No. 15-1257

IN THE

Supreme Court of the United States

HASAN K. AKBAR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF *AMICI CURIAE* UNITED STATES AIR FORCE AND NAVY-MARINE CORPS APPELLATE DEFENSE DIVISIONS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Air Force and Navy-Marine Corps Appellate Defense Divisions have been established by the Judge Advocates General of the Air Force and Navy pursuant to Article 70, Uniform Code of Military Justice. 10 U.S.C. § 870 (2012). The Divisions are statutorily tasked with representing airmen, sailors, and marines on the direct appeal of capital cases before the Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and this Court.[1]

SUMMARY OF THE ARGUMENT

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. Capital defendants, who are facing the ultimate form of societal punishment—a verdict of death—are also protected by the Eighth Amendment's requirement for a heightened level of reliability. As a result of these constitutional mandates, capital defense has become specialized, time-consuming, and unlike any other form of litigation. To ensure the reliability of death verdicts in their jurisdictions, a large majority of states retaining the death penalty, as well as every federal jurisdiction with the exception of courts-martial, have implemented a minimum qualification requirement for capital defense counsel that reflects most or all of the American Bar

[1] In accordance with Supreme Court Rule 37.4, *amici curiae* state they are the authorized legal representatives of the Air Force Appellate Defense Division and the Navy-Marine Corps Appellate Defense Division and they are allowed by law to appear before this Court.

Association's ("ABA") Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003). The strong dissent of Judge Baker (joined by Chief Judge Erdmann) from the three-to-two affirmance of Mr. Akbar's death sentence shows that the military courts have not addressed in any meanigful way the consitiutional requirments of death penalty defense.

By failing to follow the nationally accepted capital defense guidelines (including a requirement for minimum qualifications of counsel and the necessity for adequate and thorough investigation) military jurisdictions deprive military capital defendants of their right to the effective assistance of capital counsel and put military capital defendants in jeopardy of facing unreliable death sentences in violation of the Fifth and Eighth Amendments of the United States Constitution.

ARGUMENT

I. FAILING TO FOLLOW NATIONALLY ACCEPTED CAPITAL DEFENSE GUIDELINES, PARTICULARLY A GUARANTEE OF LEARNED COUNSEL, UNCONSTITUTIONALLY DEPRIVES MILITARY DEFENDANTS OF THEIR RIGHT TO COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS OF THE U.S. CONSTITUTION.

The Sixth Amendment guarantees defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). An appellant can

show ineffective assistance of counsel by showing that counsel's performance was deficient because counsel's conduct was not reasonable under the prevailing professional norms at the time of trial. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Although an appellant has the burden of showing that counsel's deficiencies resulted in prejudice, once an appellant has shown counsel's deficiency, an appellant need only establish a probability sufficient to undermine confidence in the outcome of his penalty proceeding. *Porter v. McCollum*, 558 U.S. 30, 44 (2009). Prejudice is determined based on the totality of the omitted evidence before the jury. *Strickland*, 466 U.S. at 695; *Williams v. Taylor*, 529 U.S. 362, 397 (2000). In capital cases, counsel may be deficient in the guilt phase and/or the sentencing phase. Thus, ineffective assistance of counsel may sometimes be prejudicial, and grounds for a new sentencing hearing, even if counsel was solely ineffective during the sentencing phase of a case. *United States v. Alves*, 53 M.J. 286, 290 (C.A.A.F. 2000).

Although the Court gives some discretion to the decisions of counsel in capital cases, the Court must nonetheless conduct a "probing and fact-specific analysis" in its determination regarding the assistance of counsel at trial. *Sears v. Upton*, 561 U.S. 945, 955 (2010). Moreover, in capital cases, it is absolutely essential that counsel at the outset meet the standards for effective assistance of counsel in order to ensure that any resulting death sentence is reliable. *See*, *United States v. Murphy*, 50 M.J. 4, 13 (C.A.A.F. 1998).

There is no doubt that the facts of the crime in this case are terrible, but as Judge Baker points out in his dissent, that cannot be the reason to abdicate the constitutional protections of the Sixth Amendment:

> Principle is hardest to hold in the face of countervailing virtue. For a judge that moment may arrive when knowing what is just, one must also consider what is fair. This is a case about whether or not the military justice system was fair, not whether it was just.

(Pet. App. 111a).

This Court should grant certiorari in order to state, definitively, that the right to effective assistance of counsel in a death penalty case, whether a military prosecution or in civilian courts, must be upheld.

A. THE ABA GUIDELINES SHOULD INFORM ANY *STRICKLAND* ANALYSIS BECAUSE THEY REPRESENT THE OBJECTIVE NATIONAL STANDARDS OF EFFECTIVE ASSISTANCE OF CAPITAL COUNSEL.

Ineffective assistance of counsel in a capital case can literally make the difference between life and death for a capital defendant. This Court has repeatedly emphasized that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "Because of that qualitative difference, there is a

corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *See id; see also Furman v. Georgia,* 408 U.S. 238, 256 (1972). The American Bar Association ("ABA"), recognizing the need for more reliable practices, formed a committee and developed the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in 1989 ("1989 guidelines") in which it set out "the minimal resources and practices necessary to provide effective assistance of counsel."[2] Those Guidelines included minimum qualifications of appointed counsel, a minimum number of attorneys on the defense team, and the requirement of including a mitigation specialist on the capital defense team.

In 2003, after two years of working with capital defense experts, lawyers, and national criminal defense organizations, the ABA revised its 1989 guidelines to represent a more universal set of guidelines for all capital defense teams. *See* ABA, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines").

Although the ABA Guidelines do not have the force of law, they do essentially reflect the basic accepted national standards for effective assistance of capital counsel. This Court has long referred to the ABA Guidelines as "guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins*, 539 U.S. at 524).

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[2] ABA, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989), at introduction.

Learned Counsel

One of the most important guidelines within both versions of the ABA Guidelines was the requirement, often referred to as the requirement for appointment of "learned counsel." This requirement was that lead capital counsel had to meet a minimum threshold of experience, knowledge, and skill. *See* 1989 guidelines, 5.1; *see also* ABA Guidelines, 5.1. It is undisputed that capital defense work is unlike any other type of trial advocacy due to the extraordinary complexity and demands of taking on a capital case and the potential outcome. *See* ABA Guidelines, introduction. The ABA Guidelines open with Justice Sutherland's acknowledgement in *Powell v. Alabama*[3] that capital defendants absolutely require the "guiding hand of counsel" at every last step of the proceedings against him, and now recognize that the nature of the "guiding hand" of capital counsel has become even more highly specialized since Justice Sutherland's observation in 1932. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932); ABA Guidelines, 1.1, *commentary*. Capital cases require a significantly higher degree of skill and expertise on the part of a capital defense counsel to meet those unique duties and functions. ABA Guidelines, introduction. Moreover, because of the irrevocable nature of the death penalty, every stage of the proceedings against someone facing death requires that counsel exercise extraordinary vigilance. *Id.*

Although appointment of unqualified capital counsel is not a *per se* indication that counsel will in fact be ineffective, the cases in which unqualified

[3] *Powell v. Alabama*, 287 U.S. 45 (1932).

capital counsel have also failed to render quality assistance is well-documented.[4] Justice Stephen Breyer has concluded, based on his experience in hearing capital cases, that the inadequacy of representation during capital cases is "a fact that aggravates other failings." *See Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer J., concurring).

The need for a qualified capital counsel at the time of Sgt. Akbar's conviction in 2005 had been well-established by a nearly national consensus for over ten years.[5] The ABA Guidelines were published in February 2003—over two years before Sgt. Akbar was convicted and sentenced to death. The "learned counsel" requirement had already been in place since the 1989 guidelines, which, among other minimum standards, stated that "lead trial counsel assignments should be distributed to attorneys who. . . have prior experience as. . . lead counsel or co-counsel in at least one case in which the death penalty was sought."[6]

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[4] *See* 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 (1994).

[5] *See* 18 U.S.C. § 3005 (1994) (granting capital defendants tried in federal court a right to learned counsel); *see also* 10 U.S.C. § 949a(b)(2)(c)(ii) (2010) (granting right to learned counsel to "alien unprivileged enemy belligerents" in military commissions); *see also* Lieutenant Commander Stephen C. Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, The Army Lawyer, October 2010, at 8 (establishing that at least 27 out of the 35 states that authorize the death penalty require specific qualifications for capital counsel).

[6] The 1989 guidelines also have very stringent requirements for trial work, including that the attorney should have tried nine jury trials to completion, at least one murder or aggravated murder, and an additional five felony jury trials. *See* 1989 guidelines, 5.1(1)(A)(iii).

1989 guidelines, 5.1(1)(A)(iii). Similarly, the 2003 ABA Guidelines reshape the learned counsel requirement by requiring that "every attorney representing a capital defendant has. . . demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases . . . ." ABA Guidelines, 5.1(B)(1)(b). Although the updated guideline differs from its 1989 counterpart in that it does not contain any set number of cases, it is difficult to demonstrate a commitment to providing zealous advocacy or high quality legal representation in the defense of capital cases if an attorney has not been involved in *any* capital cases.

As noted in Judge Baker's dissent: "Evaluation of defense counsels' performance starts with the identification of the prevailing standard or professional norm against which to measure counsels' performance. However, such standard is elusive. There are no guidelines in the military on death penalty defense. The armed services have not adopted the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. . . . And yet, we know that 'death is a punishment different from all other sanctions.' It is different in severity; different in finality; and different in what is expected of competent counsel. Guidance is needed." (Pet. App. 115a-116a) (Footnotes and citations omitted).

This Court should grant certiorari to review whether Sgt. Akbar's trial attorneys were unqualified to represent him and whether their lack of experience, coupled with their repeated deficient performance,

rendered their assistance constitutionally deficient under the Sixth Amendment of the U.S. Constitution.

Investigation and Mitigation

Although appointment of qualified capital counsel at trial is an essential step, such appointment is not enough to meet the threshold required by the Sixth Amendment. This Court has held that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (internal citation omitted). The Sixth, Eighth, and Fifth Amendments "require that the sentence 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 the imposition of a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This standard therefore demands substantial, rigorous investigation into both aggravating and mitigating factors, which are so vitally important in a capital case. This Court has recognized that the imposition of death by public authority is profoundly different from all other penalties—thus, "an individualized decision is essential in capital cases." *Id.* at 605; *see also* ABA Guidelines, 10.7 (2003).

Consistent with the Sixth, Eighth, and Fifth Amendments' requirements, capital counsel has a clearly established obligation to conduct a thorough investigation of the defendant's background. *Porter*, 558 U.S. at 39; *see also Williams v. Taylor,* 529 U.S. at 396. Whether or not the failure to adequately

investigate and discover mitigating evidence is sufficiently prejudicial to have affected the outcome of sentencing, failure to investigate demonstrates that trial counsel did not fulfill his obligation to conduct a thorough investigation of the defendant's background. *Williams*, 529 U.S. at 396. "[A capital defendant has] a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Id.* at 393.

Trial counsel's affirmative duty to investigate mitigating evidence is vital to the constitutionality of capital proceedings (where a failure to investigate has an egregious and deadly consequence). Although counsel may forego the presentation of mitigating evidence, he may only do so after a full investigation. *See Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams,* 529 U.S. 362. As noted in the ABA Guidelines:

> Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both [the guilt/innocence and penalty] phases of the case. . . . Because the sentencer in a capital case must consider in mitigation anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled

> investigation into personal and family history. At least in the case of the client, this begins with the moment of conception.

ABA Guidelines, 10.7, *commentary* (internal quotations and citations omitted).

The defense presentation at the sentencing hearing in this case took thirty-eight minutes. Almost no witnesses were called, and a highly inflammatory diary was introduced with no context within which to view it. As Judge Baker said in his dissent:

> Although not required per se, testimony by lay mitigation witnesses humanizing an accused person is significant. In the context of a death penalty case involving a heinous offense, it may be invaluable, as well as a defendant's best hope for life. The Supreme Court, for example, has repeatedly emphasized "the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections." *See Strickland*, 466 U.S. at 718 (Marshall, J., dissenting); *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (presentation of a defendant's life history in a capital case is "part of the process of inflicting the penalty of death" (internal

quotation marks omitted)). The Court has noted that a defendant's "troubled history . . . [is] relevant to assessing a defendant's moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

The ABA Guidelines also recognize value in such testimony. Guideline 10.11 states that "it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors." *ABA Guideline* 10.11, commentary, 31 Hofstra L. Rev. at 1061. To that end, the ABA Guidelines encourage counsel to consider presenting, in the penalty phase of the court-martial, "[w]itnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that . . . would present positive aspects of the client's life, or would otherwise support a sentence less than death," as well as "witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones." *Id.* at 1055-56. This is so because "[f]amily members and friends can provide vivid first-hand accounts of the poverty and abuse that characterizes the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and

> provider." *Id.* at 1062. Moreover, under the ABA Guidelines, "[a] capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death." *ABA Guidelines*, Introduction, 31 Hofstra L. Rev. at 927. "This Eighth Amendment right . . . does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* (internal quotation marks omitted) (citation omitted)."

(Pet. App. 142a-144a).

For purposes of a mitigation investigation, hiring a mitigation specialist is required in every death penalty case. *See* ABA Guidelines, 4.1(A)(1) (requiring that every defense team should contain at least two qualified attorneys, an investigator, and a mitigation specialist). However, hiring a mitigation specialist is not in and of itself enough. The duty to ensure that a thorough mitigation investigation is properly conducted falls completely on trial counsel.[7] *See* ABA Guidelines 10.4(B) (stating that "[l]ead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with [the] Guidelines"). Thus, although hiring a qualified

[7] Thus, the mere fact that a mitigation specialist has been hired or retained by an attorney does not abrogate counsel's duty to conduct a thorough investigation of his client's life.

mitigation specialist can significantly assist counsel in developing mitigating themes in the client's life stories and identify the need for expert assistance, trial counsel may still be ineffective if he is not sufficiently diligent and fails to "make use of mitigating evidence and [his experts]." *Head v. Thomason*, 578 S.E.2d 426, 430 (Ga. 2003), *cert denied*, *Thomason v. Head*, 124 S.Ct. 409 (2003).

Furthermore, even when some investigation has been made by counsel or under counsel's supervision, the mere presentation of "*some* mitigation evidence [does not] foreclose *an inquiry* into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears*, 561 U.S. at 955; *see also Williams*, 529 U.S. at 367-69, 397-98 (finding ineffective assistance of counsel even though counsel presented some mitigation evidence and admonishing the lower court for not evaluating the "totality of the available mitigation evidence"). In other words, the question for the Court is whether there is a reasonable probability that, absent the errors, the sentencing authority would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 694.

In making this determination, a court hearing an ineffectiveness claim must "carefully review every aspect of the case and balance the claims against the total record before [it]." *Murphy*, 50 M.J. at 8. A court's principle concern in deciding whether trial counsel exercised "reasonable professional judgment is not whether counsel should have presented a mitigation case; rather, [the] focus [is] on whether the

investigation supporting counsel's decision not to introduce mitigating evidence of a capital defendant's background *was itself reasonable*." *Wiggins*, 539 U.S. at 522-23.

When death is imposed, the death penalty's qualitative differences from other punishments and the Eighth Amendment's underlying fundamental respect for humanity call for a greater degree of reliability. *Lockett*, 438 U.S. at 604. Thus, death cannot be imposed under procedures that create a substantial risk that it will be inflicted in an arbitrary manner. *See Furman*, 408 U.S. 238; *Gregg v. Georgia*, 428 U.S. 153 (1976); *Lockett*, 438 U.S. 586. Moreover, "[w]hen a defendant's life is at stake, the Court [must] be "particularly sensitive to insure that every safeguard is followed." *Gregg*, 428 U.S. at 187.

Depriving military members of the safeguard of appointment of qualified capital counsel creates a risk that military members may be sentenced to death in an arbitrary manner. Of the twelve death sentences that have been overturned by military courts over the last twenty years, at least one third of those sentences have been overturned as a result of ineffective assistance of counsel.[8] Any percentage of wrongfully sentenced capital defendants is unacceptable even considering the relatively low number of capital defendants who are actually sentenced to death.[9]

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[8] *See United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997), *Murphy*, 50 M.J. 4, *United States v. Walker*, 66 M.J. 721, 760 (N-M. Ct. Crim. App. 2008).

[9] As the Supreme Court noted in *Furman* a trivial number of death sentences may be an indication that the penalty is being imposed arbitrarily. *Furman*, 408 U.S. at 293.

CONCLUSION

Amici respectfully requests that this Court grant certiorari in light of the fact that Sgt. Akbar's trial attorneys were unqualified to represent him and that their lack of experience, coupled with their deficient performance in failing to adequately investigate and present competent mitigation, rendered their assistance constitutionally deficient under the Fifth, Sixth, and Eighth Amendments of the U.S. Constitution.

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