

in this trial, and Applicant was prejudiced greatly by her testimony.

CLAIM FOR RELIEF NUMBER TWENTY-SIX

APPLICANT WAS DEPRIVED OF HIS U.S. CONST. AMEND. VI, RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO FULLY INVESTIGATE HIS MENTAL STATUS AND PRESENT THE SAME TO THE JURY AT TRIAL.

CLAIM FOR RELIEF NUMBER TWENTY-SEVEN

APPLICANT WAS DEPRIVED OF HIS U.S. CONST. AMEND. VI, RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BY COUNSEL'S FAILURE TO FOLLOW THE EXPERT ADVICE OF THEIR MITIGATION SPECIALIST GINA VITALE AND HAVE APPLICANT EXAMINED BY A NEURO PSYCHOLOGIST.

CLAIM FOR RELIEF NUMBER TWENTY-EIGHT

APPLICANT'S SENTENCE OF DEATH VIOLATES THE U.S. CONST. AMEND VIII, & XIV IN THAT APPLICANT'S SENTENCE OF DEATH WAS RETURNED WITHOUT THE JURY HAVING A FAIR UNDERSTANDING OF APPLICANT'S BACKGROUND AND MENTAL CONDITION.

Applicant's trial attorneys hired a mitigation specialist by the name of Gina Vitale. After conducting her investigation she informed counsel of the following:

"My investigation into the background of Mr. Irvan revealed a series of severe

medical injuries during childhood and adolescence, adult mental health treatment, placement in special education classes, the birth of a child with Down Syndrome as well as a history of poor impulse control and hyperactivity." (See exhibit " P ")

By looking at the same affidavit it is shown that Ms. Vitale informed trial counsel that more needed to be done to understand Mr. Irvan's past behaviors. Also included is a copy of her email to writ counsel dated August 23, 2004 (Exhibit " Q ") which shows that she not only suggested a QEEG, but she also suggested that a neuropsychological examination be done. Trial counsel disregarded her expert opinion, and none of the factors set forth within her affidavit were presented to the jury, nor was the evaluation of Dr. Dancien Milam which is attached hereto as (Exhibit " R "). Please see this exhibit and apply it herein as if it were set forth verbatim. Please also consider the affidavit of Dr. Floyd Jennings in exhibit R.

This case, as in the case of **Wiggins v. Smith**, 539 U.S. 510, 123 S.Ct. 2527 (2003), is a case involving deficient mitigation investigation and presentation. That court stated:

"In assessing counsel's investigation, we must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* (quoting **Strickland**, 466 U.S. at 688). In this case, where counsel had only limited records available and did not investigate further, counsel's conduct "fell short

of the professional standards that prevailed in Maryland in 1989," because no "social history report" was prepared even though counsel had funds available to retain a "forensic social worker." *Id.* at 2536.

Counsels conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) standards to which we have referred as "guides to determining what is reasonable." *Strickland, supra*, at 688; *Williams v. Taylor*, at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.I(C), p. 93 (1989) (emphasis added).

"Despite these well-defined norms, . . . , counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 2537 (citing the ABA standards again). The Court found that "[t]he scope of their investigation was also unreasonable in light of what counsel actually discovered" in the records available to them, "particularly given the apparent absence of any aggravating factors in petitioners background." *Id.* at 2537 (citation omitted).

In assessing the reasonableness of an attorneys investigation, . . . , a court must

consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [counsel] limited the scope of their investigation for strategic reasons, **Strickland** does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy.”

Even though counsel refuses to disclose what was and what was not their trial strategy, see Exhibits “H & I”. It could not have been a trial strategy to disregard the advice of the mitigation expert. What they were left with was an ill prepared expert that fell apart on the stand. By failing to follow through with the advice of Gina Vitale the jury never heard any of the evidence set forth within the affidavit of Daneen Milam set forth herein as (exhibit “R ”). Therefore, the jury was left with no mitigating explanation as to why Applicant acted the way he acted during the situations presented.

Applicant does not want to take any chance on waiving any of the important issues presented during the direct appeal. Therefore, most of those issues will be reiterated from this point on. Printed with permission from Leora Kahn the direct appeal attorney.
