No. 10-6042

IN THE
# Supreme Court of the United States

WILLIAM GLENN BOYD,
*Petitioner,*
*v.*
RICHARD F. ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF THE CONSTITUTION PROJECT AND FORMER FEDERAL AND STATE JUDGES, PROSECUTORS AND GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER WILLIAM GLENN BOYD

CLIFFORD M. SLOAN
*Counsel of Record*
BRIAN S. WALLACH
PAMELA R. SHISLER
KATHERINE RASOR
1440 New York Ave., N. W.
Washington, D. C. 20005
(202) 371-7000
CLIFF.SLOAN@SKADDEN.COM

*Attorneys for Amici Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**RULES**

**MISCELLANEOUS**

## BRIEF OF THE CONSTITUTION PROJECT AND FORMER FEDERAL AND STATE JUDGES, PROSECUTORS AND GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER WILLIAM GLENN BOYD

The Constitution Project and former federal and state judges, prosecutors and government officials respectfully submit this brief as *amici curiae* in support of petitioner William Glenn Boyd.[1]

## STATEMENT OF INTEREST

The Constitution Project is a nonprofit and nonpartisan organization seeking consensus solutions to difficult legal and constitutional issues. It performs most of its work through bipartisan committees of distinguished experts and policy makers. Its blue-ribbon Death Penalty Committee ("the Committee") includes former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. While the Committee takes no position on capital punishment, its members are united in their

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. *Amici curiae* provided timely notice to all parties and, pursuant to the letters filed with the Clerk, have permission of all parties to file this *amici curiae* brief.

profound concern that procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment be robust, and that flaws in such procedural safeguards be corrected.

The Constitution Project is joined as *amici curiae* by 28 former federal and state judges, prosecutors and government officials with extensive criminal justice experience.[2] Judges and prosecutors play integral roles in the criminal justice system, and are crucial to ensuring its fairness and accuracy. Government officials not only are responsible for the administration of the laws within their states, but also have especially important duties in connection with the administration of the death penalty. Each of the *amici* maintains an active interest in the fair and effective functioning of the criminal justice system.

*Amici* have a significant interest in this case. The *amici* have extensive experience with the administration of justice, including such matters as the real-life implications of the death penalty which many have confronted as former prosecutors, governors, and judges. Under this Court's settled precedent, the right of a capital defendant to present and have the sentencer and all reviewing courts give effect to all relevant mitigating evidence as a part of the constitutional requirement of an individualized determination is not in doubt. The Eleventh Circuit's rule that, in certain categories of capital cases,

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[2] A complete list of *amici* can be found in Appendix A.

the failure to present relevant mitigating evidence cannot establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), due to the presence of a particular aggravating factor, conflicts with this Court's precedent as well as the holdings of all other Courts of Appeals. The Eleventh Circuit's rule eliminates the effect of a capital defendant's post-sentencing mitigating evidence in several broad categories of death penalty cases, depriving these defendants of their right to an individualized determination. As long as the Eleventh Circuit is allowed to adhere to this rule, capital defendants in the Eleventh Circuit – one of the busiest death penalty courts in the country – can be sentenced to death in a manner contrary to the requirements of the Sixth and Eighth Amendments.

The determination of the propriety of the Eleventh Circuit's rule has far-reaching implications for the application of the death penalty in this country. *Amici* respectfully submit that the views of those who have extensive experience with the administration of justice, including such matters as prosecuting capital defendants, sentencing capital defendants, and determining whether to commute sentences of death, may be helpful in informing the Court's decision whether to grant review.

## INTRODUCTION

This case presents the question whether a Court of Appeals may deny capital defendants habeas relief in cases involving significant post-sentencing mitigating evidence based on the court's rule that mitigating evidence would not have made a

difference in certain categories of cases if a particular aggravating factor is present. The Eleventh Circuit has adopted such a rule – the *Dobbs* rule – in a sharp and conspicuous deviation from the constitutional requirement of an individualized determination in capital cases.[3] Under the *Dobbs* rule, no amount of post-sentencing mitigating evidence can establish *Strickland* prejudice when the defendant's crime involves careful planning, torture, rape, or kidnapping. In these cases, the rule eliminates the potential mitigating effect of a capital defendant's proffered post-sentencing mitigating evidence, depriving these defendants of their Eighth Amendment right to an individualized determination. As a result, capital defendants in those categories are without recourse for their trial counsel's failure to present mitigating evidence that could have resulted in a sentence less than death.

This Court has clearly established that the requirement of an individualized determination is a fundamental pillar of permissible capital jurisprudence. The *Dobbs* rule denies this right to capital defendants in the Eleventh Circuit whose crimes involve a particular aggravating circumstance. This Court's review is necessary to resolve conflicts and division in the Courts of Appeals, to ensure adherence to this Court's precedents, and to address an

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[3] *See Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998). For consistency, *amici* will adopt the same nomenclature for the Eleventh Circuit's rule as is used in the Petition for Writ of Certiorari. *See* Petition for Writ of Certiorari at 17, *Boyd v. Allen*, No. 10-6042 [*hereinafter Petition*].

issue of paramount importance in the review of a state's of its most severe punishment.

## ARGUMENT

### I. The Requirement Of An Individualized Determination Is A Cornerstone Of Permissible Capital Punishment.

Our system of capital punishment is based on the principle that a capital defendant may not be sentenced to death without an individualized determination that the death penalty is the appropriate punishment for his crime. As part of this individualized determination, a capital defendant has a constitutional right to present and have effect given to all relevant mitigating evidence proffered on his or her behalf. That this right may not be abridged is clear and well established.

#### (a) *A Capital Defendant Has A Constitutional Right To An Individualized Determination.*

In the capital punishment context, the Eighth Amendment's commands have led this Court to establish constitutional protections that ensure that the death penalty is "imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons"). Among these protections is the requirement of an individualized determination, which mandates "particularized con-

sideration" of the "relevant aspects of the character and record of each defendant before the imposition upon him of a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality); *see also Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) (*Penry I*) (relying on *Woodson*).

The requirement of an individualized determination under the Eighth Amendment is satisfied only when a defendant is sentenced to death after the consideration of all relevant mitigating evidence "that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 587, 604 (1978); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 262 (2007); *Eddings*, 455 U.S. at 112; *accord California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (stating that "evidence about the defendant's background and character" in a capital case at the sentencing stage is important "because of the belief long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse").

Accordingly, this Court repeatedly has emphasized the importance of enforcing a capital defendant's right to present mitigating evidence. *See*, *e.g.*, *Lockett*, 438 U.S. at 604 (holding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

less than death"); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (holding that it "could not be clearer" that "the exclusion of mitigating evidence … renders the death sentence invalid").

Moreover, this Court has held that the requirement of an individualized determination cannot be satisfied by merely allowing a defendant to present mitigating evidence; instead, the mitigating evidence must actually be given effect when determining whether the defendant's crime merits a sentence of death. *See Penry I*, 492 U.S. at 319 ("*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence"); *see also Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (noting that "the 'Eighth Amendment requires that the sentencer be able to consider and give effect to' a capital defendant's mitigating evidence") (quoting *Boyde v. California*, 494 U.S. 370, 377-78 (1990)).

Only when it is certain that the defendant's mitigating evidence has been considered and given effect can "we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry I*, 492 U.S. at 319 (citation omitted). Short of this certainty, this Court is "required to remove any legitimate basis for finding ambiguity" regarding whether the defendant was accorded an individualized determination. *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring).

### (b) *Neither The State Nor The Courts May Adopt Or Apply Rules That Limit The Right To An Individualized Determination By Discounting Or Eliminating The Effect Of Relevant Mitigating Evidence.*

It is clear that the states and the courts must refrain from adopting or applying any rule that infringes on the requirement of an individualized determination by impermissibly discounting or eliminating the mitigating effect of relevant mitigating evidence. *See Penry I*, 492 U.S. at 327 ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence") (quoting *McClesky v. Kemp*, 481 U.S. 279, 304 (1987)); *see also Abdul-Kabir*, 550 U.S. at 252 ("'[A] State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty'") (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184-85 (1988)); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1976) (stating that it is "clear … that the sentencer may not … be precluded from considering 'any relevant mitigating evidence'") (citation omitted).[4]

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[4] It is also well established that this requirement applies "notwithstanding the severity of [the defendant's] crime." *Abdul-Kabir*, 550 U.S. at 246.

In the nearly thirty years since *Lockett* and *Eddings*, this Court has consistently struck down any rule, statute, or application of the death penalty that discounts or eliminates the effect of relevant mitigating evidence, whether offered pre- or post-sentencing. *See, e.g., Abdul-Kabir*, 550 U.S. at 264 (holding that "when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence-because it is forbidden from doing so by statute or a judicial interpretation of a statute-the sentencing process is fatally flawed"); *Smith v. Texas*, 543 U.S. 37 (2004) (jury instructions that do not allow the sentencer to give mitigating evidence its full effect are unconstitutional); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (state supreme court's failure to consider and give effect to "the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding" was constitutional error).

This requirement of an individualized determination may not be fulfilled by adhering to formalities: it is a substantive requirement that ensures that a capital defendant is sentenced to death only after the defendant's mitigating evidence has been considered and given effect. *See, e.g.*, *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) ("*Penry I* did not hold that the mere mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment … Rather, the key under *Penry I* is that the jury be able to 'consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence'") (citation omitted).

## II. The Eleventh Circuit's *Dobbs* Rule Conflicts Directly With The Requirement Of An Individualized Determination Adopted By This Court And All Other Circuits.

Despite this Court's clear and oft-repeated holding that the constitutional requirement of an individualized determination mandates that all relevant mitigating evidence proffered by a defendant be given effect, the Eleventh Circuit's *Dobbs* rule eliminates this right in "many death penalty cases." *Payne v. Allen*, 539 F.3d 1297, 1318 (11th Cir. 2008). Denying this fundamental right to capital defendants directly conflicts with the requirements adopted and relied upon by this Court and every other Court of Appeals.

### (a) *The Dobbs Rule Impermissibly Denies Capital Defendants In the Eleventh Circuit The Right To An Individualized Determination.*

The *Dobbs* rule – which the Eleventh Circuit applied in this case – denies the right to an individualized determination to a large group of capital defendants by providing that:

> With crimes like this one, that are 'carefully planned, or accompanied by torture, rape or kidnapping,' we have often held 'that the aggravating circumstances of the crime outweigh any prejudice caused when a lawyer fails to present mitigating evidence.'

*Boyd v. Allen*, 592 F.3d 1276, 1297 (11th Cir. 2010) (quoting *Dobbs*, 142 F.3d at 1390). This rule, while phrased as discretionary, *see Callahan v. Campbell*, 427 F.3d 897, 938 (11th Cir. 2005), is used by the Eleventh Circuit as a bright-line prohibition, invoked routinely and mechanistically, using virtually identical language in each case, to eliminate or greatly discount the mitigating effect of a defendant's post-sentencing mitigating evidence when the murder involves one of the specified aggravating circumstances. *See Payne*, 539 F.3d at 1318; *Callahan*, 427 F.3d at 938; *Robinson v. Moore*, 300 F.3d 1320, 1351 (11th Cir. 2002); *Grayson v. Thompson*, 257 F.3d 1194, 1218 (11th Cir. 2001).

Since the adoption of the Antiterrorism and Effective Death Penalty Act of 1996, the Eleventh Circuit has never held that the post-sentencing mitigating evidence proffered by the defendant establishes *Strickland* prejudice in a case where the *Dobbs* rule was invoked. *See Petition* at 17. No matter the strength of the possible mitigating evidence, in any case falling under the *Dobbs* rule, the Eleventh Circuit has always found that sentencing relief is unavailable. In doing so, the Eleventh Circuit has achieved consistency in its capital jurisprudence by "ignoring the individual differences" among the defendants – exactly the type of "false consistency" rejected by *Eddings*. *See Eddings*, 455 U.S. at 112 (in capital sentencing, "a consistency produced by ignoring individual differences is a false consistency"). Additionally, by denying many capital defendants the right to an individualized determination, the *Dobbs* rule "creates the risk that the death penalty will be imposed in spite of factors which call for a

less severe penalty." *Penry I*, 492 U.S. at 328 (*quoting Lockett*, 438 U.S. at 605). Such a risk, "[w]hen the choice is between life and death … is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*

This case provides a powerful example of the conflict between the *Dobbs* rule and the requirement of an individualized determination. In overturning the district court, the Eleventh Circuit applied the *Dobbs* rule to eliminate the mitigating effect of petitioner's post-sentencing mitigating evidence, labeling this evidence as "cumulative" and failing to "alter the two powerful statutory aggravators that were found by the trial court." *Boyd*, 592 F.3d at 1298, 1301. However, the post-sentencing mitigating evidence offered by petitioner was as strong as, if not stronger than, a recent case from the Eleventh Circuit in which this Court held that the reviewing courts had failed to give effect to post-sentencing mitigating evidence adduced by the defendants. *See Porter v. McCollum*, 130 S. Ct. 447, 455 (2009); *see also Petition* at 20-22. Moreover, the death-qualified jury in this case returned an advisory sentencing verdict of life without parole even without having been able to consider any of the extensive post-sentencing mitigating evidence submitted by petitioner – which petitioner's trial counsel incompetently failed to present to the sentencer – rendering the argument that this case was too brutal for post-sentencing mitigating evidence to make a difference particularly unpersuasive. *Petition* at 5. None of these individualized facts made a difference to the Eleventh Circuit, however, as petitioner's crime fell within the scope of the *Dobbs* rule.

Furthermore, the *Dobbs* rule's central premise – that certain cases are too aggravated for mitigating evidence to make a difference – is completely at odds with empirical data. Sentencers confronted with very aggravated cases regularly find that the brutality of a crime does not necessarily trump any evidence of a disadvantaged or violent upbringing – the kind of evidence roundly disparaged by the Eleventh Circuit in petitioner's case. Indeed, federal jury verdict forms[5] provide many examples of cases involving brutal crimes in which the jury nevertheless recommended a life sentence based on the mitigating evidence. *See, e.g.*, Jury Verdict Form, *United States v. Cyrus*, No. 3:05-cr-00324-MMC-2 (N.D. Cal. 2009) (dated June 29, 2009) (life sentence for defendant convicted of multiple murders involving substantial planning, kidnapping and torture that were especially heinous, cruel or depraved and were committed to prevent victims from cooperating with the government based on mitigating evidence that the defendant was raised in a neglectful, and violent, family atmosphere in which he witnessed domestic violence, and experienced an "unstable early childhood and dysfunctional family result[ing] in his having a home life without structure and emotional and financial support"); Jury Verdict Form, *United States*

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[5] The federal capital punishment system requires that every jury in a capital case return written findings on aggravation and mitigation, regardless of whether the ultimate sentence is life imprisonment or death. The jury verdict forms cited herein are on file with the Federal Death Penalty Resource Counsel (http://www.capdefnet.org/fdprc). Additionally, *amici* have provided both parties with copies of all jury verdict forms cited herein.

*v. Smith*, No. 3:02-cr-05025-GAF-1 (W.D. Mo. 2007) (dated Feb. 15, 2007) (life sentence for defendant convicted of killing two people with substantial planning and premeditation due to defendant's impoverished childhood and his exposure to "numerous risk factors including parent criminality, parent substance abuse, domestic violence, physical abuse by a parent, and poor supervision"); Jury Verdict Form, *United States v. Cooper*, No. 4:01-cr-00008-WHB-FKB-1 (S.D. Miss. 2002) (dated May 15, 2002) (life sentence for defendant who was convicted of killing a suspected cooperating witness in an especially heinous, cruel, or depraved manner involving torture or serious physical abuse, due to mitigating evidence that defendant was subjected to emotional and physical abuse and neglect as a child and "grew up in an impoverished, violent, and brutal environment" in which he was exposed to extreme violence).

In particular, the sort of evidence discovered during petitioner's post-sentencing proceedings, including evidence of privation, child abuse, alcoholism among family members, neglect, and exposure to community and household violence, often has been persuasive to the sentencer's decision whether to spare a defendant's life. *See, e.g.*, Jury Verdict Form, *United States v. Cisneros*, No. 1:04-cr-00283-GBL-3 (E.D. Va. 2005) (dated Jan. 14, 2005) (life sentence for defendant convicted of murdering a suspected government cooperator whom defendant knew to be pregnant after substantial planning and premeditation and in an especially heinous, cruel, or depraved manner based on mitigating evidence that defendant had been "raised in an environment of poverty and financial hardship" and "subjected to

emotional and physical abuse"); Jury Verdict Form, *United States v. Gonzalez-Lauzan*, No. 1:02-cr-20572-JIC-1 (S.D. Fla. 2004) (dated Feb. 25, 2004) (life sentence for defendant convicted of murder involving substantial planning where the defendant was verbally, mentally and physically abused as a child and lacked positive male role model); Jury Verdict Form, *United States v. Haynes*, No. 8:98-cr-00520-PJM-1 (D. Md. 2000) (dated June 29, 2000) (life sentence for defendant convicted of murder that occurred during kidnapping of suspected government cooperator where defendant was born into a "chaotic family environment with a multi-generational history of poverty, low education, substance abuse, sexual abuse, physical abuse, domestic abuse, low employability, teen pregnancy, institutionalization and substandard housing").[6]

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[6] *See also, e.g.*, Jury Verdict Form, *United States v. Dinkins*, No. 1:06-cr-00309-JFM-1 (D. Md. 2009) (dated June 30, 2009) (life sentence for defendant convicted of multiple murder counts, including one count involving substantial planning, and where defendant had "engaged in a pattern of prior convictions for violent offenses" based on mitigating evidence that defendant "grew up in a neighborhood where he was exposed, when still a small child, to poverty, drugs, chaos, and violence"); Jury Verdict Form, *United States v. Barnes*, No. 7:04-cr-00186-SCR-2 (S.D.N.Y. 2008) (dated May 30, 2008) (life sentence for defendant convicted of committing multiple-victim murder while defendant was on supervised release based on mitigating evidence that defendant's childhood was "marked by chaos, abuse, and abandonment," that his mother was "ill-equipped to become a parent and … became increasingly overwhelmed by her circumstances," and that he "lacked positive role models in the home"); Jury Verdict Form, *United States v. Shakir*, No. 3:98-cr-00038-JTN-11 (M.D. Tenn. 2008) (dated May 20, 2008) (life sentence for defendant convicted of multiple

The reality that mitigating evidence can, and often does, result in a life sentence in cases at least as brutal as petitioner's is also supported by numerous studies showing that mitigating factors such as child abuse, extreme poverty, remorse and lack of a significant prior record – all of which are at issue in this case – "lead jurors to choose life over death."

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murders, some of which were found to have been substantially planned and premeditated, based on mitigating evidence that defendant "grew up in an impoverished, violent and brutal environment" and that his father "subjected his wife and children, including [defendant], to emotional and physical abuse"); Jury Verdict Form, *United States v. Cooper*, No. 2:01-cr-00512-JCJ-5 (E.D. Pa. 2006) (dated May 18, 2006) (life sentence for defendant convicted of three murders committed with substantial planning and premeditation based on mitigating evidence regarding defendant's exposure to violence and drug abuse at a young age and his childhood in one of the "worst communities … in which to raise children")); Jury Verdict Form, *United States v. Mayhew*, No. 2:03-cr-00165-ALM (S.D. Ohio 2005) (dated Sept. 1, 2005) (life sentence for a defendant convicted of stalking, kidnapping and killing of woman after substantial planning and premeditation due to mitigating evidence regarding defendant's "upbringing" and "lack of parental guidance"); Jury Verdict Form, *United States v. Davis*, No. 2:01-cr-00282-SSV-1 (E.D. La. 2003) (dated May 19, 2003) (life sentence for defendant who had previously been convicted of murder and sought, while incarcerated, to have witness in case killed where defendant had been subjected to emotional abuse, physical abuse abandonment and neglect as a child); Jury Verdict Form, *United States v. Cazaco*, No. 3:96-cr-00066-REP-6 (E.D. Va. 1997) (dated July 14, 1997) (life sentence for defendant convicted of robbery and multiple counts of murder involving substantial planning where mitigating evidence showed that defendant was "physically and emotionally abused and neglected by his mother throughout his childhood," and "continuously deprived of a stable home environment and rejected by his mother during his childhood").

John H. Blume, et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1038 (2008) (citation omitted); *see also* Michelle E. Barnett, et al., *When Mitigation Evidence Makes A Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 Behav. Sci. Law 751, 765 (2004) (concluding that sentencers in capital cases assign the highest mitigating effect to evidence that the defendant "had been badly beaten by his parents as a child"). Law and experience thus both demonstrate the critical importance of permitting mitigating evidence to be considered and given effect, even in the most violent or heinous crimes.

Finally, the Eleventh Circuit's mechanistic application of the *Dobbs* rule in cases like this one has produced the same result as the automatic death penalty standards that this Court has consistently rejected. *See, e.g.*, *Woodson*, 428 U.S. at 288-301 (discussing rejection of automatic death penalty standards). Indeed, Justice Stewart's words from *Woodson* are equally applicable to this rule:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from considerations in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated of-

> fense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

*Id.* Here, the Eleventh Circuit's habeas review eliminates the right of capital defendants in certain designated categories to prevail on a claim that their constitutional rights were violated because their counsel incompetently failed to discover and present mitigating evidence. By eliminating the mitigating effect of these capital defendant's post-sentencing mitigating evidence in these cases, the Eleventh Circuit has denied them as a matter of law their constitutional right to an individualized sentencing determination. *See Eddings*, 455 U.S. at 113-14 ("Just as the State may not preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence"). Indeed, predicating relief on the absence of certain broad categories of aggravating factors is no different than instructing the jury to disregard mitigating evidence that does not support a legal excuse from criminal liability, or requiring a causal nexus to the crime – restrictions on mitigating evidence that this Court has declared unconstitutional. *See id.*; *Tennard*, 542 U.S. at 289; *Penry II*, 532 U.S. at 800.[7]

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[7] The *Dobbs* rule is analogous to the Ohio death penalty statute in *Lockett* that "mandated capital punishment upon a finding of one aggravating circumstance." *Penry I*, 492 U.S. at 317. The Eleventh Circuit's rule mandates that, in ineffective assistance of counsel claims, no amount of post-sentencing

### (b) *The Dobbs Rule Creates A Direct And Substantial Circuit Split.*

The Eleventh Circuit's rule directly conflicts with the requirements adopted and relied on by every other circuit. *See Petition* at 22-26. Consistent with this Court's precedents, every other Court of Appeals, in cases of this kind, adheres to the constitutional requirement that each capital defendant be accorded an individualized sentencing determination during which all relevant mitigating evidence presented by the defendant is given effect. *See id.* at 24.

The anomalous nature of the Eleventh Circuit's *Dobbs* rule is demonstrated by the fact that, in every other circuit, petitioner's appeal would have been decided differently than it was here. *See, e.g.*, *Anderson v. Sirmons*, 476 F.3d 1131, 1147-48 (10th Cir. 2007); *Haliym v. Mitchell*, 492 F.3d 680, 685-86, 718-20 (6th Cir. 2007); *Douglas v. Woodford*, 316 F.3d 1079, 1082-84, 1091 (9th Cir. 2003); *Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002); *Lockett v. Anderson*, 230 F.3d 695, 715-17 (5th Cir. 2000); *Hall v. Washington*, 106 F.3d 742, 750-52 (7th Cir. 1997); *see also Petition* at 23-26. Had petitioner's crime been committed, for example, in the Fifth Circuit or Sixth Circuit, both of which adjoin the Eleventh Circuit, his appeal would have had the opposite result because neither of these circuits applies the categorical *Dobbs* Rule. As the holdings in

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mitigating evidence can ever be found to have been prejudicial upon a finding that the murder involved careful planning, torture, rape or kidnapping.

*Haliym v. Mitchell*, *supra*, and *Lockett v. Anderson*, *supra*, demonstrate, petitioner would have been accorded an individualized determination and afforded relief from the egregious failure of his trial counsel to discover and present a wealth of readily available mitigating evidence. While this Court has recognized permissible variations in State death penalty statutes, it has required consistency and uniformity with regard to federal constitutional requirements. It should do so again here.

This case provides an appropriate vehicle for this Court to address the Eleventh Circuit's continued application of the *Dobbs* rule. The lack of a holding from this Court on the validity of the *Dobbs* rule results in a recurring misapplication of the law. This problem is particularly important in light of the high volume of capital cases in the Eleventh Circuit. *See Petition* at 29 n.6.[8] Furthermore, as noted above, the Eleventh Circuit's unique and anomalous rule also creates a clear split and division with the other Courts of Appeals.

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[8] When a Court of Appeals has consistently misapplied Supreme Court precedent on the right to present mitigating evidence, as the Eleventh Circuit has here, this Court has granted review to correct the recurring misapplication of the law in conflict with this Court's clear precedent. *See, e.g., Tennard*, 542 U.S. at 284 (finding that the Fifth Circuit's application of an erroneous rule for "constitutional relevance" had "no foundation in the decisions of this Court" and violated the requirement that any relevant mitigating evidence should be presented to the sentencer).

* * * * *

The Eleventh Circuit's *Dobbs* rule violates constitutional rights on a recurring and important question of capital sentencing, and it conflicts with decisions of this Court and other Courts of Appeals. Review by this Court is appropriate, warranted, and necessary.

## CONCLUSION

For the foregoing reasons, and the reasons stated by the petitioner William Glenn Boyd, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CLIFFORD M. SLOAN
*Counsel of Record*
BRIAN S. WALLACH
PAMELA R. SHISLER
KATHERINE RASOR
1440 New York Ave., N. W.
Washington, D. C. 20005
(202) 371-7000
CLIFF.SLOAN@SKADDEN.COM

*Attorneys for Amici Curiae*

September 23, 2010

## APPENDIX A:

## LIST OF INDIVIDUAL *AMICI CURIAE*

**A. Bates Butler III**, United States Attorney, District of Arizona (1980-1981); First Assistant United States Attorney, District of Arizona (1977-1980); Deputy Pima County, Arizona Attorney (1970-77)

**W. J. Michael Cody**, Attorney General, State of Tennessee (1984-88); United States Attorney, Western District of Tennessee (1977-1981)

**J. Joseph Curran**, Attorney General, State of Maryland (1987-2007)

**Robert J. Del Tufo,** Attorney General, State of New Jersey (1990-1993); United States Attorney, District of New Jersey (1977-1980); Former First Assistant State Attorney General, State of New Jersey; Former Director of New Jersey's Division of Criminal Justice

**Michael H. Dettmer**, United States Attorney, Western District of Michigan (1994-2001)

**W. Thomas Dillard**, United States Attorney, Northern District of Florida (1983-1986); United States Attorney, Eastern District of Tennessee (1981)

**Hon. Bruce J. Einhorn (ret.),** United States Immigration Judge (1990-2007); Special Prosecutor and Chief of Litigation, United States Department of Justice Office of Special Investigations (1979-1990)

**James A. Fry**, Assistant District Attorney, Dallas County, Texas (1980-1982); Former Chairman, Texas State Bar Grievance Committee

**Bennett L. Gershman,** Professor of Law, Pace Law School; Former Prosecutor, Manhattan District Attorney's Office; Former Prosecutor, New York Special State Prosecutor

**Hon. John J. Gibbons (ret.)**, Judge, United States Court of Appeals for the Third Circuit (1970-1990) (Chief Judge 1987-1990)

**Charles E. Graves**, United States Attorney, District of Wyoming (1977-81)

**Professor Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; Former Assistant Attorney General, State of Florida

**Hon. Nathaniel R. Jones (ret.),** Judge, United States Court of Appeals for the Sixth Circuit, (1979-2002); Assistant United States Attorney, Northern District of Ohio (1962-67)

**Hon. Gerald Kogan (ret.),** Former Chief Justice, Supreme Court of the State of Florida; Former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida

**Hon. Thomas D. Lambros (ret.)**, Judge, United States District Court, Northern District of Ohio (1967-1995) (Chief Judge, 1990-1995)

**Laurie L. Levenson,** Professor of Law, Loyola Law School Los Angeles; Assistant United States Attorney, Central District of California (1981-88)

**Hon. Howard A. Levine (ret.),** Associate Judge, New York State Court of Appeals (1993- 2002); Chair, New York Federal-State Judicial Council (2000-2002); Associate Justice New York Supreme Court Appellate Division (1982-1993); District Attorney, Schenectady County, New York (1967-1970)

**Hon. Harold L. Lowenstein (ret.),** Former Judge, Missouri Court of Appeals

**Hon. James K. Logan (ret.)**, Judge, United States Court of Appeals for the Tenth Circuit (1977-1994)

**Kenneth J. Mighell**, United States Attorney, Northern District of Texas (1977-1981)

**Alan B. Morrison**, Assistant United States Attorney, Southern District of New York (1968-1972)

**Hon. Sheila Murphy (ret.),** Former Presiding Judge, Sixth District, State of Illinois

**Hon. Stephen M. Orlofsky (ret.)**, Judge, United States District Court for the District of New Jersey (1995-2003); Magistrate Judge, United States District Court for the District of New Jersey (1976-1980)

**Harold James Pickerstein**, United States Attorney, District of Connecticut (1974); Chief Assistant United States Attorney, District of Connecticut (1974-1986)

**Hon. William S. Sessions (ret.)**, Director of the FBI (1987-1993); Judge, United States District Court for the Western District of Texas, 1974-1987 (Chief Judge, 1980-1987); United States Attorney, Western District of Texas (1971-1974)

**Harry L. Shorstein**, State Attorney for the Fourth Judicial Circuit of Florida (1991-2007)

**Mark White**, Governor of Texas (1983-1987); Attorney General, State of Texas (1979-1983); Secretary of State of Texas (1973-1977); Assistant Attorney General, State of Texas (1965-1969)

**Beth Wilkinson,** Prosecutor, Oklahoma City bombing case; Former Assistant United States Attorney, Eastern District of New York