No. 11-9953

In The
Supreme Court of the United States

JONATHAN BOYER,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Third Circuit Court of Appeal

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BRIEF OF *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The Constitution Project is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as amicus curiae in support of Petitioner Jonathan Boyer.

The Constitution Project achieves its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and its reports. The Constitution Project frequently appears as amicus curiae before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of the American justice system. The committee was established in 2004 with the mission of examining whether criminal defendants and juveniles charged with delinquency receive adequate legal representation, consistent with the Constitution, decisions of this Court, and the rules of the legal

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

profession. In 2009, the Committee issued *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, a report which included findings on the vindication of the right to counsel and provided recommendations for reform.[2] The committee recommended that states provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of indigent defendants if states fail to comply with those requirements. The committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation.

The Constitution Project's Death Penalty Committee is a diverse committee comprised of a broad spectrum of individuals—including supporters and opponents of capital punishment—with extensive experience in the criminal justice system. In 2001, after a careful evaluation of the various death penalty processes in this country, the committee released *Mandatory Justice: Eighteen Reforms to the Death Penalty*, a report which concluded that there were insufficient protections in place to ensure fundamental fairness, and recommended death penalty reforms. In 2006, the committee issued a further report, *Mandatory Justice: The Death Penalty Revisited*, addressing the

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[2] *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* is available on The Constitution Project's website, *www.constitutionproject.org*.

problems that continue to plague death penalty litigation.[3]

Accordingly, The Constitution Project, and its Right to Counsel and Death Penalty Committees, have a strong interest in this important case regarding the Sixth Amendment right to a speedy trial, and the relationship between that fundamental right and a state's responsibility to fund counsel for indigent capital defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment to the United States constitution declares that "the accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI. Pursuant to this fundamental right, the government bears the responsibility of ensuring that the trial of each defendant charged with a crime in its jurisdiction proceeds without undue delay. *See Strunk* v. *United States*, 412 U.S. 434 (1973); *Barker* v. *Wingo*, 407 U.S. 514 (1972).

Another fundamental right is the Assistance of Counsel. U.S. CONST. amend. VI. The enforcement of both of these guarantees—speedy trial and assistance of counsel—is mandatory, and of paramount importance. Regardless of the hardship that enforcement of these guarantees may entail, the

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[3] Both *Mandatory Justice: Eighteen Reforms to the Death Penalty* and *Mandatory Justice: The Death Penalty Revisited* are available on The Constitution Project's website, *www.constitutionproject.org*.

government bears the burden of ensuring that "the accused shall enjoy" each right. *Id.*

Representing a capital defendant is a demanding endeavor, involving the fulfillment of duties that exceed those required in non-capital cases. The time and funds required to adequately defend the accused are substantial. To enable attorneys to fulfill the duties required of them, and to uphold the fundamental constitutional rights enshrined in the Sixth Amendment, a state must provide adequate funding for the defense of indigent capital defendants. If a state neglects its obligation to provide adequate funds for the representation of a capital defendant—as it did with Jonathan Boyer—the delay in reaching trial should be attributed to the state. The state's failure is the state's responsibility.

ARGUMENT

I. IN REPRESENTING A CAPITAL DEFENDANT, COUNSEL IS OBLIGATED TO FULFILL NUMEROUS DEMANDING DUTIES

The Sixth Amendment guarantees that the accused in a criminal proceeding shall "have the Assistance of Counsel for his defence." U.S. CONST. amend. VI; *see also* La. Code Crim. Proc. Ann. art. 511 ("The accused in every instance has the right to defend himself and to have the assistance of counsel."). This guarantee encompasses certain basic duties of counsel to client: the duty of loyalty, the duty to advocate, the duty to consult, and the duty to keep informed. *Strickland* v. *Washington*,

466 U.S. 668, 688 (1984). These basic duties, however, "neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id.* Given the intricacies and complexities that each defendant and each case present, no "particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Rather, the duties required of counsel in each case are determined by a test of reasonableness—"whether counsel's assistance was *reasonable* considering all the circumstances." *Id.* at 688 (emphasis added).

When the possibility of the death penalty—a sentence "qualitatively different from a sentence of imprisonment, however long"—is among the "circumstances" of a particular criminal case, reasonableness requires counsel to fulfill heightened duties. *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976).[4] Though, as this Court noted in *Strickland*, no checklist of duties exists, Sixth Amendment jurisprudence and the prevailing norms of practice encompassed in American Bar Association and other professional standards provide

[4] Scholars have noted that "[e]very task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution." Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 357 (1995); *see also* Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different*, 42 Mercer L. Rev. 695 (1990-91).

guidance to counsel as to what duties must be fulfilled. These duties, the most demanding of which are discussed below, begin "the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 1.1(B) (rev. ed. 2003) (hereinafter "ABA Capital Defense Guidelines").[5] *See also, e.g., Rothgery* v. *Gillespie County,* 554 U.S. 191, 210 (2008) ("a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.").

A. Defense Counsel Has a Duty to Establish a Relationship With the Defendant

In all criminal cases, defense counsel "should seek to establish a relationship of trust and confidence with the accused." ABA Standards for

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[5] The State of Louisiana has adopted and applied the ABA Capital Defense Guidelines. *See* LA. Admin. Code tit. 22, pt. XV § 901(A)(3) ("These guidelines are intended to adopt and apply the guidelines for capital defense set out by the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, its associated Commentary and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*."). Additionally, the ABA Capital Defense Guidelines have been cited favorably and relied upon by this Court. *See, e.g., Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (citing "American Bar Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.'").

Criminal Justice: Prosecution and Defense Function 4-3.1 (3d ed. 1993) (hereinafter "ABA Criminal Justice Standards"). This relationship assumes even greater importance in death penalty cases due to the unique characteristics of many capital defendants and the depth of personal information required for effective representation at the penalty phase of trial. Accordingly, counsel must "make every appropriate effort" to ensure a strong relationship with the client. ABA Capital Defense Guidelines 10.5(A).

Individuals charged with capital crimes disproportionally suffer from acute educational and cognitive deficiencies. Academic studies of death row inmates reflect this reality. Studies show that more than half of all death row inmates failed to complete high school, while those with some high school experience have a functional literacy level substantially below that of the grade at which they exited school.[6] Studies also show that the mean IQ of death-row inmates is well-below the national average.[7] For example, in an assessment of 44 Mississippi death-row inmates, nearly half scored

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[6] Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2004*, Bureau of Just. Stat. Bull., Nov. 2004, at 6, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=417; Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. Law 191, 199-200 (2002) (hereinafter "Cunningham & Vigen 2002").

[7] Cunningham & Vigen 2002, *supra* note 6, at 199; Richard L. Frierson et al., *Capital Versus Non-Capital Murderers*, 26 J. Am. Acad. Psychiatry Law 403, 406-07 (1998).

below the 10th percentile in "verbal IQ."[8] Additionally, a two-sample study found 30 percent of death row inmates to have borderline mental retardation.[9]

In addition to the high incidence of educational and cognitive deficiencies, capital defendants frequently have potentially mitigating personal histories. Studies show that "[m]any if not most death row inmates have histories of paternal abandonment, foster care and institutionalization, abuse and neglect, and/or parental substance abuse."[10] One study of 15 death row inmates found that 12 had experienced "extraordinary" physical or sexual abuse.[11] The common instances of physical and sexual abuse may be related, in part, to high rates of substance abuse among the parents of death row inmates which one study found to be 57 percent.[12]

The unique characteristics often associated with capital defendants increase the difficulty of establishing a relationship of trust. Educationally or

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[8] Mark P. Cunningham & Mark P. Vigen, Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates, 26 Crim. Justice & Behav. 293, 300-01 (1999).

[9] Frierson, *supra* note 7, at 406-07.

[10] Cunningham & Vigen 2002, *supra* note 6, at 202.

[11] Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 Bull. Am. Acad. Psych. Law 345, 348 (1986).

[12] Cunningham & Vigen 2002, *supra* note 6, at 193.

cognitively deficient defendants may be resistant to, and on some occasions incapable of, communicating crucial information to counsel, particularly where counsel is assigned rather than selected by the defendant. Thus, counsel must start developing a relationship with the defendant the moment the representation begins—counsel should interview defendant within 24-hours of entering the case—and must cultivate that relationship throughout the course of the representation. *See* ABA Capital Defense Guidelines 10.5 (B)-(C). Absent a relationship of trust with the client, counsel will struggle to "overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense." *Id.* at 10.5, Commentary. Moreover, establishing a strong relationship will help to "ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea." *Id.*

B. Defense Counsel Has a Duty to Assemble a Comprehensive Defense Team

In order to meet the demands of representing a capital defendant, counsel is required to assemble a comprehensive "defense team." The precise composition of the defense team may vary, though it should likely consist of additional attorneys, investigators, mitigation specialist, and mental health experts. *See* ABA Capital Defense Guidelines 4.1(A). Counsel has a duty to retain the necessary professionals and resources "needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the

proceedings, including the sentencing phase." National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases 8.1 (1988) (hereinafter "NLADA Standards").

The Louisiana Capital Defense Guidelines require that the "defense team consist of no fewer than two attorneys . . . an investigator, and a mitigation specialist." LA. Admin. Code tit. 22, pt. XV § 913(A)(1)(a); *see also* NLADA Standards 2.1 ("In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant."). Individuals that provide "expert, investigative, and other ancillary professional services" may also be required. LA. Admin. Code tit. 22, pt. XV § 913(A)(1)(a) § 913(B)(1). The members of the defense team must be assembled to "ensure that the team [as a whole] possesses the skills, experience and capacity to provide high quality representation in the particular case." *Id. at* § 913(A)(1)(d).

Similar to the Louisiana Capital Defense Guidelines, the ABA Capital Defense Guidelines contain detailed requirements for assembling a defense team. The ABA requires that:

> As soon as possible after designation, lead counsel should assemble a defense team by . . . selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes: (a) at least one mitigation specialist and one fact investigator; (b) at least one

> member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and (c) any other members needed to provide high quality legal representation.

ABA Capital Defense Guidelines 10.4(C)(2). Under these guidelines, the presence of each of the named professionals is not discretionary but mandatory.

Only if counsel has the assistance of a comprehensive team of professionals will she be able to accomplish the time consuming tasks, fulfill the demanding duties, and provide the quality of representation required of her. The demands presented by capital cases are simply too prodigious to allow for a counsel, working entirely on her own, to represent a defendant effectively.

C. Defense Counsel Has A Duty to Investigate

In all criminal cases, and even more so in those in which a death sentence is sought, defense counsel must conduct a thorough investigation. When representing a capital defendant, counsel is obligated to conduct two overlapping but distinct investigations: one for the guilt phase of trial, and one for the penalty phase. With regard to every facet of the alleged crime and of the defendant's life, counsel must either "make reasonable investigations or . . . make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

1. Investigation For the Guilt Phase of Trial

Effective representation of the accused during the guilt phase of trial requires counsel to investigate the facts and circumstances surrounding the alleged acts of the accused. This Court has emphasized the importance of investigation in criminal cases, noting that:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. *Nixon*, 418 U.S. 683, 709 (1974). Such fact development cannot occur absent a comprehensive, independent investigation by defense counsel.

It is crucial that counsel begins the investigation into guilt at the earliest possible moment, while the forensic trail remains fresh. Early (if not immediate) investigation is essential because "[o]ften there are witnesses who must be interviewed promptly by the defense lest their memories of critical events fade or the witnesses become difficult to locate." ABA Criminal Justice Standards 5-6.1, Commentary; *see also Powell* v. *Alabama*, 287 U.S. 45, 58 (1932)

(finding that defendants' due process rights were violated where, among other errors, "[n]either [counsel] nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts."). Prompt investigation enables counsel to "obtain information regarding guilt that may later become unavailable." ABA Capital Defense Guidelines 1.1, History of Guideline. Additionally, if the accused is incarcerated, investigation is necessary "to marshal facts in support of the defendant's pretrial release from custody." ABA Criminal Justice Standards 5-6.1, Commentary.

According to the NLADA Standards, a reasonable investigation will require counsel to obtain information from charging documents, the accused, potential witnesses, the police, the prosecution, the scene of the crime, and independent experts. NLADA Standards 11.4.1(d). Similarly, the ABA Capital Defense Guidelines require defense counsel to "independently investigate the circumstances of the crime, and all evidence – whether testimonial, forensic, or otherwise." ABA Capital Defense Guidelines 1.1, Commentary. A truly complete investigation will involve "not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny." *Id.* Counsel who fails to conduct such a comprehensive investigation may be determined to have provided ineffective assistance. *See, e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 385 ("Respondent's attorney [was ineffective where he]

neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery."); *Elmore* v. *Ozmint*, 661 F.3d 783, 853 (4th Cir. 2011) (finding ineffective assistance of counsel where "defense team conducted no independent analyses of the State's forensic evidence.").

2. Investigation For The Penalty Phase of Trial

The penalty phase in capital cases differs greatly from, and assumes a significantly more prominent role than, the same stage in non-capital cases. Whereas sentencing in non-capital cases "may involve informal proceedings and standardless discretion," therefore requiring minimal assistance from counsel, a "capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for discretion, that counsel's role in the proceeding is comparable to counsel's role at trial." *Strickland*, 466 U.S. at 686-87 (citations omitted). Accordingly, counsel is obligated to make every reasonable effort to investigate and uncover mitigating factors that may allow a convicted defendant to avoid the penalty of death.

Courts contemplating the imposition of a death sentence are constitutionally required to 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 a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978); *see also Eddings* v. *Oklahoma*, 455 U.S. 104, 113-15 (1982); *Hitchcock* v. *Dugger*, 481 U.S. 393, 394

(1987). As this Court has noted, "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and 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.

The right to offer mitigating evidence, moreover, "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.'"[13] Indeed, the United States Department of Justice requires its attorneys to provide counsel for the defendant with "an opportunity to present evidence and argument in mitigation" even before the "final decision to seek the death penalty" is made, and the National District Attorneys Association requires prosecutors to "disclose to the defense prior to sentencing any known evidence that would mitigate the sentence to be imposed." U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-10.120 (2011); National District Attorneys Association, National Prosecution Standards (3d ed.).

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[13] Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 Tex. L. Rev. 1301, 1317 (1997) (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

Just as with the investigation into guilt, the investigation into mitigating factors must begin swiftly (if not immediately) upon the commencement of representation. *See* ABA Capital Defense Guidelines 1.1, Commentary. The ABA Capital Defense Guidelines require counsel to investigate a capital defendant's medical, family, social, educational, employment, military, and correctional history. *See id.* at 10.7, Commentary. The investigation should reveal past abuse, mental illness, cognitive limitations, traumatic events and other factors crucial for the court's decision as to whether the defendant should be sentenced to death. *Id.* If counsel fails to conduct the reasonable investigation that would uncover such mitigating factors, his assistance may be deemed ineffective. *See, e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 395 (2000).[14] In sum, investigation for the penalty phase of trial is an extraordinarily time-consuming and exacting endeavor.

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[14] In *Williams*, defendant's attorneys were determined to have been ineffective where they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood" including the facts that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody)." *Williams* v. *Taylor*, 529 U.S. 362, 395 (2000).

D. Defense Counsel Has A Duty to Assert All Viable Legal Claims

Based on information obtained during investigations for the guilt and penalty phases of trial, defense counsel should assert all viable claims. While defense counsel in all criminal cases owe this duty to the client, defense counsel in capital cases must be particularly vigilant in asserting legal claims due to "the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence." NLADA Standards 11.5.1(b); *see also* ABA Capital Defense Guidelines 10.8(A)(3)(b). Particularly given the prevalence of appellate proceedings in death penalty cases, counsel must assert a claim "wherever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief." NLADA Standards 11.5.1(a).

The consequences of failing to assert a viable claim may be grave; future claims may be undermined by "contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." ABA Capital Defense Guidelines 10.8(A)(3)(c). Failure to preserve an issue may result in the execution of a defendant even though a reversible error had occurred at trial. The mere possibility of such an occurrence highlights the importance of counsel asserting all viable claims on behalf of a capital defendant.

II. A STATE'S FAILURE TO MEET ITS OBLIGATION TO ADEQUATELY FUND COUNSEL FOR AN INDIGENT CAPITAL DEFENDANT PREVENTS COUNSEL FROM FULFILLING THE DEMANDING DUTIES REQUIRED OF HIM

A. The State of Louisiana Has An Obligation to Provide Adequate Counsel for Indigent Defendants

This Court has recognized that indigent defendants require lawyers because of "the obvious truth that the average defendant does not have the professional legal skills to protect himself." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938). Thus, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). To uphold the principle of fundamental fairness and ensure that indigent defendants have the opportunity to defend their case, this Court has identified the "'basic tools of an adequate defense or appeal' and . . . required that such tools be provided to those defendants who cannot afford to pay for them." *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Britt* v. *North Carolina*, 404 U.S. 226, 227 (1971)).

Legal defense—particularly that of capital defendants—requires substantial funding. In order to satisfy the Sixth Amendment guarantee of assistance of counsel for indigent defendants, "[i]t is critically important . . . that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for

trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence." ABA Capital Defense Guidelines 4.1, Commentary; *see also* ABA Criminal Justice Standards 5-1.6, Commentary ("Government has the responsibility to fund the full cost of quality legal representation . . . ."). [15] Furthermore, a state's commitment to funding indigent defense must be unwavering—the commitment means that a state must "firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter." *Makemson* v. *Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987).

The State of Louisiana recognizes its commitment to fund representation for indigent defendants, including those accused of a capital

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[15] The Association of the Bar of the City of New York's Committee on Civil Rights has elaborated on the need for states to fund capital defense:

> [S]o long as the death penalty continues to exist[] in this country, capital inmates are entitled to procedures – including ones for the provision of competent counsel – that result in the full and fair review of their convictions and sentences. Correlatively, any state which chooses to impose death sentences must accept the obligation of providing mechanisms for assuring that those sentences are legally and factually correct at the time of their execution.

Comm. on Civ. Rts., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. Ass'n of the B. N.Y. 848, 848 (1989).

crime. Like the Sixth Amendment, the state constitution guarantees that "[a]t each stage of [judicial] proceedings, every person is entitled to assistance of counsel . . . appointed by the court if he is indigent and charged with an offense punishable by imprisonment." LA. CONST. Art. I § 13. To meet this responsibility, the Louisiana legislature passed the Louisiana Public Defender Act of 2007, creating a uniform system for securing and compensating qualified counsel for indigents. *See* La. Rev. Stat. Ann. § 15:142(E) (2008). Additionally, the State issued its own Capital Defense Guidelines, adopting and applying the ABA Capital Defense Guidelines and providing "capital defenders and responsible agencies with specific guidance on the performance of their functions." *See* LA. Admin. Code tit. 22, pt. XV § 901(A)(4). Section 925 of the Louisiana Capital Defense Guidelines specifically addresses funding and compensation. *See id.* at § 925.

Along with the state legislature, Louisiana courts have affirmed the state's obligation to provide for indigent defense. The Supreme Court of Louisiana has explained that "[i]mplicit in [a] defendants' constitutional right to assistance of counsel is the State's inability to proceed with their prosecution until it provides adequate funds for their defense." *State* v. *Citizen*, 898 So. 2d 325, 338 (La. 2005); *see also State* v. *Wigley*, 624 So. 2d 425, 431 (La. 1993) (Dennis, J., concurring) ("[W]hen the State seeks to end a human being's life by executing him, the State must be willing to pay, at the very least, to ensure that the scales of justice are weighted evenly. Refusing to compensate an

attorney for his services in a capital case fails to meet this responsibility.").

B. Absent State Funding, Defense Counsel Cannot Be Expected To Fulfill the Demanding Duties Required of Counsel for Capital Defendants

Representing a defendant who is facing possible execution is an enormous responsibility. To comport with the requirements of *Strickland* and provide assistance that is "reasonable considering all the circumstances," counsel must fulfill demanding duties that substantially exceed those required in non-capital cases. *Strickland*, 466 U.S. at 688. It is unreasonable, impractical, and oppressive to ask counsel to do so absent adequate funding. *See Wigley*, 624 So. 2d at 429; s*ee also id.* at 430 (Dennis, J., concurring) ("Representing a defendant in a capital case requires literally hundreds of hours of the attorney's time and requires the attorney's utmost attention and ability. Furthermore the weight of such a responsibility surely infects every part of the attorney's daily life. To place this burden on an attorney without the concomitant compensation that should accompany such a burden is simply unfair to the attorney and is intrinsically an abusive extension of the attorney's professional obligations.").

C. A Delay in the Trial of an Indigent Defendant Resulting From the State's Failure To Provide Adequate Funding Should Be Weighed Against the State for Speedy Trial Purposes

The Sixth Amendment places the obligation on the government to bring an accused to trial in a speedy fashion. *See* U.S. CONST. amend. VI; *see Dickey* v. *Florida*, 398 U.S. 30, 37-38 (1970) ("[T]he duty of the charging authority is to provide a prompt trial"). That obligation is mandatory. In does not dissolve in the face of overcrowded dockets, understaffed prosecutors, or funding deficiencies—"the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *Strunk*, 412 U.S. at 437.

States that prevent the accused from enjoying the right to a speedy trial by inadequately funding the representation of a capital defendant must be held accountable for their inaction. If a state wishes to prosecute and execute one of its indigent citizens, it must provide funds for that citizen's defense. For five years, Louisiana elected to prosecute Jonathan Boyer with a capital crime while neglecting to fund the demanding duties required of his counsel. The state must not be granted immunity for its failings through a speedy trial analysis that fails to assign responsibility where it belongs. Accordingly, Louisiana's failure to fund counsel should be weighed against it in the required speedy trial evaluation.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that a state's failure to fund counsel for an indigent capital defendant must be weighed against the state for purposes of determining whether defendant's Sixth Amendment right to a speedy trial was violated.

Respectfully submitted,

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