CAPITAL CASE – NO DATE OF EXECUTION SET

No. 00-1742

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ALLIANCE FOR THE MENTALLY ILL OF TENNESSEE, NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, TENNESSEE CHAPTER, AND TENNESSEE VOICES FOR CHILDREN, INC. IN SUPPORT OF PETITIONER

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June 22, 2001

QUESTIONS PRESENTED

I. Whether the panel majority's prejudice analysis was erroneous, including because:

A. Trial counsel's deficient performance deprived Petitioner of his fundamental right to have the sentencer give a reasoned moral response to his evidence;

B. The panel majority attached an aggravating label to evidence that actually militates in favor of a lesser penalty than death.

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INTERESTS OF *AMICI CURIAE*[1]

NATIONAL MENTAL HEALTH ASSOCIATION (NMHA) is a non-profit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. NMHA seeks to remove the stigma and prejudice associated with mental illness. NMHA has more than 340 affiliates nationwide. NMHA believes that mental illness can influence an individual's mental state at the time he or she commits a crime. NMHA also believes mental illness should always be taken into account during all phases of a potential death penalty case. Furthermore, NMHA believes that the age, maturity, mental status, and any childhood history of abuse/trauma of an offender should always be considered in deciding his or her punishment.

NATIONAL ALLIANCE FOR THE MENTALLY ILL OF TENNESSEE (NAMI Tennessee) is a non-profit organization founded in 1985 and affiliated with the National Alliance for the Mentally Ill, headquartered in Arlington, Virginia. NAMI Tennessee participates in advocacy on the local, state and national levels to ensure quality and accessible hospital and community services for persons with mental illness, and to change stereotypes, dispel myths, and overcome the stigma associated with mental illness. NAMI Tennessee strongly believes that persistent mental illness is a mitigating factor that must be considered by the jury in a capital sentencing hearing.

NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS is a national organization founded in 1968 with an

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

active membership of 5,000 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.

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.

NATIONAL ASSOCIATION OF SOCIAL WORKERS, TENNESSEE CHAPTER (TN-NASW) is the Tennessee chapter of NASW. NASW-TN has over 2000 members. TN-NASW joins this *amici curiae* brief based on a strong conviction that a capital sentencing jury must be presented with available mitigating circumstances in order to properly decide whether or not to impose the death penalty, which TN-NASW believes is often inequitably applied to people of low-income backgrounds, people of color, and people who are mentally ill.

TENNESSEE VOICES FOR CHILDREN, INC., is a statewide, not-for-profit, non-partisan organization of families, professionals, business and community leaders, and government representatives committed to improving and expanding services related to the emotional and behavioral well-being of children. Tennessee Voices for Children joins this *amici curiae* brief because it believes that capital defendants who suffered from extreme physical and emotional abuse as children should be given an opportunity to present the history and circumstances of their lives to the jury that is deciding whether to impose a sentence of life or death.

SUMMARY OF THE ARGUMENT

Petitioner Abu-Ali Abdur'Rahman is a criminal defendant with an extensive history of severe childhood abuse and serious mental illness, none of which was presented to the jury that sentenced him to death. His trial counsel failed to conduct even the most perfunctory investigation into his background and failed to present *any* mitigating evidence at his capital sentencing hearing. Every state and federal court that has considered counsel's performance has concluded that it was deficient. The federal district court judge—the only fact-finder to have heard the entire unpresented case in mitigation—concluded that Mr. Abdur'Rahman was prejudiced by counsel's deficient performance and ordered the issuance of a writ of habeas corpus as to Petitioner's death sentence.

A panel of the Court of Appeals for the Sixth Circuit, with one member dissenting, reversed the Order of the district court on the grounds that, although counsel's performance was clearly deficient, Petitioner was not prejudiced thereby because the mitigating evidence, which the panel majority acknowledged to be "compelling," also had "aspects" that would be evidence of "aggravating circumstances." That conclusion was wrong as a matter of law—under Tennessee law only evidence relevant to narrowly-defined statutory aggravating circumstances may be

considered by the jury as a basis for imposing the death penalty, and there are no aggravating circumstances which would find support from what the panel majority summarily characterized as a "history of violent character traits."

Moreover, the panel majority's conclusion ignores a vast body of knowledge resulting from more than a century of scientific and social investigation into the root causes of mental illness and compulsive violent behavior. By doing so, the panel majority betrays a fundamental misunderstanding of the nature and etiology of mental illness, disregards the causal relationship between mental disorders and childhood abuse and neglect, and contravenes many of the basic principles of capital jurisprudence announced by this Court. *Amici curiae* reject the arbitrary characterization of mental illness as favorable or unfavorable, and strongly oppose a ruling that would deny a mentally-ill defendant the "reasoned moral response" to his mitigating evidence, Penry v. Lynaugh, 492 U.S. 302, 328 (1989), that is the *sine qua non* of capital sentencing. The Petitioner was denied that fundamental right because the jury never heard *any* of his mitigating evidence.

ARGUMENT

I. THE PANEL MAJORITY'S PREJUDICE ANALYSIS WAS WRONG, INCLUDING BECAUSE:

A. TRIAL COUNSEL'S DEFICIENT PERFORMANCE DEPRIVED PETITIONER OF HIS FUNDAMENTAL RIGHT TO HAVE THE SENTENCER GIVE A REASONED MORAL RESPONSE TO HIS EVIDENCE.

Four mental health experts testified at the hearing before the district court in this case.[2] All agreed that Petitioner suffered

[2] Dr. Samuel Craddock, a clinical psychologist called by the State, who had examined the Petitioner prior to his trial in 1987; Dr. Robert Sadoff, a forensic psychiatrist who examined the Petitioner as part of

from serious mental illnesses: delusional thinking, Borderline Personality Disorder, Post-Traumatic Stress Disorder, paranoia, and dissociation. The evidence of Petitioner's mental disorders was uncontroverted. Similarly, the evidence that Petitioner suffered extreme abuse and neglect during childhood went unchallenged.[3] And yet, the jury that sentenced Petitioner to death never heard anything about his disturbed childhood and

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the habeas proceedings; Dr. Diana McCoy, a clinical psychologist and mitigation expert who prepared a detailed social history of the Petitioner as part of the habeas proceedings, and Dr. Raymond Winbush, an academic psychologist also retained by the defense as part of the habeas proceedings. A fifth expert, Dr. Daniel Martell, a forensic neuropsychologist retained by the State, listened to the testimony of Dr. Sadoff, but was not called to testify.

[3] Dr. McCoy, who prepared the social history of Petitioner, found that his mother was a mentally disturbed, sexually promiscuous alcoholic who abandoned her first three children in the woods when they were infants and was unable to properly bond with any of her children. Petitioner's father was also a sexually promiscuous alcoholic who inflicted extreme physical abuse on Petitioner and his siblings. He hog-tied and locked Petitioner in a dark closet for extended periods of time, beat him with billy clubs and military straps (usually focusing the beatings on Petitioner's genitals), and forced him to eat his own vomit. Dr. McCoy, who had worked on more than 20 capital cases, characterized Petitioner's background as "one of the most compelling social histories that I have encountered and one of the saddest stories." (Tr. 662-63). Dr. Winbush testified that Petitioner's was the "singularly worst case of abuse I have come across in 26 years being an academic psychologist." (Tr. 1315).

Petitioner has a long history of being institutionalized for psychological evaluation and/or treatment (age 14, Western State Hospital, Tacoma, Washington, treatment; age 16, New Jersey State Hospital, following suicide attempt; age 18, St. Elizabeth's Hospital, Virginia, observation and examination; age 21, FCI, Tallahassee, Florida, following suicide attempt and self-mutilation). While institutionalized, Petitioner has been prescribed, at various times, the following psychotropic medications: Thorazine, Chloropromazine, Artane, Prolixin, Haldol, and Sinequan.

long history of mental illness because his trial counsel failed to conduct *any* investigation and failed to present *any* mitigating evidence.

This Court has long insisted that "[c]onsideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'" California v. Brown, 479 U.S. 538, 554 (1987) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality)). The Court has mandated that the decision whether to impose the death penalty be a "reasoned moral response" to the evidence, Penry v. Lynaugh, 492 U.S. 302, 328 (1989), and has emphasized that "[i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976).

Other circuits, faced with similar examples of trial counsel's complete failure to investigate and present any mitigating proof, have concluded that a finding of prejudice was unavoidable: "A finding that [Petitioner] was not prejudiced by this failure would deny [Petitioner] the chance to ever have a jury, Nevada's death penalty arbiter, fully consider mitigating evidence in his favor .... We therefore reverse and remand for resentencing so that a jury can properly weigh mitigating and aggravating circumstances before deciding [Petitioner's] fate." Deutscher v. Whitley, 884 F.2d 1152, 1161-62 (9th Cir. 1989); see also Collier v. Turpin, 177 F.3d 1184, 1202-04 (11th Cir. 1999) ("The jury was called upon to determine whether a man whom they did not know would live or die; they were not presented with the particularized circumstances of his past and of his actions on the day of the crime that would have allowed them fairly to balance the seriousness of his transgressions with the conditions of his

life. Had they been able to do so, we believe that it is at least reasonably probable that the jury would have returned a sentence other than death"); Dobbs v. Turpin, 142 F.3d 1383, 1386-87 (11th Cir. 1998) ("We have found prejudice in past cases where counsel's failure to investigate resulted in similar omissions of mitigating evidence"); Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991) (prejudice requirement "clearly met" by counsel's failure to present evidence of petitioner's childhood poverty and history of mental illness).

In the present case, the district court reached a similar conclusion: "[T]he overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts, and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand." Pet. App. 97a.[4]

The district court was the only fact-finder to have heard the entire case in mitigation that could have and should have been presented on behalf of this Petitioner. The court found the Petitioner's witnesses to be credible and the case in mitigation substantial. While acknowledging that not all of the evidence was helpful to Petitioner, the court concluded that "there is more than a reasonable probability that, had trial counsel introduced the mitigation they would have had available after a reasonable investigation, the result of the sentencing would have been different. The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing." Pet. App. 86a.

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[4] In its Order granting the writ of habeas corpus as to Petitioner's death sentence, the district court set out some of the mitigating evidence in Petitioner's case. Pet. App. 88a-94a. Likewise, Judge Cole, writing in dissent from the panel majority's reversal of the district court's Order, noted the extensive case in mitigation that was never presented to Petitioner's jury. Pet. App. 41a-46a.

B. THE PANEL MAJORITY ATTACHED AN AGGRAVATING LABEL TO EVIDENCE THAT ACTUALLY MILITATES IN FAVOR OF A LESSER PENALTY THAN DEATH.

The panel majority in this case, without discussion or analysis, summarily concluded that despite the obvious deficiencies in trial counsel's performance and the compelling nature of the unpresented mitigating evidence, Petitioner had suffered no prejudice under Strickland because certain "aspects" of the evidence "would be compelling evidence of aggravating circumstances." The panel majority specifically cited Petitioner's "motive for killing a fellow prison inmate and a history of violent character traits." Pet. App. 20a.

Preliminarily, it should be noted that Petitioner's prior conviction for second degree murder for the prison killing and a prior conviction for assault were already before the jury, and, as the dissent noted, would not have subjected Petitioner to additional statutory aggravating factors. Pet. App. 45a.

Moreover, as the district court noted, the explanation that the prison killing was in response to predatory homosexual attacks on Petitioner and extortion for homosexual favors by the homicide victim would actually have mitigated an otherwise unexplained act of violence. Pet. App. 93a. Because trial counsel failed to investigate the prior conviction, the jury was never provided with any facts about the circumstances of the prison killing. The panel majority's general allusion to a "history of violent character traits"—presumably a reference to some of the psychiatric diagnoses Petitioner had received when institutionalized—was not evidence a jury could have considered as support for any statutory aggravating factor under Tennessee law. Thus, the panel majority's conclusion that the mitigation proof contained "compelling evidence of aggravating circumstances" was wrong as a matter of law.[5]

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[5] At most, that evidence only would have been admissible as

Equally disturbing is the panel majority's apparent characterization of Petitioner's past psychiatric diagnoses and/or symptoms as evidence of "aggravating circumstances." Mental illness is an unavoidable condition. To punish someone because he suffers from a mental illness is clearly unconstitutional. See Robinson v. California, 370 U.S. 661, 666 (1962) ("[I]n light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"). To enhance punishment by finding that a defendant's mental illness is an "aggravating" circumstance is similarly impermissible. Zant v. Stephens, 462 U.S. 862, 885 (1983).

In Zant, the Court upheld a Georgia inmate's death sentence, notwithstanding the jury's reliance on an invalid aggravating circumstance, because the state had *not* "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness (citation omitted)." 462 U.S. at 885.

The panel majority in this case attached an "aggravating label" to Petitioner's evidence of mental illness by concluding that a description of Petitioner's "motive" for committing a prior homicide and his "history of violent character traits" would have offset what it acknowledged to be "mitigating evidence that a sentencer might find to be compelling," see Pet. App. 20a.

As noted, Petitioner's prior homicide was a response to

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rebuttal to mitigating circumstances that might have been proffered. See Cozzolino v. State, 584 S.W.2d 765, 767-68 (Tenn. 1979); Carter v. Bell, 218 F.3d 581 (6th Cir. 2000). Significantly, the State declined the opportunity to offer such rebuttal evidence at the hearing before the federal district court: Dr. Martell, the State's expert, who listened to the testimony of Dr. Sadoff and was in the courtroom, was not called to testify and Petitioner's psychiatric proof was not contested. Tr. 601.

predatory homosexual attacks in prison. Elmer H. Bishop, a correctional supervisor at the institution where the homicide occurred, testified in his deposition that Petitioner was under extraordinary pressure at the time. Less than two months prior to the homicide, Petitioner was assaulted for resisting homosexual advances by another inmate. Exhibit 135, pp. 14-15. Mr. Bishop testified that because Petitioner was younger and smaller in stature he was "the target of predators." Id. at 21.

The homicide victim, Stein, was a known homosexual who had "circulated false rumors of abnormal sexual activity" between himself and Petitioner. Bishop testified that Stein "was a member of a group of inmates who were attempting to apply extortionate pressures on [Petitioner] to submit to Stein's demand for homosexual activities," and that the homicide arose out of the earlier assault on Petitioner by members of that group. Id. at 22, 25. Petitioner attempted to work out the problem with Stein, but was pushed and laughed at. He "lost his temper ... got very angry," and impulsively stabbed Stein. Id. at 26.

Viewed in context, the foregoing explanation of Petitioner's "motive" for committing the homicide is mitigating, not aggravating. Dr. Sadoff testified that Petitioner suffers from Post-Traumatic Stress Disorder and Borderline Personality Disorder—both of which can lead a person to experience intense, even psychotic, reactions of fear and anger in stressful situations.[6] Dr. McCoy testified that Petitioner's vulnerability and fear were heightened in the prison setting where he was repeatedly raped and threatened with rape by other inmates. Tr. 639-640. The explanation that Petitioner killed another inmate because he was feeling persecuted and threatened by that person was certainly more likely to induce feelings of compassion in jurors than *no explanation whatsoever*, particularly when the

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[6] As the district court noted, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. Dr. Masri also diagnosed Petitioner as having a Borderline Personality Disorder. Pet. App. 93a.

prosecutor argued that the killing was "deliberate."[7]

The panel majority's conclusion that the "motive" for the prior homicide would have been more aggravating than mitigating is not supported by the record. The panel's assessment of the evidence ignored the testimony of the experts and usurped the role of the jury, see, e.g. Smith v. Stewart, 140 F.3d 1263, 1270-71 (9th Cir. 1998) ("[W]e are not asked to imagine [in assessing prejudice] what the effect of certain testimony would have been upon us personally," but rather "what the effect might have been upon the [sentencer]").

The effect the unpresented mitigating evidence would have had on Petitioner's jury is clearly shown in affidavits obtained from eight of the jurors who sat on the case. They each expressed dismay at not having been informed of, *inter alia*, Petitioner's history of mental illness and hospitalizations, childhood abuse, attempted suicides, and homosexual threats against him in prison. Most of the jurors stated that had they known those facts about Petitioner's background they probably would have voted for a life sentence. See Affidavits attached as an appendix hereto.

The panel majority's assessment of Petitioner's "history of violent character traits" also ignores the testimony of the expert and lay witnesses. As the district court noted, the record does contains evidence of several convictions for assault, and a number of prison citations for misconduct. However, in the context of the entire mitigation case they were not terribly significant.[8]

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[7] Under Tennessee law, T.C.A. § 39-13-201(b)(1), a "deliberate" act is one performed with "cool purpose"—exactly the opposite of what the facts show Petitioner's mental state to have been when he committed the prior homicide. But the jury had no way of knowing that, since they were given no information at all about the circumstances surrounding the prior conviction.

[8] The evidence of Petitioner's misconduct, when viewed in context, is understandable as a product of his mental illnesses and/or his response to a dangerous environment. But even if viewed out of

Petitioner also had been diagnosed as having a "sociopathic personality disturbance with anti-social reaction," an "antisocial personality," and a "psychopathic personality." Pet. App. 95a. The three diagnoses are actually three different names for the same disorder: what is now formally designated as "Antisocial Personality Disorder." See *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV) 645-49 (1994).

With regard to the diagnoses of Antisocial Personality Disorder, all the experts agreed that Petitioner's primary Axis II diagnosis is Borderline Personality Disorder (BPD), *not* Antisocial Personality Disorder (APD). Dr. Sadoff, whom the State's expert considered one of the ten foremost forensic psychiatrists in the country, Tr. 144, explained why BPD was the proper diagnosis. Tr. 468, 540, 554, 584. BPD is characterized by many of the same features as APD—e.g. impulsivity, reckless disregard for the safety of others, irritability and anger—but it is a much more serious illness in that it also involves marked identity disturbance, emotional instability, paranoia, dissociation, and transient psychotic episodes. See DSM-IV at 650-54; Tr. 457.

Dr. Winbush noted with regard to the diagnoses of APD in Petitioner's prison records, that it is fairly common for black males to get such a diagnosis more often than is warranted, and in his opinion the more recent diagnoses of Petitioner as suffering from Post-Traumatic Stress Disorder and BPD were more accurate than the older ones dating back fifteen or twenty years. Tr. 1321. Moreover, as Dr. McCoy testified (quoting DSM-IV), "[T]he diagnosis [APD] may at times be misapplied to individuals in settings in which seemingly antisocial behavior may be part of a protective survival strategy." Tr. 653. Much

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context, they are far less serious than the criminal acts noted in other cases where prejudice has been found. See, e.g., Williams v. Taylor, 120 S. Ct. 1495 (2000) (previous convictions for armed robbery, burglary and grand larceny, auto theft, and two separate violent assaults on elderly victims perpetrated after the capital offense).

of Petitioner's misconduct was reported in the prison records, and should not serve as the basis for a diagnosis of APD, Tr. 656, particularly when the criteria for other, more serious disorders are so evident.[9]

The root causes of Petitioner's mental disorders and antisocial behavior can be traced to the extraordinary abuse and neglect he suffered as a child. Tr. 475-78. Dr. Winbush described Petitioner's background as "singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read." He characterized the treatment of Petitioner by his father as "torture." Tr. 1315-16. Significantly, Petitioner's two full siblings, who were not abused as severely as Petitioner, suffered from similar psychological problems: His sister Sylvia has been in and out of mental hospitals and is violent and bipolar. Tr. 626. His brother Mark was accused of sexually and physically abusing his own children, had a terrible temper and would explode into rages; he ultimately committed suicide. Mark reportedly told his half-sister Nancy Lancaster that she didn't know what kind of hell he, Sylvia and Petitioner lived in. Tr.

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[9] Furthermore, Petitioner has many positive traits that defeat the effort to brand him as a "sociopath." As Dr. McCoy noted, when "he is out of prison ... we see a person who for the most part is not getting in trouble." Tr. 654. Dr. Winbush also observed that "there were long periods of work history when he had an opportunity to be committing criminal acts but he didn't." Dr. Winbush noted that even in prison, when Petitioner did not feel threatened by rape, his behavior was not troublesome. Tr. 1340. And, as the district court noted, despite his mental health problems, Petitioner had functioned as a productive member of society: holding steady jobs, attending college, and performing volunteer work in poor neighborhoods. He was described as gentle, caring, filled with dignity, and a person of sincere religious beliefs. None of this positive evidence was heard by the jury. Pet. App. 92a.

626-27.

Dr. McCoy testified that Petitioner began running away from home when he was eight or nine. Tr. 630. The beatings from his father continued all through his childhood and were very severe. That abuse resulted in Petitioner having terrible, deep-seated conflicts and anger toward authority figures. Tr. 525-28, 636. Petitioner's early school evaluations variously describe him as "very sick and in need of immediate commitment," "psychotic," "paranoid," and "warped." One early diagnosis of "psychopathic delinquent" was changed to "personality pattern disturbance and paranoid personality." Tr. 637.

Petitioner was small of stature. When his family moved to a rough neighborhood in Philadelphia, he began carrying a knife to protect himself. It was in Philadelphia that his behavior really deteriorated. Much of that deterioration was due to the increased pressures which adolescence brought to bear on an already deeply disturbed individual with few internal or external supports. He needed treatment and protection, but none was forthcoming. One school evaluator noted that Petitioner had little control over his behavior, which was symptomatic of a deep disturbance, and that like a "frightened child" he attempted to cover his feelings to hide his low opinion of himself. Tr. 638. The record shows that Petitioner's mental illnesses antedated his behavioral problems. Once institutionalized, Petitioner's behavioral problems were exacerbated by the constant threat of rape.

The panel majority's characterization of Petitioner's mental illnesses and their attendant symptoms as "aggravating," and thus, as justification for finding no prejudice in the failure to introduce any mitigating proof in the sentencing hearing, was clearly a myopic view of the evidence.

Other circuits have considered the issue of Strickland prejudice when so-called "harmful" evidence is interspersed with the mitigating proof, and have concluded that although "some of the evidence could have harmed [petitioner] . . . the fact that counsel did not even investigate this mitigating

evidence, combined with the general lack of any mitigating evidence before the jury, denied [petitioner] any opportunity, vouchsafed by the law, to avoid the death penalty." Lockett v. Anderson, 230 F.3d 695, 716 (5th Cir. 2000).

In Kenley v. Armontrout, 937 F.2d 1298, 1308 (8th Cir. 1991), the court was even more emphatic; in words that could apply equally to Petitioner's case it said:

> The state courts and district court concluded as a matter of law that there was no prejudice because the mitigating evidence was "scant" and the aggravating evidence would have been more damaging. We have demonstrated that the state court fact finding was not supported by the record because the potential mitigating evidence was substantial. We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of [petitioner's] character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence.
>
> Had all the reports been introduced into evidence and had all affiants and doctors testified, we do not deny the jury would have heard aggravating information . . . [W]e are doubtful that much of the additional aggravating information would have had any significant incremental effect on the jury. Further, the aggravating information was mostly cumulative.

See also Pickens v. Lockhart, 714 F.2d 1455, 1466-67 (8th Cir. 1983) ("It is sheer speculation that character witnesses in mitigation would do more harm than good ... and that Pickens was not prejudiced by the omission. Here, counsel's default deprived Pickens of the possibility of bringing out even a single mitigating factor"); Emerson v. Gramley, 91 F.3d 898, 906-07 (7th Cir. 1996) (prejudice found even though the unpresented mitigating evidence also contained a number of criminal acts (arson, armed robbery, attempted murder) omitted from the prosecution's enumeration of aggravating circumstances).

In Williams v. Taylor, 120 S. Ct. 1495 (2000), this Court found prejudice in the failure to present mitigating evidence of the petitioner's abuse and neglect during his early childhood, the testimony of character witnesses, and proof of borderline mental retardation, notwithstanding Williams' previous convictions for armed robbery, burglary and grand larceny, auto theft, and two separate violent assaults on elderly victims perpetrated after the capital offense. Id. at 1500. Like the trial attorneys in this case, Williams' counsel did not begin to prepare for the sentencing hearing until a week before trial, and they failed to conduct an investigation that would have uncovered "extensive records graphically describing Williams' nightmarish childhood." Id. at 1514. The Court found that counsel's "unprofessional service prejudiced Williams within the meaning of Strickland." Id. at 1515.

Certainly, Petitioner's childhood was no less "nightmarish" and his counsel's performance no less "unprofessional" than that of Williams. If anything, they were worse. The panel majority's prejudice determination, like that of the courts in Williams, was clearly erroneous both legally and factually. As with Williams, the graphic descriptions of Petitioner's childhood, "filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability," and shown that, like Williams, "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." Id. at 1515-16.

CONCLUSION

Petitioner is a mentally ill defendant who was never afforded the opportunity to have a jury make the "reasoned moral response" to his evidence that is a constitutionally indispensable part of any decision to impose the death penalty. The panel majority attached an aggravating label to evidence that actually is mitigating. Petitioner was clearly prejudiced by trial counsel's failure to conduct *any* investigation or present *any* mitigating

evidence.

For these reasons, as well, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Counsel for *Amici Curiae*

AFFIDAVIT

Bonnie M. Meyer, being duly sworn, states under oath as follows:

1. I am a resident of Davidson County, Tennessee. I was a juror in the death penalty case of State vs. James Lee Jones, Jr., which was tried in Nashville, Tennessee, in July, 1987. I have a good memory of the trial and the jury's deliberations.

2. In the sentencing stage of the trial, I did not want to give the defendant the death penalty. I did not think that the evidence was strong enough for the death penalty. I was one of the last hold-outs on the jury to vote for the death penalty.

3. If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe I would have voted for the death penalty.

4. In voting on the sentence, I thought that the jury's vote had to be unanimous, whether the vote was for the death penalty or for a life sentence. I thought that it was the jury's duty to try to reach a unanimous decision on the sentence, and if a unanimous decision was not reached, then it would be a mistrial. I did not know or understand that if the jury was not unanimous on the death penalty, then the defendant would receive a life sentence. If I had understood this, then I probably would not have changed my mind and I would have continued to vote for a life sentence.

/s/
Bonnie M. Meyer
(Dated the 9th day of October, 1997)

AFFIDAVIT

I am Alice Stoddard, and I sat on the James Jones Jury in 1987. I would have wanted to know then about Mr. Jones's history of mental illness and the nature of the facts about his 1972 murder conviction relating to homosexual assault against him. I would have been interested in the fact that no blood was found on Mr. Jones' coat, and in particular I think the facts of his childhood abuse and corresponding mental illness should have been made known to us as jurors in some detail. We would have wanted to consider all this evidence. I believe I would have voted for a life sentence for Mr. Jones rather than death had I heard the factual evidence I have just mentioned. I do not believe this information should have been withheld from us.

/s/_____
Alice Stoddard
(Dated the 23rd Day of April, 2001)

AFFIDAVIT

I am Jimmy Swarner and was a juror in the case of James Jones many years ago. I would have wanted to hear everything about Mr. Jones' life before deciding on his sentence. I would have wanted to know all about the way his father treated him and about his mental problems.

I don't want Mr. Jones to be put to death. I would like the governor to spare his life. We should have gotten to hear all the information about Mr. Jones.

/s/
Jimmy Swarner
(Dated the 23rd Day of April, 2001)

AFFIDAVIT

I am Scarlett McAllister Smith and was a juror in the case of James Jones. There are several things that have come to light about this that disturb me. I certainly would have wanted to see the TBI lab report which showed Mr. Jones had no blood on his clothes. I would have wanted to know all about Mr. Jones' extensive mental health history including treatment, diagnoses, and attempted suicides. We should have been informed about the abuse experienced at the hands of his father, which occurred when he was young. I really would have wanted to have heard from his wife about his behavior, talking to nonexistent people and animals and also heard about his family's mental health problems. We were given none of this at sentencing to consider for mitigation. Had I known all this at the time, there is a chance my decision would have been different. I feel that James Jones had the right to have all this presented to the jury.

/s/
Scarlett McAllister Smith
(Dated the 16th day of May, 2001)

AFFIDAVIT

I am Yolanda Howard and was a juror in the case of James Jones. I had no idea that James Jones had a history of very serious mental illness and hospitalizations for treatment of his problems. It seems to me the defense attorneys didn't bring out any of this, nor did they tell us anything about his family's problems either. I didn't know about the horrible abuse of this man by his father, and I certainly would have wanted to consider all this in deciding his sentence. It is my belief I would have voted for life for Mr. Jones rather than death if I had heard the details of this man's life and the extent of his mental illness. We didn't have a chance to understand Mr. Jones at all because we weren't informed. Another thing that really bothers me is we did not see the TBI lab report about the blood tests. It seems important that we should have known that no blood was found on Mr. Jones's clothes, especially since they showed us pictures with all the blood in them. Seeing those pictures was really upsetting to me. It might really have made a difference to me if I had heard testimony about the lack of blood on Mr. Jones's clothes. Basically I am upset that all this information was withheld from us in deciding this man's life. That is a very hard decision to make, and I think we should have had complete information.

/s/_____
Yolanda Howard
(Dated the 26th day of May, 2001)

AFFIDAVIT

Being on the James Jones jury was hard, and I remember a lot of the details presented in court. We were not given information detailing Mr. Jones' mental illness and hospitalizations. I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones's clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me – whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer. I do not want Mr. Jones executed under these conditions. I absolutely, as a juror, would have wanted to have heard all the information about Mr. Jones before deciding his sentence – life or death. Given all the history of mental illness Mr. Jones has, I would have voted for a life sentence. I most definitely would have voted for life even then. I believe people with problems can be helped.

/s/_____
Loretta L. Galloway Simpson
(Dated June 4, 2001)

AFFIDAVIT

To whom it may concern. Having met with Ms. Anne Walker-King & Mr. Chris Armstrong this evening & having reviewed various evidence in relation to Mr. Abu Ali, aka James Jones, it is my belief & opinion that this evidence would have made a significant difference in the sentencing phase of the trial. Further, given the nature of the evidence I would further offer for consideration that the death penalty be over turned in this case.

/s/
Everett C. Stone III
Jury Foreman
(Dated the 11th day of June 2001)

AFFIDAVIT

Being on the James Jones jury was hard, and I remember a lot of the details presented in court. We were not given information detailing Mr. Jones' mental illness and hospitalizations. I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones' clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me – whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer.

I am giving this statement because I think the jury in James Jones case should have heard evidence of Mr. Jones' mental illness and details of the childhood abuse he experienced. I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death. The results could have been different at sentencing if I had heard the true facts.

/s/
James D. Wimberly
(Dated the 13th day of June, 2001)