No. 98-8384

IN THE SUPREME COURT OF THE UNITED STATES

TERRY WILLIAMS,
Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex I State Prison,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner Terry Williams. Written consents of the parties to the filing of this brief have been submitted to the Court.[1/]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The NACDL views with grave concern the continuing erosion of the Sixth Amendment right to effective assistance of counsel, particularly in capital cases, where effective advocacy is essential. This case highlights two aspects of that erosion. First, a number of courts have misapplied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), to deny

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[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

relief even to capital defendants whose trial counsel utterly failed to perform their constitutional role. Second, some courts have wrongly concluded that this Court's narrow decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), added a requirement of "unfairness" to the *Strickland* prejudice standard. These errors threaten to weaken further the already minimal representation that many capital defendants receive. We believe that the perspective of our members, who regularly represent capital defendants at trial, on appeal, and in collateral litigation, will be useful to the Court.

SUMMARY OF ARGUMENT

1. Every accused requires the "guiding hand of counsel" for his defense. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Persons charged with capital crimes--many of whom are poor, uneducated, and mentally ill or retarded--have a particularly acute need for counsel. That need is greatest during the penalty phase, when counsel's ability to discover and present mitigating evidence often makes the difference between a life sentence and the death penalty.

2. In applying the two-part standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), many courts--including the court of appeals in this case--fail to recognize the unique features of capital sentencing proceedings, including defense counsel's responsibility to present mitigating evidence and the sentencer's inherently subjective consideration of that evidence. To ensure that the Sixth Amendment guarantee of effective assistance of counsel has meaning at the penalty phase of capital cases, this Court should make clear that, for purposes of the *Strickland* prejudice requirement, a "reasonable probability" of a different outcome exists whenever defense counsel fails to present significant mitigating evidence without a sound tactical basis, at least in the absence of overwhelming aggravating evidence.

3. The court of appeals compounded its erroneous application of the *Strickland* prejudice requirement by holding that this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), added an additional hurdle for the defendant to surmount. According to the court of appeals, *Lockhart* requires a defendant alleging ineffective assistance of counsel to show *both* a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different, *and* that the result of the proceeding was unfair or unreliable. In fact, as Justice O'Connor's concurrence in *Fretwell* makes clear, that case addressed the narrow circumstances presented--counsel's failure to raise a legal point that had merit at the time of trial but had been overruled by the time of the habeas proceeding--and did not purport to heighten the burden of a capital defendant seeking to establish prejudice under *Strickland*. The court of appeals' interpretation of *Fretwell* threatens to weaken the protections of the Sixth Amendment and to undermine the reliability of capital sentencing proceedings.

ARGUMENT

I. THE IMPORTANCE OF COUNSEL TO A CAPITAL DEFENDANT.

The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." U.S. Const. Amend. VI. This Court has repeatedly recognized that "[t]he right of an accused to counsel is beyond question a fundamental right." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). Lawyers are essential to persons accused of crimes "because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984).

The Court has often emphasized the significance of counsel to criminal defendants. As it declared more than sixty-five years ago:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

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

Every defendant requires "the guiding hand of counsel," but an accused facing the death penalty has a particularly acute need for an attorney's assistance. Capital defendants face the ultimate, irreversible penalty; they are often, in the words of *Powell*, "ignorant and illiterate" or of "feeble intellect"; they are generally poor; they are often despised; and they are almost invariably incarcerated. Lacking the tools with which to organize a defense, persons charged with capital crimes look to their attorneys more than any other group of defendants.

Counsel for the defendant in a death penalty case plays an especially critical role at the penalty phase. As this Court has repeatedly recognized, the Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest

kind of 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." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original) (plurality opinion); *see, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (same). Mitigating evidence can cover a vast range of information about the defendant, including his family background and upbringing, his school performance, his contact with the juvenile justice system, any prior incarceration, and his mental health history. *E.g., Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987) (defendant has right to have jury consider evidence of difficult childhood, family background, and capacity for rehabilitation); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (defendant has right to present evidence of his good behavior in jail while awaiting trial); *Eddings*, 455 U.S. at 115 ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.").

Only defense counsel can properly evaluate the significance of potential mitigation evidence, and only counsel can obtain and present that information. "Defense counsel . . . has both the opportunity and the duty to present potentially beneficial mitigating evidence and to attempt to convince the sentencer that notwithstanding the defendant's guilt, he or she is a person who should not die." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 (1983). Counsel typically must discover potential mitigating factors through consultation with the defendant and a comprehensive investigation of his life; develop a trial strategy that integrates any guilt phase defenses with the mitigating factors; and implement that strategy at all stages of the trial, from voir dire through penalty phase closing arguments. *See id.* at 320-39 (discussing defense counsel's duties with respect to mitigation); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving*

Standard of Care, 1993 U. Ill. L. Rev. 323, 339-42, 360-65 (same). It is in light of the peculiarly heavy responsibilities of defense counsel at the penalty phase of a capital case that the court of appeals' decision in this case must be examined.

II. THE COURT OF APPEALS MISAPPLIED THE PREJUDICE PRONG OF *STRICKLAND*.

The Sixth Amendment does not merely guarantee counsel to persons charged with serious crimes; it requires the *effective* assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court resolved an extended judicial debate over the proper standard for determining whether a defendant's counsel provided effective assistance. The Court established a precise two-part requirement. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Since *Strickland*, this Court has repeatedly applied its two-part standard in determining ineffectiveness claims. *See, e.g.*, *Kimmelman*, 477 U.S. at 375; *Darden v. Wainwright*, 477 U.S. 168 (1986); *Hill v. Lockhart*, 474 U.S. 52 (1985).

The *Strickland* ineffectiveness standard governs both capital and non-capital cases. In death penalty proceedings, however, that standard must be applied in light of the unique features of capital litigation. Thus, in determining whether "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, a court in a death penalty case must consider counsel's responsibilities with respect to the discovery and presentation of mitigating evidence. And in determining whether the defendant has established prejudice from counsel's errors--the issue that this case presents--a court

must take into account the extraordinarily personal nature of each juror's decision whether to vote for death and the subtle, possibly subconscious, effect on that decision that mitigating evidence may have. *See* Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 486-89 (1987). As Professor Goodpaster observes, "The sentencer's ultimate decision [in a capital case] is based on innumerable constituent decisions regarding the weight and credibility of witnesses and evidence as well as on many intangible emotional, moral, and psychological factors," and thus "[t]he ultimate effect [of a failure to present mitigating evidence] on the sentencer's final decision is absolutely indeterminate and indeterminable." Goodpaster, *supra*, 58 N.Y.U. L. Rev. at 350-51; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1864-65 (1994) ("It is impossible for reviewing courts to assess the difference that investigation into mitigating circumstances and the effective presentation of mitigating evidence might make on a jury's sentencing decision."); White, *supra*, 1993 U. Ill. L. Rev. at 333 n.57 ("Because of the nature of the capital sentencing decision, determining whether additional mitigating evidence would have altered the sentencer's decision is highly speculative.").

Because of the irreversible nature of the death penalty, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980), and the fact that "short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision," Goodpaster, *supra*, 58 N.Y.U. L. Rev. at 354, the *Strickland* prejudice requirement is generally satisfied whenever--as plainly occurred here--defense counsel fails to present significant mitigating evidence without a sound tactical basis, at least in the absence of truly overwhelming aggravating

evidence.[2/] Such an approach adheres to the balance struck in *Strickland* between finality and fairness, while taking into account the unique nature of the capital sentencing process.

Some courts since *Strickland* have misapplied its prejudice standard by condoning patently inexcusable failures by capital defense counsel to investigate and present mitigating evidence on the ground that there is no "reasonable probability" that the evidence would have affected the sentencing decision. In one case, for example, a court found no prejudice from defense counsel's reliance on a sentencing statute that had been held unconstitutional three years before trial because it improperly restricted mitigating evidence. The court found no prejudice even though the statute on which counsel erroneously relied effectively precluded consideration of the defendant's most powerful mitigation evidence, while the statute actually in effect expressly permitted consideration of that evidence. *Frey v. Fulcomer*, 974 F.2d 348, 359-68 (3d Cir. 1992); *see id.* at 369-72 (Cowen, J., dissenting). And in another case, a court found no prejudice from counsel's failure to present or argue compelling mitigation evidence, including the defendant's honorable military service, his church attendance, his other religious activities, and additional character evidence. *Messer v. Kemp*, 760 F.2d 1080, 1092 (11th Cir. 1985); *see id.* at 1096-97 (Johnson, J., dissenting). *See generally* Bright, *supra* (describing cases); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv.

[2/] *Strickland* itself involved a failure to present mitigation evidence at the penalty phase of a capital case. But the omitted mitigating evidence in that case was weak; the evidence conflicted with the penalty phase strategy that trial counsel adopted; and the aggravating evidence was overwhelming. *See* 466 U.S. at 699-700. Thus, *Strickland* represents the relatively rare case where a reviewing court can conclude with confidence that there is no "reasonable probability" that presentation of mitigating evidence would not have affected the outcome.

L. Rev. 1923, 1931-32 (1994) (same); Fong, *supra*, 39 Stan. L. Rev. at 477-79 (same). Although purporting to follow *Strickland*, these (and other) decisions have misapplied its prejudice standard by demanding overwhelming evidence, not simply a "reasonable probability," that the trial result would have been different.

The decision below represents a particularly stark example of an appellate court's evisceration of *Strickland* in the capital sentencing context. Despite trial counsel's failure to discover and present uniquely powerful mitigating evidence, and despite the conclusion of two experienced trial judges--one state and one federal--that counsel's dereliction was prejudicial under *Strickland*, appellate judges, far removed from any contact with jurors and the capital trial process, decided that "[t]he mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury." *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998). The Fourth Circuit's opinion omits any sustained analysis of the potential effect of that evidence on the jurors, as *Strickland* plainly requires, and--most critically--fails to recognize the inherently subjective and indeterminate nature of the capital sentencing process.[3/]

The court of appeals' decision and the other cases cited above underscore the need for this Court to explicate the application of the *Strickland* prejudice requirement to the penalty phase of capital proceedings. In particular, the Court

[3/] The court of appeals compounded its misapplication of *Strickland* by holding that Williams could establish prejudice only by showing a reasonable probability that the mitigating evidence would have caused all twelve jurors to vote against death, even though, under the Virginia sentencing scheme, a single juror's vote against death would have required imposition of a life sentence. *See Williams*, 163 F.3d at 868.

should make plain, in accordance with *Lockett* and its progeny, that significant mitigating evidence--even evidence that an appellate judge might find unpersuasive--can cause a sentencer to impose a long term of years or life without parole, instead of concluding that death is the only appropriate sanction.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISION IN *FRETWELL*.

The court of appeals committed a second error in its prejudice inquiry: purporting to apply this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), it concluded that to establish prejudice from counsel's unprofessional performance, a defendant must show *both* a reasonable probability that, but for counsel's errors, the outcome would have been different, *and* that "the result of the proceeding was unfair or unreliable." *Williams*, 163 F.3d at 869. Other courts as well have interpreted *Fretwell* to heighten the showing that a defendant must make to establish prejudice. *See, e.g., Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 3734 (1999); *Holman v. Page*, 95 F.3d 481, 490-91 (7th Cir. 1996), *cert. denied*, 520 U.S. 1254 (1997); *Durrive v. United States*, 4 F.3d 548, 550-51 (7th Cir. 1993).

These cases misread *Fretwell*. Its rule arose from a peculiar setting: the defendant alleged that his counsel was ineffective for failing to make a sentencing argument based on a decision that had been overruled by the time the habeas petition was filed. In rejecting this claim, the Court applied its conclusion in *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Strickland* that, "'in judging prejudice and the likelihood of a different outcome, [a] defendant has no entitlement to the luck of a lawless decisionmaker.'" *Fretwell*, 506 U.S. at 370 (quoting *Nix*, 475 U.S. at 175 (quoting *Strickland*, 466 U.S. at

695)).[4] The Court concluded that, under the circumstances, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. . . . To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at 369-70. As Justice O'Connor recognized in her concurrence, *Fretwell* concerned "unusual circumstances" and did not purport to change the prejudice standard that *Strickland* established. *Id.* at 373-74 (O'Connor, J., concurring); *see, e.g., Martin v. United States*, 109 F.3d 1177, 1180-82 (7th Cir.) (Rovner, J., dissenting from denial of rehearing en banc) (interpreting *Fretwell* in accordance with Justice O'Connor's concurrence), *cert. denied*, 522 U.S. 931 (1997); *Flores v. Demskie*, 11 F. Supp. 2d 299, 305-06 (S.D.N.Y. 1998) (same); *United States v. Calderon*, 864 F. Supp. 929, 932 n.7 (N.D. Cal. 1994) (same); *State v. Bowers*, 966 P.2d 1023, 1028 n.4 (Ariz. App. 1998) (same); *In re Avena*, 12 Cal. 4th 694, 739-40, 909 P.2d 1017, 1044-45 (1996) (Arabian, J., concurring) (same).

The narrow circumstances that produced the decision in *Fretwell* have no application here or in many of the other cases in which that decision has been applied. Petitioner does not seek "a windfall to which the law does not entitle him" or a decision based on "the luck of a lawless decisionmaker." Instead, he asserts that his counsel failed to present evidence to the jury that, under *Lockett* and its progeny, he had--and continues to have--a constitutional right to have it consider. *Strickland* squarely controls the ineffectiveness determination under these circumstances.

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[4] In *Nix*, the Court applied this principle to hold that a defendant did not suffer prejudice from his counsel's refusal to present perjured testimony. *See* 475 U.S. at 175-76.

Moreover, altering *Strickland* to require a showing of unfairness in addition to a reasonable probability of a different outcome produces at least two adverse effects. First, such an interpretation undermines the Sixth Amendment guarantee of effective assistance of counsel, which--as discussed above--has been weakened already through an insufficiently rigorous application of *Strickland*. Second, interpreting *Strickland* to permit a reviewing court to conclude that no "unfairness" occurred--and thus no Sixth Amendment violation has been established--despite counsel's errors that had a reasonable probability of affecting the outcome injects into the capital sentencing process the arbitrariness that this Court has endeavored to reduce. *See, e.g., California v. Ramos,* 463 U.S. 992, 998-99 (1983); *Beck,* 447 U.S. at 641; *Gregg v. Georgia,* 428 U.S. 153, 188 (1976) (plurality opinion). Except in the narrow circumstances identified in *Nix* and *Fretwell*, a proceeding must be considered "unfair" and "unreliable" whenever a defendant establishes defective performance and prejudice under *Strickland*. To permit judges to conclude otherwise, based on a cold record and an undefined notion of "unfairness," would produce precisely the element of caprice that *Fretwell* itself purports to eliminate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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