IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC14-770
L.T. NO. 2004-CF-004525

THOMAS BEVEL
Appellant,
v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DUVAL COUNTY

BRIEF *AMICUS CURIAE* OF THE FLORIDA CAPITAL RESOURCE CENTER AND THE DEATH PENALTY CLINIC AT FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW IN SUPPORT OF APPELLANT

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IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

Florida Capital Resource Center ("FCRC") is a nonprofit organization whose mission is to protect the constitutional rights of capital defendants in Florida by assisting defense counsel in providing effective representation. To that end, FCRC provides free consultation, training, research, advocacy, and other necessary resources to capital defense attorneys and their defense teams. As protecting the Sixth Amendment right to effective assistance of counsel for capital defendants is the cornerstone of its mission, FCRC has a keen interest in the outcome of this case.

The Death Penalty Clinic ("DPC") at Florida International University College of Law is a clinic that works to improve the defense function in capital cases. Consulting on cases throughout the State of Florida with a specific focus on the mitigation component of capital representation, the DPC provides research, drafts motions, conducts witness interviews, and provides consultation and other necessary assistance to capital defense attorneys, working to ensure they are aware of and practice according to established professional norms in death penalty cases. As the claims in this case relate to the mitigation investigation and presentation performed by Appellant's trial counsel, the outcome of this case is of clear import to the DPC.

SUMMARY OF THE ARGUMENT

Amici intend to demonstrate (1) the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Rev. 2003) reflect

prevailing practice norms at the time of Appellant's trial and should be referred to as guides for determining what is reasonable, (2) mitigation evidence is an indispensable part of capital sentencing proceedings, (3) a thorough mitigation investigation is an indispensable part of providing effective assistance of counsel, and (4) under professional practice norms, mitigation specialists are critical members of the defense team.

ARGUMENT

I. THE ABA GUIDELINES REFLECT PREVAILING PRACTICE NORMS AND SHOULD BE REFERRED TO AS GUIDES TO DETERMINING WHAT IS REASONABLE.

In 1989, recognizing the growing problem of inexperienced counsel providing ineffective assistance in capital cases, the ABA House of Delegates adopted the *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989) ("*1989 Guidelines*"). *See* ABA Standing Comm. on Legal Aid and Indigent Defendants, Section of Criminal Justice, and Section of Litigation, *Report to the House of Delegates*, at 2 (1989).

In 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants ("SCLAID") and Special Committee on Death Penalty Representation ("SCDPR") led a two-year effort to revise and update the *1989 Guidelines*. *See ABA Guidelines for the Appointment and Performance of Defense Attorneys in Death Penalty Cases* (Rev. 2003) ("*2003 Guidelines*") (*1989 Guidelines* and *2003 Guidelines* are herein

collectively referred to as "*ABA Guidelines*") ("Introduction"). As with the *1989 Guidelines*, an incredibly rigorous review process was undertaken, utilizing an Advisory Committee of experts[1] until the final version was adopted by the House of Delegates on February 10, 2003. *Id*.

Amici note the *ABA Guidelines* are not "inexorable commands," *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009), or "a set of rules constitutionally mandated by the Sixth Amendment and that govern the Court's *Strickland* analysis." *Mendoza v. State*, 87 So. 3d 644, 653 (Fla. 2011). Nor should they be. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland v. Washington*, 466 U.S. at 668, 688 (1984).

But neither should the *ABA Guidelines* be emphatically ignored.[2] The well-defined norms articulated in the *ABA Guidelines* serve as a reliable benchmark

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[1] The Advisory Committee included representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section on Individual Rights and Responsibilities; SCLAID; SCDPR; National Association of Criminal Defense Lawyers; National Legal Aid & Defender Assocation; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

[2] In the trial court's order, rather than engage in a reasonableness analysis, the court simply found Appellant's trial counsel was not deficient and stated that the ABA Guidelines do not "govern the Court's *Strickland* analysis." (21 PCR 3488-89.)

against which to analyze the reasonableness of a trial attorney's performance. That is why the Supreme Court[3], the federal courts of appeals[4], and indeed, this Court[5] have long referred to them as "guides to determining what is reasonable."

Amici submit that because the *ABA Guidelines* reflect the prevailing professional norms at the time of Appellant's trial in August 2005, they provide a reliable benchmark against which to analyze the reasonableness of Appellant's trial counsel in this case.

II. MITIGATION EVIDENCE IS AN INDISPENSABLE PART OF CAPITAL SENTENCING.

In *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), the United States Supreme Court held that individualized sentencing procedures are a "*constitutionally indispensable* part of the process of inflicting the penalty of death." (emphasis added). Thus, in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Court held that the Eighth and Fourteenth Amendments require that the sentencer "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

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[3] *See Bobby v. Van Hook*, 558 U.S. 4, 11-12 (2009); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

[4] *See, e.g.*, *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d, 1228 (11th Cir. 2011); *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004); *Hamblin v. Mitchell*, 354 F. 3d 482, 487 (6th Cir. 2003).

[5] *See, e.g.*, *Parker v. State*, 3 So. 3d 974, 984-85 (Fla. 2009); *Blackwood v. State*, 946 So. 2d 960, 974 (Fla. 2006).

proffers as a basis for a sentence less than death."

The Court extended its *Lockett* ruling in *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982), and again in *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), to clearly establish that not only may the sentencer not be precluded, but the sentencer "may not refuse to consider . . . 'any relevant mitigating evidence,'" *Skipper*, 476 U.S. at 4 (citing *Eddings*, 455 U.S. at 114).

A sentence of death should be a reflection of a jury's "reasoned, moral response to the defendant's background, character and crime." *California v Brown*, 479 U.S. 538, 545 (1987). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson*, 428 U.S. at 305, it "is essential that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v Texas*, 428 U.S. 262, 275 (1976).

Because Appellant's jury was unable to consider what has been shown to be a substantial amount of relevant mitigating evidence, confidence in the reliability of his sentence has been undermined and the Eighth and Fourteenth Amendments require that this Court grant him a new penalty phase. *See* Appellant's br. at 63-65.

III: A THOROUGH MITIGATION INVESTIGATION IS AN INDISPENSABLE PART OF PROVIDING EFFECTIVE ASSISTANCE OF COUNSEL.

Because the Eighth Amendment requires the consideration of all relevant

mitigating evidence, it necessarily follows that trial counsel has an affirmative duty to conduct a *thorough* investigation to collect that evidence. Indeed, this Court has recognized that "an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated . . . ." S*tate v. Pearce*, 994 So. 2d 1094, 1102 (Fla. 2008) (citation omitted). Moreover, the obligation to investigate and prepare for penalty phase subsists even if the client waives mitigation or objects to it. *Walker v. State*, 88 So. 3d 128, 137-41 (Fla. 2012) (citing *2003 Guidelines* § 10.11); *Hurst v. State*, 18 So. 3d 975, 1011 (Fla. 2009) (citing *1989 Guidelines* §11.4.1(C) at 93).

"Investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence . . . ,'" *Wiggins*, 539 U.S. at 510 (quoting *1989 Guidelines* § 11.1.4(c)); *accord Blackwood v. State*, 946 So. 2d 960, 974 (Fla. 2006); *accord 2003 Guidelines* § 10.11(A), and given the enormous scope of what is considered relevant ("anything in the life of the defendant which *might* militate against the appropriateness of the death penalty," *Brown v. State*, 526 So. 2d 903, 908), the mitigation investigation "requires extensive and generally unparalleled investigation into personal and family history." *2003 Guidelines* § 10.7 cmt. at 80.

It is in no small part due to the requirements of the mitigation investigation that the "team approach" to capital defense has become the national standard. The *2003 Guidelines* outline the members of the defense team as including *at minimum*,

two attorneys, an investigator, and a mitigation specialist. *2003 Guidelines* §§ 4.1, 10.4. Further, because "[n]eurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses," at least one of the members of the team must be qualified to screen for mental or psychological disorders or impairments. *2003 Guidelines*, §4.1 cmt. at 30-31.

Paraphrasing the *1989 Guidelines*, the Supreme Court in *Wiggins* mentioned "medical history, educational history, employment and training history, *family and social history*, and religious and cultural influences" as areas attorneys should be exploring for mitigation evidence. 539 U.S. at 524 (citing *1989 Guidelines* 11.8.6, p. 133) (original emphasis); *accord Parker v. State*, 3 So. 3d 974, 984-85 (Fla. 2009). The *ABA Guidelines* elaborate with the following *non-exhaustive* list that can be thought of as a starting point:

> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
> (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (*e.g.*, failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
> (3) Educational history (including achievement, performance, behavior,

and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
(4) Military service, (including length and type of services, conduct, special training, combat exposure, health and mental health services);
(5) Employment and training history (including skills and performance, and barriers to employability);
(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).

2003 Guidelines § 10.7 cmt. at 80.

Thus, the foundation of the mitigation investigation will consist of life-history records and interviews. These records often contain "a wealth of mitigating evidence, [either] documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness." *2003 Guidelines* § 10.7 cmt. at 82-83.

What often is considered powerful mitigating evidence, such as childhood physical or sexual abuse, also is very personal and difficult for most people to discuss, and it requires "overcoming considerable barriers, such as shame, denial and repression." *2003 Guidelines* § 10.7 cmt. at 81-82. Thus, multiple interviews over a period of time are generally required in order skillfully to gain the trust of clients and witnesses before they will feel comfortable revealing such personal, often traumatizing information. As Federal Judge Helen G. Berrigan writes:

> Enlisting the trust of the defendant and family members alone may take repeated visits. The defendant and family members have firsthand information needed for an effective defense, but are often not forthcoming because the information is highly personal. Childhood

> trauma and abuse are common in the background of capital defendants, yet family members, parents in particular, are understandably reluctant to disclose maltreatment or failure. . . . The defense must be sensitive to these concerns and be able to explain to family members that the investigation is not about blame or castigation, but about seeking an explanation for the defendant's conduct and a basis for mercy from the jury. Breaching that resistance and developing trust takes time and patience.

Hon. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View From the Federal Bench*, 36 HOFSTRA L. REV. 819, 825-26 (Spring 2008).

Effectively conducting mitigation interviews requires a certain level of clinical skill and experience; they normally must be done by an experienced and qualified mitigation specialist. Revealing information about past traumatic events can itself be re-traumatizing, and such interviews must be conducted by someone who has the skills necessary carefully to avoid further harm while successfully eliciting the relevant mitigating evidence. Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1148-49 (2003).[6]

Clinical skills are also required during mitigation interviews for the purpose of mental health screening. Multiple interviews with the client provide opportunities

[6] Mr. Selinger experienced these difficulties first-hand when he attempted to interview Appellant's aunt and grandmother in his office two weeks before the trial, resulting in a "contentious relationship between [Appellant's grandmother and Selinger] that never dissipated." Appellant's Br. at 60-61

to "observe, over time, the defendant's gait, mental state, affect regulation, memory, comprehension of writing and speech," and other physical or behavioral conditions that can signal signs of impairment. Richard G. Dudley, Jr. and Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 968 (2003). The ability to identify those signs in the client and recognize them during interviews with other family members is necessary to identify genetic or hereditary conditions. *Id.* at 969.

All of the information gleaned from records and interviews must be carefully organized and analyzed. While some records might provide detailed information that is mitigating in and of itself, other records may provide evidence of bigger, yet "hidden" issues. The ability to identify and develop these nonobvious issues is one of the most important skills involved in the investigation, as it will guide the investigation toward potent mitigation evidence. Those skills are vital as they relate to the identification of mental health issues needing expert evaluations, as a full social history on the defendant is necessary for most experts to provide a reliable assessment. *See* Dudley, *supra*, at 974.

Throughout this entire process, defense counsel also has a continuing duty to investigate any reasonably available evidence to rebut the prosecution's case in aggravation. *Wiggins*, 539 U.S. at 510 (quoting *1989 Guidelines* § 11.1.4(c)); *Green*

v. State, 975 So. 2d 1090, 1114 (Fla. 2008) (counsel ineffective for failing to investigate juvenile record containing information that would have defeated prior violent felony aggravator); *accord 2003 Guidelines* § 10.11(A).

Given all that is required to conduct effectively the mitigation investigation, it is *imperative* that defense counsel begin the investigation as soon after accepting representation as possible. Hence *2003 Guidelines* § 1.1(B) makes clear that "[t]hese Guidelines apply from the moment the client is taken into custody and extend to all stages of every case . . . including initial and ongoing investigation . . . ." The overriding concern is most obvious: *an investigation of this magnitude takes a significant amount of time and care and cannot adequately be performed hastily*. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000) (ineffective assistance found when record established counsel did not begin to prepare for penalty phase until a week before the trial); *Lewis v. State*, 838 So. 2d 1102, 1109 (Fla. 2002) (ineffective assistance found when counsel spent just 18 hours preparing for penalty phase).

In light of the above, two things are manifest: First, a mitigation investigation is both a monumental undertaking and an absolutely indispensable part of rendering effective assistance of counsel.

Second, the mitigation investigation is a *multidisciplinary* investigation that requires multiple subsets of skills; rarely can an attorney complete such an undertaking effectively on his or her own.

IV. UNDER PROFESSIONAL PRACTICE NORMS, MITIGATION SPECIALISTS ARE CRITICAL MEMBERS OF THE DEFENSE TEAM.

A. The Mitigation Specialist

Federal Judge Hellen G. Berrigan noted that the "primary purpose" of her article about mitigation specialists was to "dispel judicial misgivings about the crucial importance of mitigation development in the trial of a capital case."[7] Berrigan, *supra*, at 821. Apparently, Judge Berrigan was responding to "a recent survey of capital defense attorneys and mitigations specialists [in which] concern was expressed over . . . inadequate court funding and judicial ignorance or outright hostility to the mitigation needs in death penalty cases."[8] *Id*. However, based on the breadth of the investigation, and the skills required to conduct that investigation effectively, the need for mitigation specialists is quite clear.

Indeed, most defense teams have come to rely on mitigation specialists because a qualified mitigation specialist has the unique skills and necessary experience to perform the many tasks that a mitigation investigation requires. The

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[7] Judge Berrigan went on to note that "inclusion of a mitigation specialist on post-conviction in a capital case is likewise important. A common issue on post-conviction is ineffective assistance of counsel for failure to develop mitigation." Berrigan, *supra*, at 821 n. 13.

[8] Indeed, the court below has made its disdain for mitigation specialists clear. *See* (21 PCR 3489); *Criminal Specialist Investigations, Inc. v. State*, 58 So. 3d 883 (Fla. 1st DCA 2011) ("Based on the apparent widespread use of mitigation specialists or coordinators and the recommendation of the ABA Guidelines that capital defense attorneys consult them, the trial court was incorrect in its suggestion that there was no such position recognized under applicable law.").

2003 Guidelines §§ 4.1 and 10.4 define the defense team as having – at minimum – two attorneys[9], one investigator, and one mitigation specialist, thus recognizing the different skills each brings to the defense team.

The fact investigator's job is to investigate the facts of the case. The investigator's role is primarily going to focus on the issues presented during the guilt phase – "the what, when, and how the alleged crime occurred." Berrigan, *supra*, at 827. As investigators often have a law enforcement background, their training and investigative skills are invaluable when preparing to challenge the prosecutor's evidence against the client. *Id*.

The mitigation specialist's job, on the other hand, is to focus on the investigation and presentation of mitigating evidence. Their role is to assist the defense team in "identifying, understanding, and presenting evidence that can reveal 'why' the offense occurred and reasons why the death penalty is not the appropriate punishment for the defendant." Leonard, *supra*, at 1151. As the social history

[9] Florida law provides for two attorneys in capital cases. Public defender offices generally assign two attorneys to every capital case, and Florida Rule of Criminal Procedure 3.112(e) provides that, "upon written application and showing of need, [a court] should appoint cocounsel to handle every capital trial . . . ." This rule followed the ABA's admonitions to states to implement minimum qualifying standards for capital attorneys, and although trial courts maintain discretion, when adopting the Rule, the Court acknowledged that "two lawyers should ordinarily be appointed." *In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610 (1999).

investigation is "an in-depth investigation and analysis of the defendant's life and character, including the genetic and environmental factors that shaped him," *id*., mitigation specialists "are generally trained in the social sciences, with college [or advanced] degrees in social work or psychology," and additional training and experience in the field of capital litigation.[10] Berrigan, *supra*, at 827. While the investigator and mitigation specialist may work together, the skills required of the mitigation specialist are different than those of the investigator.

B. Mitigation Specialists Are Part of Prevailing Practice Norms

In *Wiggins*, the Supreme Court found that trial counsel's conduct was deficient for failing to investigate, among other things, Mr. Wiggins' social history. 539 U.S. at 524. The Court's ruling focused on the testimony of a licensed social worker "concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner had suffered . . ." and trial counsel failed to uncover. *Id.*, at 516.

However, the Court also found deficient trial counsel's decision not to retain a forensic social worker to prepare such a report, "[d]espite the fact that the Public Defender's office made funds available" for such a purpose. *Id*. at 524. The social

[10] Appellant's mitigation specialist, for example, has a bachelor's degree in psychology, a master's degree in social work, is a licensed clinical social worker, and trained at the Center for Death Penalty Litigation in Durham, North Carolina, where she was on staff for six years. (19 PCR 3031.)

worker, retained by Mr. Wiggins' postconviction counsel, had prepared the report [r]elying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members . . . ." *Id*., at 516. "In other words, [he was] a mitigation specialist who did his job." Berrigan*, supra*, at 811.

While the Court did not adopt a position that the use of mitigation specialists are mandated in every case, the Court at least acknowledged they were part of professional practice norms in Maryland at the time of the trial (1989). *Wiggins*, 539 U.S. at 524.

The *2003 Guidelines*, however, make clear that "the use of mitigation specialists has [since] become part of the existing standard of care in capital cases." § 4.1 cmt. at 34. This was partly based on a federal report adopted by the Judicial Conference of the United States in which the work of mitigation specialists was deemed "part of the existing 'standard of care' in a federal death penalty case." *See* Subcomm. on Fed. Death Penalty Cases, Judicial Conference of the U.S., *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 24 (1998) ("Without exception, the lawyers interviewed by the Subcommittee stressed the importance of a mitigation specialist to high quality investigation and preparation of penalty phase."). The report went on to recommend that Federal Defender Offices create permanent salaried positions for mitigation specialists. *Id.* at 26.

At the time of Appellant's trial, the use of mitigation specialists in capital cases had become commonplace in Florida as well. *See*, *e.g.*, *Reynolds v. State*, 99 So. 3d 459, 495 (Fla. 2012) (sentenced Sep. 2003) (noting counsel worked closely with mitigation specialist); *Deparvine v. State*, 995 So. 2d 351, 360 (Fla. 2008) (advisory sentence rendered Aug. 2005) (noting testimony of mitigation specialist). *See also Simmons v. State*, 105 So. 3d 475, 509 (Fla. 2012) (sentenced Dec. 2003), (finding counsel inaffective at penalty phase, specifically noting trial counsel did not "consider hiring a mitigation specialist"); *Butler v. State*, 100 So. 3d 638, 661 (Fla. 2012) (sentenced Jun. 1998) (trial counsel stating in post-conviction proceeding that due to experience in Butler's case (failed to retain a mitigation specialist), he has retained a mitigation specialist in every capital case since).

And the appointment of mitigation specialists is well-founded in law. In *Westbrook v. Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983), the court held that the Eighth Amendment right to present mitigating evidence places "an affirmative duty on the State to provide the funds necessary for production of the evidence. Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence [are] unavailable." More recently, in *Criminal Specialist Investigations, Inc. v. State*, 58 So. 3d 883, 886 (Fla. 1st DCA 2011), the court held that "mitigation specialist" is a recognized position under Florida law.

The Florida Legislature has also codified its recognition of the need for the advanced skills mitigation specialists provide in capital cases. *See* Fla. Stat. § 27.5305(4) (2014) (recognizing the right of mitigation specialists to compensation when appointed in capital cases); General Appropriations Act of 2014 at 137 (compensation for mitigation specialists set at higher rate of $75 per hour as compared to $40 per hour for other types of investigators).

Finally, and in accord with the *2003 Guidelines*, the Florida Public Defender's Association's ("FPDA") manual *Defending a Capital Case in Florida* states that "[t]he capital defense team should consist of at least two attorneys, a secretary or legal assistant, an investigator, and a mitigation specialist," adding the "team approach including a mitigation specialist is essential to an effective mitigation investigation." Austin Maslanik, *Mitigation Investigation*, *in* DEFENDING A CAPITAL CASE IN FLORIDA, at 1, 14 (Peter N. Mills ed., 2013).

Given the above, *Amici* submit that the use of mitigation specialists is clearly established as a professional practice norm both nationally and in Florida.

C. Trial Counsel was Deficient in Failing to Retain a Mitigation Specialist

Having demonstrated the critical role of mitigation specialists, and that use of mitigation specialists is (and was at the time of Appellant's trial) part of professional practice norms both nationally and in Florida, *Amici* submit that Appellant's trial

counsel was deficient for failing to retain a mitigation specialist.[11]

The Court in *Strickland* advised that "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S., at 690-91. Trial counsel in this case not only failed to perform an independent investigation, he failed to retain any professional assistance (mitigation specialist or investigator) that could have expanded his investigation to an effective level. (16 PCR 2645.) The question therefore becomes whether trial counsel's decision not to hire a mitigation specialist was objectively reasonable.

The Sixth Circuit has addressed this issue in *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008) (sentenced 1987), and again in *Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011) (sentenced 2001).

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[11] To be clear, *Amici* are not suggesting that an attorney is *per se* deficient or ineffective for failing to retain a mitigation specialist. *See*, *e.g.*, *Hoskins v. State*, 75 So. 3d 250, 256 (Fla. 2011). In fact, Sara Flynn, the mitigation specialist retained by Appellant's post-conviction counsel, testified that it is possible for an attorney to effectively complete the mitigation investigation without the assistance of a mitigation specialist, even naming one attorney whom she feels effectively conducts his own investigations. (19 PCR 3145.) However, she added that in her fifteen years as a mitigation specialist, having worked on "about 125 capital cases" (19 PCR 3031-32, 45), she has come across "very few" attorneys who possess the skills needed to effectively do her job, stating "most . . . do not feel they are qualified or that they would do a competent mitigation investigation." (19 PCR 3145-46.) In other words, though possible, it is certainly not the "norm."

In *Jells*, after first finding trial counsels' conduct deficient for beginning their penalty phase preparations just sixteen days prior to the hearing,[12] the court went on to find that "[i]n the context of Jells's case, his counsel's failure to employ a mitigation specialist who would have fully investigated Jells's educational, social, and psychological background was objectively unreasonable." 538 F.3d at 493-94. The court noted that while "counsel did not have a specific obligation to employ a mitigation specialist, they did have an obligation to fully investigate the possible mitigation evidence available," adding that the evidence they did find "should have alerted them that further investigation by a mitigation specialist might proved [sic] fruitful." *Id.* at 496 (citing *Wiggins*, 539 U.S. at 524-25).

Likewise, in *Foust*, again noting that "defense teams do not have a specific obligation to employ a mitigation specialist . . . ," the court held that "[g]iven the nature of Foust's mitigation defense and his counsel's failure . . . to conduct an independent investigation, failing to hire a trained mitigation specialist was deficient performance." 655 F.3d 524, 537 (2011).

Here, the record establishes that this was Mr. Selinger's second capital case, and in the evidentiary hearing, he acknowledged that he was still learning in that Mr.

[12] The record shows Mr. Selinger spent a total of 15.5-16.5 hours on his mitigation investigation, and six to seven of those hours came after Appellant was convicted. (16 PCR 2657-58.) Ms. Flynn (Appellant's mitigation specialist) spent a total 130 hours on her mitigation investigation. (19 PCR 3098-99.)

Eler was his "trainer in order to become qualified to handle death penalty cases." (16 PCR 2703-04.) Even though Mr. Selinger testified that he had never seen the *ABA Guidelines* at the time of Appellant's trial, (16 PCR 2642), his limited knowledge of and experience in mitigation investigations should have "alerted him" that retaining the assistance of a trained mitigation specialist (or even an investigator) with more experience in penalty phase investigation "might have proven fruitful," and his failure to do so was objectively unreasonable. *See id*.

Given trial counsel's failure to conduct an independent investigation, and the scope and significance of the mitigation evidence uncovered by Appellant's mitigation specialist in post-conviction, trial counsel's failure to hire an experienced mitigation specialist was deficient performance. *Id*.

CONCLUSION

Because Appellant's trial counsel failed to conduct the requisite investigation, Appellant's jury was unable to consider a substantial amount of relevant mitigating evidence, thus compromising Appellants Eighth Amendment right to an individualized sentencing and undermining confidence in the reliability of his sentence. *Amici* respectfully request this Court remand Appellant's case for a new penalty phase proceeding.

Respectfully Submitted,

BY: /s/Stuart L. Hartstone

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), that this Brief complies with the Rule's type-font requirements, in that it was prepared in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via electronic mail to the Office of the Attorney General at capapp@myfloridalegal.com as well as to the following counsel this 20th day of November, 2014:

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