No. 02-311

IN THE

Supreme Court of the United States

Kevin Wiggins,

Petitioner,

v.

Sewall Smith, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND THE NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 150,000 social workers with chapters in every state, the District of Columbia, and internationally. Established in 1955, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. Among its activities in furtherance of its purposes, NASW promulgates professional standards and criteria, conducts research, publishes books and studies of interest to the profession, provides continuing education and enforces the NASW *Code of Ethics*. NASW has adopted a Policy on Mental Health affirming the Association's commitment to take a lead in influencing public policy on mental health issues and to educate the public about mental health as a means of fostering prevention and intervention. NASW's participation in this case furthers NASW's policy on mental health issues.

The National Association of Black Social Workers is a national organization founded in 1968 with an active membership of 5000 social work practitioners, professors, and scholars. Its primary focus is the preservation of the Black family, an objective which is augmented and supported by the work of various committees, including those in the area of criminal justice.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. A portion of Part I of the Argument (*infra* at 10-12) is substantially derived from the Brief *Amici Curiae* of the National Association of Social Workers *et al.* filed in *In re Adoption/Guardianship No. CCJ14746 in the Circuit Court for Washington County*, 759 A.2d 755 (Md. 2000).

STATEMENT

In October 1988, the state indicted petitioner Kevin Wiggins in the Baltimore County, Maryland Circuit Court on charges of first-degree murder, robbery, theft, and burglary, and announced its intention to seek the death penalty. Petitioner opted to have his guilt tried by the judge, who found him guilty of first-degree murder, robbery, and two counts of theft in August 1989.

Petitioner opted to be sentenced by a jury. His counsel, however, introduced *no* mitigating evidence regarding petitioner or his background. In particular, although petitioner's trial counsel knew that the Maryland Public Defender's Office routinely retained expert forensic professionals to prepare social histories of capital defendants, and that funds were available for that purpose, petitioner's counsel did not secure a social history for petitioner. Petitioner's counsel was thus unaware of the scope of the available evidence in assessing and determining a strategy for sentencing.

Instead, petitioner's counsel later testified, he focused on "retrying" petitioner's guilt at sentencing, urging the jury – which was repeatedly instructed that petitioner had already been convicted of first-degree murder – to reach the "stunning conclusion that * * * [it] can't be sure beyond a reasonable doubt that Kevin Wiggins *had any role at all* in the [victim's] murder." JA 391 (emphasis added). In response, the prosecution again emphasized that petitioner had already been convicted of first-degree murder, and that the jury was obligated to consider petitioner's crime and "weigh that * * * against what you know about his background" (*id.* 407) – which, because petitioner's counsel had failed to introduce mitigating evidence regarding that background, was only the stipulated fact that petitioner had no prior convictions. Not surprisingly, petitioner was sentenced to death.

In 1993, after exhausting his direct appeal, petitioner sought post-conviction relief in the state trial court. Pet. App. 31a-32a. Post-conviction counsel established that the mitigating evidence regarding petitioner's background that petitioner's counsel could have developed, but did not, would have painted a compelling case to the jury. In particular, post-conviction counsel submitted a social history prepared by Hans Selvog, a licensed clinical social worker with a bachelor's and master's degree. *Id.* 139a & n.264. Based on interviews with petitioner, his three sisters, his maternal aunt, and maternal cousins, as well as a review of foster care, medical, and school records (*id.* 140a), the social history compiled by Mr. Selvog detailed petitioner's dysfunctional upbringing, the repeated and horrific neglect and abuse suffered by petitioner throughout his childhood, and the results of various psychological and physical evaluations of petitioner:

Petitioner's Dysfunctional Upbringing. Petitioner is the product of his mother's extramarital affair with another married man. Petitioner has never met his biological father, and "has only limited knowledge of [him]." Pet. App. 163a. Petitioner's mother – who was herself abused as a child – was addicted to alcohol and never held a job. *Id.* 165a. Once, while intoxicated, she left petitioner's younger sister – who was then two years old – in a taxicab. *Id.* 164a. Petitioner's mother frequently left her four children for "days and weeks at a time" with only petitioner's oldest sister, India (who is three years older than petitioner), to care for them. *Id.* 165a. During the frequent and lengthy absences of petitioner's mother, India was sexually abused by a family friend. Petitioner was aware of the abuse and "felt bad that he couldn't do anything to help" her; although petitioner's mother was also informed of the abuse, she refused to believe India. *Id.* 171a. When petitioner's mother was at home, she would sometimes have sexual intercourse in the same bed in which petitioner and his siblings were sleeping. *Id.*

Neglect and Malnourishment. While residing with their mother, petitioner and his siblings were severely neglected and malnourished. Before abandoning her children "for two to three weeks at a time," petitioner's mother would lock the children out of the kitchen, leaving them to fend for themselves. Pet. App. 166a. At these times, petitioner's sister India would try to find any money hidden in the house to purchase food for her siblings; the children subsisted primarily on junk food and rice, which India cooked on the heater or radiator in bowls or pans hidden in anticipation of her mother's absence. *Id.* When India could not find money to purchase food, she would attempt to obtain food from neighbors or relatives, by panhandling, or by searching through trashcans. *Id.* Petitioner recalls that on some occasions, when the siblings had no food for days, he "ate paint chips from the window sill and drank water." *Id.* 167a. If petitioner's mother returned home and found that her children had entered the kitchen, she was "very abusive." *Id.* The apartment in which petitioner's family resided was "continually filthy." *Id.* 172a.

Physical Abuse By Petitioner's Mother. Petitioner's mother frequently beat her children. Pet. App. 167a-171a. On one occasion, after petitioner accidentally set the family's curtains on fire, petitioner's mother – who was intoxicated – held petitioner's hands against the hot metal grates of the family's gas stove. When petitioner did not stop crying, he was then beaten with a belt. As a result of his injuries, petitioner was hospitalized for a week; he recalls that although his hands (which were "in a cast suspended above his head") hurt, hospital employees were nice to him and "[t]he food was good." *Id.* 167a-171a.

Physical and Sexual Abuse While in Foster Care and the Job Corps. When petitioner was six, he and his siblings were placed in their first foster home, where they remained for approximately one year. They were removed from this home,

however, after it was discovered that their foster mother was physically abusing them. Pet. App. 175a-176a.

Petitioner remained in his second foster home for nine years. Petitioner's second foster mother, Lenore Miner, disciplined the children by beating them with her fists, belts, or switches. Petitioner was also repeatedly sexually molested by his foster father, Charles Miner, but petitioner recalls that at the time he harbored mixed feelings about Mr. Miner because he was "starved for attention": "I wanted a father and mother real bad." Pet. App. 177a. At the same time that Mr. Miner began to molest petitioner, however, petitioner also became unable to eat; he was then beaten by Mrs. Miner for his failure to eat and for throwing food away. *Id.* 176a-179a. At one point, petitioner ran away from home and went to an emergency shelter for the homeless. *Id.* 183a. In 1977, the Wiggins children were dropped from their caseworker's case load as a result of a shortage in Department of Social Services caseworkers. *Id.* 184a.

In November 1978, following stints in two other foster homes and a brief return to the Miners' house, petitioner was placed in the home of Mrs. Martha Blackwell. While there, petitioner – as well as other foster children in the home – was repeatedly raped by Mrs. Blackwell's two sons. A report by petitioner's social worker prepared during this time indicated that petitioner would, even during the winter, go outside at night without his shirt or shoes. Pet. App. 189a-191a.

Petitioner stopped attending school during the eleventh grade. At the age of eighteen, petitioner left the Blackwell home and joined the Job Corps. Pet. App. 191a. While there, petitioner was befriended by a Job Corps Administrator and eventually sexually abused by him. Petitioner reports that when his sexual involvement with the administrator first began, he "thought" or "hoped" that he might be adopted by the administrator. *Id.* 193a. After two years in the Job Corps, petitioner graduated with a degree in food service but was unable to understand what he read. *Id.* 192a-193a.

Petitioner's History After Leaving Foster Care. After leaving the Job Corps and foster care, petitioner worked steadily at a variety of jobs. At some times, however, petitioner was homeless and lived with "different people who befriended him on the streets." Pet. App. 194a-195a.

Results of Tests and Evaluations of Petitioner. Beginning at the age of seven, petitioner was administered various psychological and physical tests, including:

- An October 1968 psychological evaluation, which stated that petitioner "[i]n general seems to be an emotionally flat and expressionless child. When asked, he did not know how old he is." Pet. App. 180a.

- A 1969 report, which stated that petitioner was "extremely lethargic about dressing, eating, and doing most activities"; had "difficulty distinguishing between fantasy and reality"; and had "poor ability to concentrate." *Id.* 179a-180a.

- A 1970 evaluation by a pediatrician, which reported that petitioner had an I.Q. of 72, was "underachieving, hyperactive and observed to have 'staring spells' frequently. * * * He hasn't learned the alphabet yet in the two years he was in school." An electro-encephalograph performed at the pediatrician's referral suggested that petitioner suffered from a "seizure disorder." *Id.* 181a.

- A 1979 evaluation by Lawrence Hines, a community health worker with a master's degree in nursing, which reported that petitioner was "referred because of strange and bizarre behavior," that petitioner's "intellectual capacity was far below that of a 16 year old," and that petitioner was "unable to abstract or conceptualize, but there is no evidence of hallucinations or delusions." Mr. Hines reported that his "impression" of petitioner was "mental retardation with cranial pathology." *Id.* 191a-192a.

In the social history, Mr. Selvog stated that "[f]rom birth to age five, the most critical years of psychosocial development, Kevin Wiggins was severely neglected and

violently abused." Pet. App. 195a. Citing studies regarding the effects of child abuse, including sexual abuse, on its victims, Mr. Selvog concluded that "the horror of [petitioner's] violent childhood environment and the indelible trauma of sexual assault throughout his formative years, combined with borderline mental retardation, impaired his development and significantly contributed to his involvement in the present offense." *Id.* 198a. At trial, Mr. Selvog further testified that "the effects of that sort of abuse and experiences of neglect cause these sort of behavior problems and emotional problems that Kevin exhibited throughout his life," and that petitioner "experienced extreme signs of depression" and "suicide ideation." *Id.* 141a.

Emphasizing the importance of the failure to commission a social history of petitioner, the state post-conviction court ruled from the bench that petitioner's trial counsel had been ineffective:

> I don't even remember a death penalty case that there was not this social history done. * * * Not to do a social history, at least to see what you have got, to me is absolute error. I just – I would be flabbergasted if the Court of Appeals said anything else. I really don't think that is even a close question.

JA 605. In a written decision issued over three years later, however, the court denied post-conviction relief, ruling that although petitioner's counsel was not aware of the mitigating evidence presented during the post-conviction proceeding, the failure to investigate mitigation evidence was a permissible "trial tactic." Pet. App. 155a-156a. On appeal, a divided Maryland Court of Appeals affirmed. *Wiggins* v. *State*, 724 A.2d 1, 17 (1999).

On August 6, 1999, petitioner filed a timely petition for relief pursuant to 28 U.S.C. 2254 in the U.S. District Court for the District of Maryland. Pet. 11. Judge J. Frederick Motz granted petitioner relief with respect to, *inter alia*, his

ineffective assistance of counsel claim. Pet. App. 50a-55a. In reaching his conclusion that petitioner's counsel had been ineffective by failing to develop a mitigation case, Judge Motz specifically emphasized that the information contained in the social history commissioned by petitioner's post-conviction counsel "might well have influenced the jury's appraisal of * * * [petitioner's] moral culpability." *Id.* 55a (quoting *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000)).

On appeal, the Fourth Circuit reversed. Like the Maryland Court of Appeals, it deemed the decision by petitioner's trial counsel not to put on *any* mitigating evidence regarding petitioner's background to be "an informed strategic choice" insofar as counsel was purportedly aware "of some of the details of Wiggins' childhood as they existed in the presentence investigation report and social services records which he had seen." Pet. App. 20a-21a. The court explained that "[a]lthough further investigation would have developed more extensive details of Wiggins' childhood, the extant records did inform [petitioner's counsel] of a possible avenue of mitigation" (*id.* 20a) – an avenue that, according to the court of appeals, petitioner's trial counsel simply chose not to pursue because "it tended to conflict with any attack on" whether petitioner was principally responsible for the murder (*id.* 21a). The court of appeals thus distinguished petitioner's case from this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000), describing *Williams* as a case in which

> counsel's complete failure to investigate could not have led to a reasonable strategic choice for the simple reason that he had no information upon which to make a strategic choice. It was this wholesale failure that led the Court to conclude that Williams did not receive constitutionally sufficient representation.

Pet. App. 19a.

The court of appeals specifically rejected Judge Motz's conclusion that, contrary to this Court's holding in *Williams*, petitioner's counsel had been ineffective at sentencing insofar as he failed to "conduct a more complete investigation" (Pet. App. 53a) of petitioner's background and, in particular, failed "to develop a social history exposing [petitioner's] harsh childhood and sub-average mental capacity" (*id.* 18a). The court of appeals explained that "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history * * * in a capital case," but instead "merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." *Id.* 19a.

The court further reasoned that petitioner could not, in any event, have been prejudiced by his trial counsel's failure to commission a social history, because some of the evidence contained in petitioner's social history was – in its view – not "unequivocally mitigating" and thus effectively constituted a "double-edged sword": "the jury could just as easily have viewed [petitioner's] childhood and limited mental capacity as an indicator of future lawlessness." Pet. App. 23a.

SUMMARY OF ARGUMENT

The Fourth Circuit's conclusion that, notwithstanding his failure to investigate and present mitigating evidence at the sentencing phase of petitioner's trial, petitioner's counsel was not constitutionally ineffective is flawed in three respects:

First, the Fourth Circuit's decision fails to acknowledge the significance of the information contained in the available social history evidence to the jury's sentencing deliberations. Based on the expertise of the clinical social workers responsible for compiling social histories and giving testimony regarding those histories and the information contained therein, it is clear that social histories provide important and reliable evidence relevant to jury sentencing

determinations in capital cases. By failing to accord sufficient weight to this information, the Fourth Circuit overlooks the significant effect – as demonstrated by empirical studies – that social histories and the information contained therein can have on jurors in capital cases.

Second, the Fourth Circuit's conclusion that it was reasonable for petitioner's counsel to "retry guilt" because "not all of the available social history evidence is unequivocally mitigating" is unsupported by any empirical evidence, and in any event misapprehends the role of mitigating evidence in a jury's sentencing determination.

Third, the Fourth Circuit's determination that petitioner's trial counsel was not ineffective because he reasonably relied on an "informed strategic choice" to "retry guilt at sentencing" based on his alleged knowledge of a few basic facts regarding petitioner's background fails to attribute sufficient importance to the effect of petitioner's counsel's failure to introduce *any* mitigating evidence at sentencing.

The collective effect of these flaws in the Fourth Circuit's reasoning renders the Fourth Circuit's opinion well outside the mainstream in its treatment of mitigating evidence, but in particular with regard to the kind of mitigating evidence set forth in petitioner's social history.

ARGUMENT

I. Social Histories and Testimony By Clinical Social Workers Contain Important and Reliable Evidence Directly Relevant to Sentencing Determinations In Capital Cases.

Social histories and testimony by clinical social workers contain important and reliable evidence that is routinely and widely used in capital cases to allow the sentencer to make the "individualized assessment of the appropriateness of the death penalty" required by the Constitution. See *infra* at 17-21. The typical master's-level clinical social worker responsible for preparing such 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 Maryland, licensed clinical social workers must – in addition to having a master's degree in social work from an accredited program – also pass a licensing examination and have "2 years * * * with supervised experience of at least 3,000 hours after receiving the master's degree with a minimum of 144 hours of periodic face-to-face supervision." Md. Health Occ. Code Ann. § 19-302(e).

In 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.[2] This overwhelming recognition that clinical social workers are eminently capable of diagnosing and treating such disorders 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 diagnostic services speaks volumes about the reliability and effectiveness of those services.

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[2] 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).

The reliability and effectiveness of the diagnostic services provided by licensed clinical social workers are further demonstrated by both state and federal laws mandating coverage of clinical social work services. Because clinicians cannot undertake treatments without first making diagnoses, and because most insurance forms require diagnoses using the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM-IV")[3] as a condition of rendering payment, these laws – and the reimbursements paid by health insurance plans to clinical social workers for the diagnosis and treatment of emotional and mental illness and substance abuse – reflect a recognition that clinical social workers are fully qualified mental health professionals trained to diagnose DSM-IV-identified mental and emotional disorders. To that end, the clinical social worker's knowledge base (which includes expertise in family theory, clinical understanding of how early trauma affects an individual in later life, training and experience in development, understanding of human behavior as purposeful and goal-oriented, ability to see the client as a human being with complex forms of adaptation, and behavioral development) is both relevant and highly skilled.

Maryland courts have routinely relied on expert testimony presented by social workers. Thus, in *In re Adoption/Guardianship No. CCJ14746 in the Circuit Court for Washington County*, 759 A.2d 755 (Md. 2000), the Maryland Court of Appeals rejected arguments by the biological parent that a social worker should not be allowed to testify regarding his diagnoses of the parent and her child because he was neither a psychiatrist nor a psychologist,

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[3] The fourth edition of the American Psychiatric Association's DSM-IV is a standard diagnostic reference tool used by mental health professionals and specifically states that it was designed for use by skilled mental health professionals, including clinical social workers, in clinical practice for the classification and diagnostic assessment of mental disorders. DSM-IV at xv (1994).

holding that the trial court did not err in permitting a licensed clinical social worker to testify as an expert witness and provide diagnostic expert testimony. The Court of Appeals explained that:

> as a licensed clinical social worker, [the expert] is specifically authorized by the [Maryland] Legislature to render diagnoses based on a recognized manual of mental and emotional disorders. It is plain from the statutory language that the Legislature deems licensed clinical social workers capable of rendering diagnoses such as those made by [the expert] based on [the] DSM-IV.

Id. at 759-60.

Based on this expertise, courts have not only relied on expert testimony, including diagnoses, by clinical social workers, but they have also routinely relied on social histories prepared by clinical social workers. For example, in *Moore* v. *Reynolds*, 153 F.3d 1086, 1110 (CA10 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.*[4]

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[4] See also *Castro* v. *Oklahoma*, 71 F.3d 1502, 1510-14 (CA10 1998) (vacating death sentence when state trial court rejected request for funds for expert psychiatrist to assist at sentencing; in concluding that petitioner

Maryland courts have similarly considered social history reports – including, in at least three other capital cases, social histories prepared by Mr. Selvog[5] – in sentencing proceedings. In *Gilliam* v. *State*, 629 A.2d 685, 700 (Md. 1993), Judge Fader (in whose court petitioner was also sentenced) considered at sentencing a twenty-two-page social history prepared by graduate social work students from the University of Maryland and based on interviews with the defendant and his mother, sister, aunt, and friend. In preparation for post-conviction proceedings, the Office of the Public Defender hired Mr. Selvog to review the first social history and conduct "a second psychosocial investigation of [defendant's] family background," which was then used to provide the basis for conclusions by the psychiatrist retained by post-conviction counsel. *Id.* In considering Gilliam's argument that his state trial counsel erred in relying on the original social history prepared by the graduate social work students, the Court of Appeals quoted at length from the social history compiled by Mr. Selvog:

> Throughout the initial four years of his life, Tyrone Gilliam Jr. witnessed extreme violence between his parents. Both his mother and father were capable of inflicting injury and their fierce and unpredictable outbursts created a home environment that was threatening, confusing and insecure. Further, the ongoing violence between the parents

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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.").

[5] Mr. Selvog also testified at the post-conviction hearing that he had been qualified as an expert in six capital cases in Maryland. JA 414-15.

> elicited the constant fear from Tyrone Jr. and his sister that at any moment they too might suffer the same brutalization.
>
> After his parents' final separation, which followed a particularly explosive episode, Tyrone Jr.'s existence became even more unstable as he moved with his mother and sister to many different residences during the next four years. And the trauma he had suffered when his parents were together did not end after their separation; he continued to be subjected to a fearful and brutal environment while cared for at his maternal grandmother's home. Here his stepgrandfather viciously abused his wife, children and grandchildren. And on top of this were the constant sexual attacks Tyrone Jr. was subject to in this house and as well as at the hands of a babysitter.

Id. at 700.[6] Similarly, in *Ball* v. *State*, 699 A.2d 1170 (Md. 1997), the sentencing judge heard testimony from the defendant's wife, mother, and Mr. Selvog that was

> aimed, in part, at establishing that Appellant was emotionally disturbed from a young age and that he had no prior convictions for crimes of violence. Toward this end, Mr. Selvog prepared a social history of Appellant, which included information concerning Appellant's previous convictions for

[6] In *Gilliam*, by the agreement of the prosecution and Mr. Gilliam's counsel, Mr. Selvog's social history report was admitted into evidence "with the exception of the portion containing his opinions." 629 A.2d at 691. Because it concluded that Gilliam had not preserved the issue for appellate review, the Court of Appeals declined to decide whether the portion of the social history containing Mr. Selvog's opinions were properly excluded. *Id.* In petitioner's case, the Maryland Court of Appeals did not question either the admissibility or the reliability of the social history prepared by Mr. Selvog.

> drug-related and motor vehicle offenses, as well as various burglary and theft offenses.

Id. at 1177. See also *Whittlesey* v. *State*, 665 A.2d 223 (Md. 1995) (discussed *infra* at 16-17).

Reliance on social history is consistent with this Court's sensitivity "to any impediment to the consideration of any type of mitigating evidence in a death sentencing hearing." *Hutchins* v. *Garrison*, 724 F.2d 1425, 1437 (CA4 1983). Thus, "[r]ecognizing that 'the imposition of death by public authority is * * * profoundly different from all other penalties,'" this 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) (per curiam), in which this Court found that the exclusion of testimony as hearsay at the guilt phase of a capital trial violated the Due Process Clause, the courts of appeals have emphasized that mitigation evidence proffered by a capital defendant should generally be admitted when it is "reliable and relevant." *Sallahdin* v. *Gibson*, 275 F.3d 1211, 1237 (CA10 2002).

The Maryland Court of Appeals has reached similar conclusions regarding the importance of ensuring that all mitigation evidence gets to the jury in capital proceedings. In *Whittlesey* v. *State*, 665 A.2d 223 (1995), a decision issued two years prior to the post-conviction trial court's opinion, the Maryland Court of Appeals vacated appellant's death sentence and remanded for a new sentencing proceeding when the trial court had excluded as hearsay several documents and the testimony of four witnesses – including that of Hans Selvog, who had "prepared a comprehensive

social history of the Whittlesey family in an effort to apprise the jury of Appellant's difficult family background." *Id.* at 241. The court of appeals interpreted Md. Ann. Code art. 27, § 413(c)(1), which governs the admission of evidence at Maryland capital sentencing proceedings, as requiring "that evidence be reliable, but not that it comply with the strict standards applicable in the guilt-or-innocence phase of the trial." *Id.* at 243. Thus, the court explained, on remand in any capital sentencing proceeding, the trial court

> shall admit any relevant and reliable mitigating evidence, *including hearsay evidence that might not be admissible in the guilt-or-innocence phase of the trial*. This relaxed standard for admissibility of evidence will ensure that the fact finder has the opportunity to consider "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."

Id. at 244 (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis added)).

II. The Fourth Circuit Erred In Failing To Attribute Significance To The Failure To Introduce Social History Evidence.

This Court has long held that capital punishment serves two purposes: deterrent and retributive. See, *e.g.*, *Enmund* v. *Florida*, 458 U.S. 782, 786 (1982). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, 481 U.S. 137, 149 (1987). The principle that the sentencer's sense of a defendant's moral culpability is an essential element in determining whether to impose the death penalty has been consistently reflected in this Court's precedents. In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), this Court explained that

> punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "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 or mental problems, may be less culpable than defendants who have no such excuse."

Id. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Such an individualized assessment is necessary, this Court has emphasized, because "only when the jury is given a vehicle for expressing its reasoned moral response * * * in rendering its sentencing decision * * * can we be sure that the jury * * * has made a reliable determination that death is the appropriate sentence." *Penry* v. *Johnson*, 532 U.S. 782, 797 (2001) (internal quotations and citations omitted). See also *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (because death sentence is qualitatively different from other sanctions, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case") (citation omitted)).

The Fourth Circuit's decision failed to appreciate the significance of the substantial mitigating evidence that would have been available for presentation at sentencing – *viz.*, the "crucial facts" (Pet. App. 54a) of petitioner's social history. This Court recognized the importance of the information contained in a capital defendant's social history in *Williams* v. *Taylor*, 529 U.S. 362 (2000), in which this Court reversed the Fourth Circuit's determination that the petitioner in that case had not been prejudiced by the ineffective assistance of his counsel. *Id.* at 398. In so holding, this Court accorded significant weight to the failure of Williams's counsel to investigate or present "extensive" evidence regarding

Williams's "nightmarish" childhood (*id.* at 395), explaining that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability" (*id.* at 398).

Like this Court in *Williams*, the courts of appeals have repeatedly emphasized the importance of the details of a capital defendant's social history and, in particular, the likelihood that such details may provide sufficient information about a defendant so as to affect the jurors' assessment of his moral culpability and, ultimately, result in the imposition of a life sentence. Indeed, information regarding a capital defendant's social history is regarded as so central to the sentencing proceeding that at least one court has emphasized that "a substantial mitigating case may be *impossible* to construct without a life-history investigation." *Karis* v. *Calderon*, 283 F.3d 1117, 1135 (CA9 2002) (emphasis added). The information in a defendant's social history allows jurors to "know where the defendant came from and how he came to sit before them convicted of a capital crime. Jurors intuitively understand that some people are dealt a poor hand in life, through their genetic and social inheritance and their family environment." *Id.* at 1133 n.9 (quoting criminal law expert who appeared at federal habeas hearing); see also *id.* at 1140 (information contained in petitioner's social history, including information regarding abuse suffered as child, would have been "important in understanding the root of [petitioner's] criminal behavior and his culpability"). See also *Smith* v. *Stewart*, 241 F.3d 1191, 1198-1200 (CA9 2001) (remanding for resentencing when petitioner's trial counsel had failed to investigate or present evidence of the petitioner's mental impairment and social history, including a "horrific childhood," that the court of appeals regarded as "powerful and potentially lifesaving").

Thus, in *Coleman* v. *Mitchell*, 268 F.3d 417, 447 (CA6 2001), *cert. denied*, 122 S. Ct. 1639 (2002), the Sixth Circuit

found that petitioner's counsel had been constitutionally ineffective when he had failed to investigate petitioner's personal history and his presentation at sentencing consisted only of an unsworn statement by petitioner and a closing argument that did not mention petitioner's personal history. The court of appeals explained that "given Petitioner's personal background, psychological history, and potential organic brain dysfunction, * * * it is reasonably probable that the presentation of even a substantial subset of the mitigating evidence detailed above would have humanized [petitioner] before the jury such that at least one juror could have found he did not deserve the death penalty." 268 F.3d at 454 (internal quotations omitted). See also *Glenn* v. *Tate*, 71 F.3d 1204, 1207 (CA6 1995), *cert. denied*, 519 U.S. 910 (1996) (trial counsel ineffective when jury "was given virtually no information on [petitioner's] history, character, background and organic brain damage – at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death"); *Lambright* v. *Stewart*, 241 F.3d 1201, 1208 (CA9 2001) (recognizing that "[e]vidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case"); *infra* at 25 (discussing *Emerson* v. *Gramley*, 91 F.3d 898, 906 (CA7 1996)).

As the district court recognized in granting petitioner habeas relief with respect to his sentence, and as the experiences of *amici* reflect, the social history subsequently prepared by petitioner's post-conviction counsel contained compelling information regarding petitioner's background that, if presented as mitigating evidence at petitioner's sentencing, "might well have influenced the jury's appraisal of * * * [Wiggins's] moral culpability." Pet. App. 55a (quoting *Williams* (alterations in original)). In contrast to the district court's opinion, as well as the opinions of this Court and other courts of appeals, the Fourth Circuit's decision that petitioner's trial counsel was not constitutionally ineffective failed to appreciate the weight that the information contained

in petitioner's social history could have carried in the jury's sentencing deliberations.

Significantly, the positive effect that social histories and the information contained therein can have on jurors in capital cases is not merely speculative, but has been borne out in numerous empirical studies. In a 1997 poll, only forty-seven percent of the participants surveyed indicated that they favored the imposition of the death penalty on defendants who were the victims of serious abuse as children, while a 1995 study indicated that only nine percent of the participants favored the death penalty for mentally retarded defendants. See John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1503 (1999).

A survey of South Carolina residents who had actually served as jurors in capital cases revealed similar – and sometimes even more dramatic – results: forty-three percent of the jurors interviewed indicated that they were more likely to vote for a life sentence if presented with evidence that the defendant had been seriously abused as a child, while nearly seventy-four percent of the jurors surveyed indicated that evidence of the defendant's mental retardation would make them less likely to vote for death sentence. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1575-76 tbl. 10 (1998). Fifteen percent of the jurors surveyed also attached some mitigating weight to evidence that the defendant had been extremely poor as a child. *Id.* Particularly given that a death sentence may only be imposed by a unanimous vote of jurors, the presentation of evidence regarding a defendant's social history may – as other courts of appeals have recognized – well have a direct effect on the outcome of a capital defendant's sentencing.

For two reasons, this empirical evidence regarding the likely effect that mitigating evidence would have had on the

jury's decision to sentence petitioner to death is in no way undermined by evidence indicating that "lingering doubt" theories – *e.g.*, the "strategy" purportedly adopted by petitioner's trial counsel – can also be effective in persuading jurors to impose a life sentence. Garvey, *supra*, at 1563.

First, efforts to raise doubts regarding guilt at the sentencing phase cannot be regarded as a legitimate tactic in petitioner's case, in which the jury did not decide petitioner's guilt and thus could not have harbored any "lingering doubts" remaining from the guilt phase. To the contrary, trial counsel's "strategy" would have effectively required the jury to overturn the judge's decision – an unlikely scenario in any event, but especially so in light of the repeated admonitions to the sentencing jury emphasizing that petitioner's guilt had already been determined.[7] Further, petitioner's trial counsel's "strategy" of "retrying" petitioner's guilt utterly failed to account for the relevant inquiry at sentencing: whether petitioner had *actually committed* the murder at issue. Petitioner's trial counsel did not pursue this inquiry – by, for example, positing who else might have committed the murder – and instead made only the vastly different argument that the jury should reach the "stunning conclusion" that it could not "be sure beyond a reasonable doubt" that petitioner "*had any role at all*" in the victim's death. JA 391 (emphasis added).

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[7] See JA 53 (prospective jurors instructed that petitioner "has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs"); *id.* 362 (jury instructed that petitioner's conviction "is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact."); *id.* 404, 407 (prosecutor emphasized that petitioner "has been convicted of first degree murder and robbery," and that jury was to "consider his crime" and "weigh that against what you know about his background"); *id.* 391 (petitioner's trial counsel conceded during closing arguments that petitioner "has been convicted" and that jury "cannot change that").

Second, even if efforts to create lingering doubt regarding petitioner's responsibility for the murder were a legitimate strategy in petitioner's case, such a strategy would not – as Judge Niemeyer noted in his concurring opinion (Pet. App. 25a-26a) – preclude petitioner's trial counsel from also presenting the substantial available mitigating evidence regarding the abuse suffered by petitioner as a child and his borderline mental retardation. Indeed, as Judge Motz (*id.* 55a n.17) emphasized in granting petitioner habeas relief with respect to his death sentence:

> [M]itigating information [regarding petitioner's] vulnerability and limited intelligence would not have been strategically inconsistent with "retrying guilt" during the sentencing phase. * * * [S]killful counsel would have been able to mesh these facts into an effective argument that Wiggins had been made the pawn of others who were responsible for the murder.

III. The Fourth Circuit Erred In Holding That Petitioner Received Constitutionally Effective Counsel On The Ground That The Available Mitigating Evidence Was Potentially A "Double-Edged Sword."

According to the Fourth Circuit, "counsel is not ineffective for failing to introduce evidence that would have hurt as much as it helped." Pet. App. 22a (citing *Darden* v. *Wainwright*, 477 U.S. 168, 186-87 (1986)). In petitioner's case, the court of appeals opined, "not all of the available social history evidence is unequivocally mitigating," but was instead effectively a "double-edged sword" – that is, "the jury could just as easily have viewed [petitioner's] childhood and limited mental capacity as an indicator of future lawlessness." *Id.* The Fourth Circuit's holding that petitioner's trial counsel was not constitutionally ineffective because the evidence that would have resulted from an investigation of petitioner's background was not "unequivocally mitigating" misapprehends the role that mitigating evidence plays in a capital sentencing proceeding.

To begin, the Fourth Circuit's blanket statement that the sentencing jury "could just as easily have viewed [petitioner's] childhood and limited mental capacity as an indicator of future lawlessness" is not merely unsupported by any actual data, but it is in fact directly contradictory to the empirical evidence (see *supra* at 21) regarding the effect that social histories can have on a jury's sentencing decision, and in particular on a jury's assessment of a capital defendant's moral culpability. See Blume & Johnson, *supra*, at 1502-03.

Moreover, the Fourth Circuit's treatment of such allegedly "double-edged" evidence is out of step with the treatment of mitigating evidence by this Court and other courts of appeals. In *Williams*, this Court held that the petitioner's counsel had been constitutionally ineffective when he had failed to investigate or present mitigating evidence regarding, *inter alia*, the abuse and neglect suffered by petitioner as a child and proof of borderline mental retardation. 529 U.S. at 396. The Court reached this conclusion notwithstanding that the available mitigating evidence would also have revealed Williams's extensive criminal record, including convictions for armed robbery, burglary, grand larceny, auto theft, and two violent assaults on elderly victims. *Id.* Such evidence, this Court specifically concluded, did not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [Williams's] favor" (*id.* at 396), while "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's *appraisal of his moral culpability*" (*id.* at 398 (emphasis added)). Moreover, the Court noted, the evidence of Williams's previous violent actions actually served a mitigating purpose by demonstrating that "in each case" his previous criminal offenses, like the murder for which he had been sentenced to death, "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's

selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.*

Like this Court in *Williams*, and unlike the Fourth Circuit in this case, other courts of appeals have recognized that counsel may be constitutionally ineffective for failing to investigate and present available mitigating evidence even when that evidence also contains allegedly "harmful" aspects. In *Emerson* v. *Gramley*, 91 F.3d 898 (CA7 1996) (Posner, J.), petitioner's trial counsel had failed to investigate – and therefore to introduce at sentencing – mitigating evidence. The court of appeals concluded that petitioner's trial counsel had been constitutionally ineffective because the social history evidence subsequently collected for petitioner's post-conviction proceedings might have affected at least one juror's assessment of petitioner's moral culpability:

> the possibility that a case in mitigation along the lines devised by these lawyers might have saved Emerson from the death penalty cannot confidently be reckoned trivial. The mitigation specialist's 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors (including the death of Emerson's child, possibly strangled by her mother, and the death of one of Emerson's brothers by shooting), as to reduce Emerson's moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think Emerson deserving of mercy.

Id. at 907. Significantly, the court of appeals in *Emerson* reached this conclusion even though the favorable mitigating evidence available to petitioner's trial counsel was "outweighed or at least offset" by "additional evidence of criminal and other antisocial behavior." *Id.*

Similarly, in *Lockett* v. *Anderson*, 230 F.3d 695, 710-11 (CA5 2000), the Fifth Circuit reversed the district court's

decision that Lockett's counsel had not been constitutionally ineffective when the available mitigating evidence regarding his "mental and emotional problems" was potentially "more harmful than helpful." While acknowledging the "tension * * * between a possible jury finding of reduced culpability versus the possible conclusion that Lockett's mental problems aggravated the threat of future dangerousness" (*id.*), that court – following this Court's decision in *Williams* – nonetheless held that the available mitigating evidence may well have affected the jury's assessment of Lockett's moral culpability:

> If we can conclude that a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established. If the medical opinion testimony in this case – that Lockett suffered from some organic brain disorder that tended to explain his violent conduct and made him less able to control his behavior than a normal person – had been presented to the jury, we think a reasonable juror could have found that his particular mental condition * * * made him less morally culpable for his cruel and senseless crime.

Id. at 716. The Fifth Circuit concluded that the failure of Lockett's counsel even to "investigate this mitigating evidence, combined with the general lack of any mitigating evidence before the jury, denied Lockett any opportunity, vouchsafed by the law, to avoid the death penalty." *Id.*

The Eleventh Circuit reached the same conclusion in *Harris* v. *Dugger*, 874 F.2d 756 (CA11), *cert. denied*, 493 U.S. 1011 (1989). Acknowledging that the available mitigation evidence was "fraught with danger" because it "would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army," the court held that Harris's counsel had been constitutionally ineffective because "[t]estimony about [his] good character constituted the only

means of showing that Harris was perhaps less reprehensible than the facts of the murder indicated." *Id.* at 764. See also *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (CA8 1983) (district court's ruling that mitigating evidence "would do more harm than good" was "sheer speculation").

This Court's holding in *Williams* and the reasoning of other courts of appeals demonstrate beyond cavil that petitioner's counsel was constitutionally ineffective insofar as he failed to investigate or present substantial mitigating evidence regarding petitioner's background, and the possibility that such evidence could serve as a so-called "double-edged sword" does not save petitioner's counsel from ineffectiveness. Rather, the relevant inquiry is whether such evidence might have affected the jury's assessment of petitioner's moral culpability. Particularly in light of the relative weakness of the state's case supporting the death penalty (Pet. App. 51a), the Fourth Circuit's failure to undertake such an inquiry misapprehends the role of mitigating evidence in a capital sentencing proceeding.

IV. The Fourth Circuit Erred In Failing To Attribute Significance To The Fact That Petitioner's Counsel Introduced No Mitigating Evidence, Especially When Maryland Courts Follow the "One Juror" Rule.

At sentencing, petitioner's trial counsel did not introduce any mitigating evidence regarding petitioner's background "other than the stipulated statutory mitigating factor that Wiggins had no prior violent convictions" (Pet. App. 8a), and instead opted to "retry" the issue of petitioner's guilt. Deeming the decision not to further investigate or present mitigating evidence regarding petitioner's background to be an "informed strategic choice" by counsel, the court of appeals concluded that petitioner's trial counsel had not been constitutionally ineffective. *Id.*

The Fourth Circuit's holding that petitioner's trial counsel was not constitutionally ineffective fails to attribute

sufficient importance to counsel's failure to introduce any mitigating evidence whatsoever regarding petitioner's background. Because the trial judge had already rendered a guilty verdict in petitioner's case, such that the jury was charged only with sentencing petitioner, any "decision" by petitioner's trial counsel not to investigate or present *any* mitigating evidence cannot be regarded as a legitimate trial strategy: as Justice O'Connor noted in *Williams* v. *Taylor*, 529 U.S. 362, 415 (2000), counsel's failure to investigate and present substantial mitigating evidence "provided the jury with no reasons to spare petitioner's life."

Both before and since *Williams*, other courts of appeals reviewing ineffective assistance of counsel claims have properly attributed considerable significance to the total failure of counsel to introduce any mitigating evidence. These courts have emphasized that the presentation of mitigating evidence is an essential part of the individualized assessment of the defendant's moral culpability required in any sentencing proceeding. Thus, in *Battenfield* v. *Gibson*, 236 F.3d 1215, 1235 (2001), the Tenth Circuit agreed with petitioner that his trial counsel – who also had failed to investigate or introduce mitigating evidence – had been constitutionally ineffective. The court explained that

> the jury sentenced [petitioner] knowing only that he was involved in the [victim's] murder * * * and previously had been convicted of assault and battery with a dangerous weapon. Had they been given more information about [petitioner's] background, personality, and the facts of his prior conviction, we conclude there is a reasonable probability they would have determined the mitigating circumstances outweighed the single aggravating circumstance.

Similarly, in *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (1983), the Eighth Circuit held that petitioner's counsel had been constitutionally ineffective when he had failed to present any mitigating evidence. The court of appeals explained that

the failure to present mitigating evidence "deprived Pickens of the possibility of bringing out even a single mitigating factor" that the jury "would have considered * * * and possibly been influenced by." *Id.*[8]

In petitioner's case, the failure of his trial counsel to present any mitigating evidence regarding petitioner's background takes on special significance in light of the prosecution's argument to the jury that its duty was to "consider his crime" and "weigh that * * * against what you know about his background." JA 404, 407. Because petitioner's counsel had not presented any mitigating evidence about petitioner's background, the jury that sentenced petitioner knew only that he had not previously been convicted of any crimes; like the jury in *Williams*, they were "provided with no [other] reasons to spare petitioner's life." 529 U.S. at 415 (O'Connor, J., concurring). By holding that petitioner's trial counsel was not constitutionally ineffective because he had made an "informed strategic decision" to retry petitioner's guilt, the Fourth Circuit's decision overlooks the significance of the failure of petitioner's trial counsel to introduce any mitigating evidence regarding petitioner's background, as well as the impact of that complete dearth of mitigating evidence on the jury's ability to make the "individualized assessment" of petitioner's moral culpability guaranteed by the Constitution.

Further, the experiences of *amici* indicate that the failure of petitioner's trial counsel to present mitigating evidence regarding petitioner's background and borderline intelligence is particularly serious because, under Maryland law, the death penalty cannot be imposed if even one juror believes that the

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[8] See also *Smith* v. *Stewart*, 140 F.3d 1263, 1268 (CA9) (emphasizing that in light of aggravating factors, "counsel's failure [to put on mitigating evidence] was a virtual admission that the death penalty should be imposed upon his client"), *cert. denied*, 525 U.S. 929 (1998); *supra* at 25-26 (discussing *Emerson* and *Lockett*).

mitigating evidence outweighs any aggravating evidence. See *Borchardt* v. *Maryland*, 786 A.2d 631, 660 (Md. 2001). Other courts of appeals have attributed substantial weight to this rule, reasoning that because the proper inquiry under *Strickland* is whether there is a "reasonable probability that the outcome would have been different" absent counsel's failures (446 U.S. 668, 694 (1984)), it is crucial to account for the particular circumstances in which a life sentence would have been imposed at trial. Both the Seventh and Eighth Circuits have employed precisely this approach in *Emerson* and *Lockett* (*supra* at 25-26). Similarly, in *Mak* v. *Blodgett*, 970 F.2d 614 (1992), *cert. denied*, 507 U.S. 951 (1993), the Ninth Circuit expressly rejected the argument that the district court had erred in finding prejudice by considering the effect of mitigating evidence on a single juror. The court of appeals explained that "the effect-on-one-juror approach comports with Washington death penalty law. The law of Washington * * * allows any one juror to set aside the death penalty." *Id.* at 621. The Third, Fifth, Sixth, Tenth, and Eleventh Circuits have reached the same conclusion.[9]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for certiorari and the petitioner's brief on the merits, the judgment of the Fourth Circuit should be reversed.

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[9] See also *Coleman* v. *Mitchell*, 268 F.3d 417, 452 (CA6 2001), *cert. denied*, 122 S. Ct. 1639 (2002) (discussed *supra* at 19-20); *Neal* v. *Puckett*, 239 F.3d 683, 691 (CA5 2001); *Castro* v. *Oklahoma*, 71 F.3d 1502, 1516 (CA10 1998) ("Our harmless error inquiry * * * may be framed in its starkest terms by inquiring, 'Do [we] harbor a significant doubt that this evidence would have caused at least one juror to choose life rather than death?" (internal citation omitted; alteration in original); *Frey* v. *Fulcomer*, 974 F.2d 348, 368 (CA3 1992), *cert. denied*, 507 U.S. 954 (1993); *Bertolotti* v. *Dugger*, 883 F.2d 1503, 1519 n.12 (CA11 1989) ("[I]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation."), *cert. denied*, 497 U.S. 1032 (1990).

Respectfully submitted,

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