.

Davis v. State, 2008 WL 902884 at *20-21. The trial court's reasoning, adopted in its entirety by the Court of Criminal Appeals, is severely flawed for a number of reasons.

The evidence of an abusive upbringing that was presented by Davis at his Rule 32 hearing is entirely consistent with the type of evidence that has frequently been held to support a finding of prejudice under *Strickland*. In *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), the United States Supreme Court found trial counsel ineffective for having failed to discover evidence concerning the defendant's childhood. That evidence showed that defendant was raised by alcoholic parents who physically and emotionally abused him, suffered fetal alcohol syndrome, and had a very low I.Q. The Court found that failure to present this evidence at Rompilla's sentencing hearing resulted in prejudice, requiring reversal of his sentence:

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 [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.

Similarly, in *Harris*, *supra*, the Alabama Court of Criminal Appeals found that counsel's failure to present evidence that Harris was a "battered woman" who had suffered past spousal abuse was prejudicial to Harris, because the sentencer "could have found the evidence to be mitigating had it been presented during the penalty phase." *Id.* at 1130.

These cases demonstrate that the abuse suffered by Davis was severe enough to establish a reasonable probability of a different sentencing outcome. They also confirm that the passage of time between his childhood abuse and commission of a crime as a young adult does not lessen its impact, and certainly does not support a conclusion that he was not prejudiced by his trial counsel's ineffectiveness in failing to uncover it. The abuse suffered by the defendants in both *Rompilla* and *Harris* occurred many years before the crime (as much as twenty years earlier), a much longer gap than the five or six years the trial court found had passed between Davis's abuse and his crime.

Moreover, scientific literature reveals that 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) (finding "clear and significant associations between reports of physical abuse and risks of violent offending"); Shore, *Rethinking the Brain: New Insights into Early Development* (Families and Work Institute, 1997) (Children who experience parental rejection or neglect more likely to develop antisocial traits and to exhibit violent behavior); English, Widom & Branford, *Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior*, Final Report to National Institute of Justice (2004) (Abused and 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 one of many forms of violent crime as juveniles or adults).

Had trial counsel engaged the services of a clinical social worker to prepare and present Davis's social history, that witness would have been able not only to

testify about the facts of Davis's abusive childhood, but to explain how the abuse shaped Davis's adult personality and conduct. A social worker also would have been able to explain to the sentencing jury, and to the court, the well accepted dynamics that often result in such abuse going unreported, even when it is quite severe.

The authorities cited above thus make clear that the conclusion that Davis's suffered no prejudice because of counsel's ineffectiveness is wrong. The most undeniable indication, however, that prejudice did occur appears in the Court of Criminal Appeals' own March 2006 opinion in Davis's case. There, having reviewed the very same evidence of abuse that is now dismissed as insufficient to establish prejudice, the Court of Criminal Appeals deemed the evidence "powerful" and stated that had Davis's claims in this regard not been procedurally barred (a holding that was later reversed by this Court), it would have been "compelled to grant relief and order a new sentencing hearing." *Davis v. State*, 2006 WL 510508 at *5, *9. The Court of Criminal Appeals found that it was "certainly...reasonable to conclude that the evidence of

Davis's child abuse could very well have tipped the scales" in favor of life. *Id.* at *8.

Although the Court of Criminal Appeals, after a second round of briefing and further consideration of the matter, has decided to reconsider its earlier reaction to the evidence presented by Davis, the fact that judges of the Court of Criminal Appeals, who have frequently had occasion to review and consider this type of evidence, were in 2006 so moved by Davis's childhood abuse is telling. If the Court of Criminal Appeals itself found Davis's evidence so compelling, there can be no doubt that there is at least a "reasonable probability" that Davis's jury would also have been moved by it, and would have made a different decision if the evidence had been presented to them.

CONCLUSION

For the foregoing reasons, NASW respectfully urges the Court to reverse the ruling of the lower court affirming the denial of postconviction relief pursuant to Rule 32, Ala. R. Crim. P. It is clear that Davis's counsel provided ineffective assistance of counsel with respect to the investigation and presentation of evidence concerning his

background of abuse, and that Davis suffered prejudice as a result.

Respectfully submitted,



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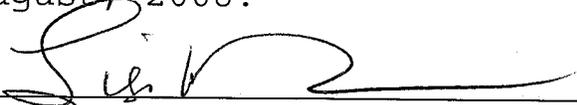
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