NO._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

KAREEM GLASS - PETITIONER

VS.

BARRY R. SMITH - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KAREEM GLASS
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QUESTION PRESENTED

I. WHERE CAPITAL COUNSEL INDUCED PETITIONER INTO A WAIVER OF HIS ENTIRE PENALTY PHASE AND A WAIVER OF HIS APPELLATE RIGHTS IN RETURN FOR A GUARANTEED LIFE SENTENCE. WHERE ALL APPELLATE COURTS AGREE THAT CAPITAL COUNSEL FAILED TO CONDUCT ANY MITIGATING INVESTIGATION OR PREPARE FOR A PENALTY PHASE AND WHERE A FORENSIC PSYCHIATRIST LATER FOUND AT LEAST SIX MITIGATING CIRCUMSTANCES AVAILABLE HAD CAPITAL COUNSEL INVESTIGATED, DOES CAPITAL COUNSEL'S INEFFECTIVENESS PREJUDICE PETITIONER RENDERING THIS WAIVER INVALID?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States District Court appears at Appendix A to the petition and is unpublished.

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is reported at 633 Pa. 762; 125 A.3d 1198, 2015 Pa. LEXIS 2332 and is unpublished.

The opinion of the Superiror Court of Pennsylvania appears at Appendix F to petition and is reported at 118 A.3d 458; 2015 Pa.Super. unpub. LEXIS 3330 and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was April 4, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on May 5, 2018 and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

IOWA V. TOVAR, 541 U.S. 77 (2004);

STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984);

WIGGINS V. SMITH, 538 U.S. 510, 524 (2003);

DUE PROCESS OF LAW - FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

DUE PROCESS VIOLATION - FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

STATEMENT OF THE CASE

On October 21, 2008 following a jury trial in the Court of Common Pleas of Philadelphia County before the Honorable M. Teresa Sarmina, a jury convicted Petitioner of first degree murder, attempted murder, aggravated assault, possessing an instrument of crime, and recklessly endangering another person. The following day on October 22, 2008, when a capital penalty phase was to begin, Petitioner's capital counsel (Attorney Jack McMahon [herein "capital counsel"]) abruptly began to vigourously urge Petitioner to enter a waiver of the penalty phase altogether, as well as a waiver of all appellate rights, in exchange for a life sentence and the death penalty being removed.

Prior to October 22, 2008, capital counsel failed to so much as mention a penalty phase or mitigation evidence to Petitioner, or Petitioner's family members "whatsoever". (Petitioner at this point had no idea what a penalty phase was or what it entailed, as Petitioner has never been through "any" trial proceeding, thereby having zero trial experience). Capital counsel had not ever discussed a penalty phase with Petitioner nor conducted any investigation into Petitioner's background, childhood, upbringing and did not interview a single member of Petitioner's family. Capital counsel failed to hire a mitigating investigator, or a mitigating specialist to investigate potential mitigation evidence. Capital counsel conducted no investigation into petitioner's brain damage which could have provided significant mitigation evidence, where capital counsel had information of Petitioner's brain damage but failed to follow these leads.

Capital counsel relentlessly urged Petitioner to waive his penalty phase hearing and appellate rights in exchange for a life sentence hours using sophistry relentlessly, (capital counsel even used Petitioner's previous civil attorneys Neil, Derek and David Jokelson [The Jokelsons] who did not practice criminal law[1] and whom were present to support Petitioner to actively persuade Petitioner to enter this waiver), until Petitioner eventually and reluctantly entered into this waiver against Petitioner's will and desires. Petitioner was then sentenced to life in prison without parole and a consecutive term of twenty (20) to forty (40) years for attempted murder.

Nine days after being convicted and sentenced, on October 31, 2008, Petitioner forwarded a handwritten letter to the trial court seeking to withdraw this waiver on the basis of ineffective assistance of counsel ("IAC"). On January 10, 2009 Petitioner filed a timely pro se Post Conviction Relief Act Petition (PCRA), in an effort to demonstrate the invalidity of this waiver, citing ("IAC"). On April 26, 2013 and April 29, 2013, the PCRA court held an evidentiary hearing. At the conclusion of the evidentiary hearing, the court denied relief stating Petitioner had not demonstrated prejudice. On January 10, 2016, Petitioner filed a pro se habeas corpus petition asserting ("IAC"). After preserving this claim through all stages of state and federal courts, after being denied in this Third Circuit Court of Appeals April 4, 2018, and being denied rehearing on May 15, 2018, this timely petition for Writ of Certiorari follows before this Honorable Court.

[1] The Jokelson attorneys were not Pa.R.E. 801 qualified to represent defendants in capital cases nor do they prapctice criminal law.

When the state court ruled on the merit of the ("IAC") claims against capital counsel, it correctly found (and the appellate court agreed), that "Mr. McMahon was not prepared to represent Petitioner adequately at the penalty phase proceeding. Mr. McMahon was aware that Petitioner had suffered significant cognitive damage as a result of a beating by police officers. Appendix M, 4-26-13 N.T. at 59-60. However, Mr. McMahon did not secure a witness who could have explained to a degree of scientific certainty, the cognitive impairments that Petitioner suffered." However, although capital counsel did not prepare for the penalty phase hearing and conducted no investigation whatsoever, the state and appellate courts incorrectly denied Petitioner relief. Although Petitioner did not know of mitigation evidence available to him, although capital counsel could not have explained to Petitioner specific mitigation evidence which was avialable to be presented to a jury, because capital counsel failed to conduct any mitigating investigation in order to convey this informative evidence to Petitioner and inform Petitioner of its evidentiary significance.

The important question incorrectly decided by the appellate courts and now entreated to your magnanimous Court is distinct factually and legally collectively from "any" other questions. It has not been, but should be settled by this Court. Likewise, the appellate court's decision conflicts with [relevant] decisions of this court as well as [relevant] decisions of other appellate courts.

REASONS FOR GRANTING THE PETITION

["No court has ever addressed the waiver of a capital penalty phase altogether, and how to address prejudice in such instance"] where capital counsel was found to be constitutionally deficient and where four years later an expert (psychologist) Steven E. Samuel evaluated Petitioner's previous brain damage, as well as interviewed Petitioner's family members and found there to be at least six mitigating circumstances had capital counsel investigated.

If the United States Supreme Court does not grant Certiorari it will leave Petitioner condemned to a fundamental miscarriage of justice as well as similarly situated defendants who may be relentlessly swayed into entering an invalid waiver of their entire penalty phase and of their appellate rights.

Having your magnanimous Supreme Court decide this question is of such heightened importance, as it has not been settled by your Court and it leaves the lower courts without definite guidance or precedent in such instance as here, where in unison, both legally and factually, there has not been an identical question. Without your magnanimous guidance, fundamental injustices identical can prevail in the lower courts. The lower courts decision conflict with circuit decisons of nearly identical facts to the facts presented sub judice. The lower courts decision also conflicts with relevant decisions of this magnanimous Court.

The Petitioner has long maintained that he would have insisted on a penalty phase hearing if only capital counsel had been prepared to introduce mitigation evidence, had counsel conveyed this evidence to Petitioner and had capital counsel discussed the penalty phase process with Petitioner.

More troubling is that capital counsel had information of Petitioner's neurological injuries, as well as of Petitioner's troubling childhood. As noted by Psychologist Steven E. Samuel, Petitioner's "brain functioning is still impaired today." Capital counsel knew that Petitioner had been brutally beaten by Philadelphia Police. Dr. Samuel also found that substance abuse affected Petitioner's moral blameworthiness, and capital counsel ignored these leads.

With the wrongful convictions prevelant in Philadelphia, by way of police corruption, manipulation and contamination of material, anecdotal, and physical evidence in criminal prosecutions, it is of national importance of having your leadership, and magnanimous Supreme Court decide this question. Otherwise, an innocent defendant can be wrongfully convicted, commence to a penalty phase without competent counsel envisioned by the Sixth Amendment of the United States Constitution, but instead with constitutionally deficient counsel who can lock step before a penalty phase in a capital case without having conducted any investigation [sic] "whatsoever" into the defendants background and notwithstanding can propose to be effectively advising the defendant in an uninformed manner, to enter a waiver of his appellate rights (pardon and commutation), to forgo any appeal to any court to at some point prove their innocence. As well as forever foregoing the informed nature of mitigation evidence that was never conveyed to the defendant, mitigation evidence that could have outweighed aggravating factors overwhelmingly, or where the undiscovered mitigation evidence would have demonstrated the defendant had significant cognitive impairments which directly affects the defendants decision making, where a defendant could have been mentally retarded (or whose mental capacity was diminished and where the defendant was never eligible for the death penalty ab initio by law.

This is of national importance because without your magnanimous Court deciding this question, any person including the innocent and wrongfully convicted can be unconstitutionally snared into a waiver of their penalty phase and appellate rights in a similar fashion, to painfully, unconstitutionally, and unjustly languish in prison until death. Petitioner has no other judicial recourse, except to implore your judicial discretion. Petitioner painfully needs this Court's help and clarity on this single question. If not now, then how and when? The proceeding in the state and appellate courts "did not" afford Petitioner an opportunity to exercise all of his constitutional rights, (as Petitioner's right to weigh options of potential mitigation evidence was hampered and impeded by capital counsel's ineffectiveness) and the proceedings "did not" comport with federal law. Furthermore, the appellate courts are capriciously denying this appeal, frustrating and exasperating the rudimentary nature of justice and liberty for all. Petitioner is essentially begging this Court to address this question.

The United States Supreme Court has never explicitly expressed to what extent or lack thereof, is there a requirement or necessity of the "knowing and intelligent" nature of a waiver of a penalty phase (and appellate rights) in exchange for a life sentence. The United States Supreme Court has stated in SCHIRO V. LANDRIGAN, 550 U.S. 465 (2007), that "we have never required a specific colloquy to ensure that a defendant 'knowingly and intelligently' refused to present mitigation evidence."

However, the waiver of a penalty phase and refusing (or waiving the right) to present mitigation evidence are distingishable. As are the the two instances of (1) refusing (waiving the right) to present mitigation evidence, and (2) waiving the right to a penalty phase jury.

In any event, leadership by the United States Supreme Court is needed to address not the constitutionality of mitigation evidence, but whether the uninformed and unknowing nature (and existence) of such evidence due to counsel's constitutionally inadequate investigation, prejdice a defendant when mitigation evidence later discovered could reasonably have outweighed evidence in aggravation.

Demonstrating constitutonal right to present mitigation evidence

It has been long held by this Court that the Eighth and Fourteenth Amendment require that the sentencer "must not be precluded from considering, as a mitigating factor, any aspect of a defendant's character and in limiting the range of mitigating circumstances which may be considered by the sentencer, was constitutionally infirm. LOCKETT V. OHIO, 438 U.S. 586 (1978); SKIPPER V. SOUTH CAROLINA, 476 U.S. 1 (1986); BREWER V. QUARTERMAN, 550 U.S. 286 (2007); ABDUL-KABIR V. QUARTERMAN, 550 U.S. 233 (2007).

"Counsel has an 'obligation to conduct a thorough investigation for mitigation evidence.'" *WILLIAMS,* 529 U.S. at 396 (citing 1 ABA Standards for Crimial Justice 4-4.1, commentary, p. 4-55 (2d Ed. 1980)). "The investigation must include efforts to discover all reasonable available mitigating evidence, including information about medical history, educational history, employment and training history, [and] family and social history." WIGGINS V. SMITH, 538 U.S. 510, 524 (2003)(quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §§ 11.4.1(c), 11.8.6 (1989)(emphasis added). TAYLOR V. HORN, 504 F.3d 416; 2007 U.S. App. LEXIS 22448; STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

Without dispute, and without argument we can agree that defendants have a constitutional right to present mitigation evidence.

Likewise, the United States Supreme Court has explicitly addressed prejudice when challenging counsel's constitutionally inadequate investigation, which is to say that if "the available mitigating evidence taken as a whole, might well have influenced the jury's appraisal of [the defendant's] moral culpability, then prejudice has been shown. WILLIAMS V. TAYLOR, 529 U.S. 362, 397-98 (2000); *WIGGINS,* 539 U.S. at 538; SEARS V. UPTON, 561 U.S. 945 (2010).

Showing that this question has not been, but should be settled by this Court

The United States Supreme Court has never explicitly addressed prejudice where (the appellate courts found) that trial counsel failed to investigate mitigating evidence in preparation for a petitioner's penalty phase. Where capital counsel failed to investigate mental health evidence, develop life-history mitigation, evidence of substance abuse and dependence, or read prior expert medical records of petitioner's brain damage that was given to capital counsel for review by Neil Jokelson early on. See Appendix M, 4-26-13 Evid. Hear. N.T. at 176.

Notwithstanding, capital counsel relentlessly advises and urges Petitioner to enter a waiver of his penalty phase altogether and appellate rights (to challenge counsel's effectiveness), in exchange for an assured life sentence. Petitioner avers that such a predicament signals fundamental unfairness, as this ultimatum in a capital judicial process is without constitutonal protections. Leadership is now beckoned by your Honors to at once address the waiver of a penalty phase in such instance.

In IOWA V. TOVAR, 541 U.S. 77 (2004), the United States Supreme Court held:

> "that the constitution does require that any waiver of the right to counsel be knowing, voluntary, and intelligent-(and went on to state)-as of constitutional rights in the criminal process 'generally'-must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances. The information that a defendant must possess in order to make such an intelligent selection depends, in each case, upon the particular facts and circumstances surrounding the case, including (1) the defendant's education or sophistication, (2) the complex or easily grasped nature of the charge, and (3) the stage of the proceeding."

In the waiver of constitutional rights herein being a constitutional right to a penalty phase). With this basis established by the Supreme Court in *TOVAR,* couple this with the facts that Petitioner was not made aware of a penalty phase process by capital counsel, had suffered from cognitive brain damage and dropped out of school in the tenth grade due to his cognitive impairments and had never attended a trial before. This satisfies the unknowing and involuntary requirement in *TOVAR.*

It is logical to conclude that this is exactly the "constitutional rights in the criminal process" that "generally-must be a knowing and intelligent act," that the Supreme Court Justices spoke to in *TOVAR.*

All circuits agree that mitigation evidence is of constitutional dimension and any such waiver of this evidence must be made knowingly and intelligently with knowledge of fact specific mitigation evidence which has been discovered during investigation efforts.

Since JOHNSON V. ZERBST, 304 U.S. 458 (1938), your magnanimous Court has held that:

> " a defendant's waiver of trial rights cannot be given effect unless it is 'knowing' and 'intelligent'." ILLINOIS V. RODRIGUEZ, 497 177 (1990); emphasis on this holding with regard to a waiver was given SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218 (1972), at 241-242, stating: "a strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided...The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not 'unknowingly' relinquished the basic protections that the framers thought indispensable to a fair trial."

Because the waiver of mitigation evidence, and the waiver of a penalty phase are homogeneous existentially, Petitioner could only cite mitigation case law. As penalty phases are the tribunals by which mitigation evidence is presented and like a constitutionally deficient investigation of mitigation evidence (which is prepared for a penalty phase can be assessed for *STRICKLAND,* deficiency interchangeably with the former. Which is why Petitioner could only raise the following factual arguments in the appellate courts for this proposition.

In BATTENFIELD V. GIBSON, 236 F.2d 1215 (2001) the Tenth Circuit held that where *Battenfield* waived his right to present mitigation evidence, that his counsel did not investigate where an abundance of mitigation evidence was available had counsel investigated, and, by the discovery, the court found that *Battenfield* could not have waived a right to present evidence that was not known. *Battenfield* was granted a new sentencing hearing and the prejudice inquiry was to show a reasonable probablity that the mitigation evidence could outweigh the aggravating factors in the penalty phase. The court stated that "the ability of counsel to make strategic decisions and to competently advise without a reasonable investigation hampers the meaning of mitigation evidence and the availability of possible mitigation strategies.

In THOMAS V. HORN, 570 F.3d 105 (3d Cir. 2009), the Third Circuit Court of Appeals remanded the Disctrict Court's granting of a new penalty phase in THOMAS V. BEARD 388 F.Supp. 2d 489 (2005), for an evidentiary hearing solely to determine the extent of trial counsel's pre-sentence investigation efforts to obtain mitigation evidence. Where the District Court found that Thomas waiver to present mitigation evidence was made unknowingly, and Thomas was prejudiced because it was a reasonable probability that, for such evidence that was available had trial counsel investigated, it would have been powerful enough for a single juror to affect his or her sentencing decision. Likewise, the prejudice inquiry was a demonstration that the mitigation evidence that was not discovered by trial counsel could outweigh the aggravating factors had it been discovered by trial counsel. The court held that Thomas could not have full knowledge of what he was waiving, his waiver was not made knowingly, voluntarily, and intelligently, and it must be considered invalid.

In LYNCH V. SEC'Y DEPT. OF CORR., 897 F.Supp. 2d 1277; 2012 U.S. Dist. Lexis 136981 the District Court granted habeas relief finding that it was unreasonable for counsel to advise petitioner to waive a jury without first adequately investigating and advising him of the extent of available mental health mitigation, including his cognitive impairment, particularly given that counsel should have been aware of the potential existence of this powerful mitigation evidence as it was referenced in by Dr. Cox in his report.

The court found that the admission of brain damage evidence is a compelling mitigator for a jury to consider, and petitioner's reliance on his mental health as the only weighty mitigating factor in his defense, and Petitioner's concern about his judge's potential harshness, a reasonable probability exists that Petitioner would not have waived a jury at sentencing had counsel adequately investigated Dr. Cox's original diagnosis and advised Petitioner of his cognitive impairments. To determine prejudice, the court "reweighed the evidence in aggravation against the totality of available mitigating evidence."

In BLANCO V. SINGLETARY, 943 F.2d 1477, 1500-03 (11th Cir. 1991), the Court of Appeals for the Fifth and Eleventh Circuits held that the standard for sentencing prejudice in the context of waiver, when a defendant challanges [a waiver]...the question is whether there is a reasonable probability that absent errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." The court held that had Blanco relatives testified in mitigation, there was a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

In WILKES V. BOWERSOX, 145 F.3d 1006, 1015-1016 (8th Cir. 1998), the Court of Appeals for the Eighth Circuit stated:

> "it is clear that such a waiver cannot be knowing and intelligently made in the absence of full information about the nature of ones choice. First, counsel's duty to investigate reasonably and inform and advise his client must be fulfilled before either the lawyer or his client can decide what evidence to present; if counsel failed to investigate and advise, the petitioner's waiver was [not] knowing and intelligent and thus without legal effect." *Thomas,* [supra]

In COLEMAN V. MITCHELL, 268 F.3d 417, 449-50 (6th Cir. 2001), the Court of Appeals for the Sixth Circuit stated:

> "for the refusal to present mitigating mental health evidence to be an informed one, counsel must first fulfill its independent obligation to investigate, despite a defendant's express wishes to the contrary." "Our doubt as to counsel's mitigation strategy extends to counsel's ability to competently advise his client about purposes and strategy of mitigation."

The United States Supreme Court stated long ago in VON MOLTKE V. GILLIES, 332 U.S. 708, 724 (1948): "To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and 'circumstances in mitigation thereof," and all other factors essential to a broad understanding of the whole matter."

Non-applicable cases used by the appellate courts to deny relief

In denying relief the appellat ecourts used a cluster of various cases which involved waivers of appellate rights which were dissimilar legally or factually. See Appendix C, Magistrate Report and Recommendation (R&R). For wxample, in the Magistrates R&R which was adopted, the Magistrate cited UNITED STATES V. MABRY, 536 F.3d 231, 236 (3rd Cir. 2008), where Mabry challenged the fact that his attorney did not appeal his plea bargain, and this was the basis of Mabry's appeal.

The Magistrate cited WATTS V. WILSON, NO. 07-2820, 2008 WL 5094251 (E.D. Pa. June 27, 2008), where Watts was found guilty of first degree murder, and before sentencing Watts entered a waiver of his appellate rights in exchange for a life sentence and the death penalty being removed. Watts appealed and the habeas court found that Watts failed to allege circumstances demonstrating that his counsel's representation fell below an objective standard of reasonableness, resulting in an involuntary or unknowing waiver of his right. Further, Watts attorney during his colloquy professed that he had explained to Watts the likelihood of success in a penalty phase, and he thought that the jury could return with a death sentence. See Appendix C, (R&R) at 21.

The Magistrate [at pg. 29 fn. of R&R] cited; ALLEN V. SECRETARY FLORIDA DEP'T OF CORR. 611 F.3d 740, 762 & 764 n.14 (11th Cir. 2010), and *LANDRIGAN* [supra], in rejecting *BATTENFIELD* STATING "in light of" *LANDRIGAN* and *ALLEN*, the continued validity of Battenfield is in question. However, *LANDRIGAN, ALLEN* and *BATTENFIELD* all instructed their attorneys not to present mitigation evidence, where petitioner sub judice never instructed counsel not to present mitigation evidence, and yet [sic] capital counsel never discussed any mitigation stage or penalty stage with Petitioner whatsoever.

Unlike *LANDRIGAN* and *ALLEN,* Battenfield only instructed his counsel "at trial" not to present mitigation, and deficient performance was found by the circuit court in Battenfield with regard to counsel's failure to investigate "prior to trial", to uncover what turrned out to be a cache of mitigating evidence. The circuit court ultimately held that Battenfield's counsel could in no way effectively advise and inform Battenfiled on what course of action to take, where counsel had no knowledge of this information to begin with.

LANDRIGAN and *ALLEN* holdings are lucid to Petitioner, you can not vigorously instruct [or doggedly prevent counsel from investigating] counsel not to investigate, and in turn claim counsel failed to investigate, advise effective, or uncover favorable mitigation evidence.

Petitioner sub judice argued the premise that is so deeply rooted in Supreme Court precedent related to allegations of ineffective assistance in connection with the entry of a plea, related to advice, and whether that advice was within the range of competence demanded of attorney's in criminal case. HILL V. LOCKHART, 477 U.S. 52 (1985); McMANN V. RICHARDSON, 397 U.S. 759, 771 (1970); TOLLETT V. HENDERSON, 441 U.S. 258 (1970).

However, there is no rooted precedent specifying advice in the context of a waiver of a penalty phase. The state court cites COMMONWEALTH V. BARNES, 687 A.2d 1163, 1167 (Pa.Super. 1996), stating "a waiver of appellate rights is the functional equivalent of a guilty plea." However, the court flip-flops from guilty plea cases, to waiver of appellate right cases. When the epicenter of the claim presented involves the waiver of a penalty phase, not simply appellate rights. This hide and seek analysis makes challenging the constitutionality of this waiver impossible. As there is no precedent to the instant case, for that reason, this Court's leadership is implored as this forces Petitioner to anticipate in desperation what law will be applied by the appellate courts.

The Honorable and Bighearted Justices Stevens, Souter, Ginsburg, and Breyer spoke to this point in *LANDRIGAN,* of how "prisoners will be forced to file separate cliams in anticipation of every possible argument that might be made in response to their genuine claims." pg. 30 fn.7. In the Justices dissenting opinion, it also quoted *BATTENFIELD* for the principle adopted by the Tenth Circuit that "unless respondent knew of the most significant mitigation evidence available to him, he could not have made a knowing and intelligent waiver of his constitutional rights." Id., at 540 U.S. 491.

For all the reasons petitioner cited in *BATTENFIELD, GIBSON, THOMAS, LYNCH, BLANCO, COLEMAN and WILKES.* Because legally and factually the federal question presented instantly are the most similar to the above cases, yet the decision in denying relief conflicts with these relevant decisions. The facts are that counsel failed to conduct a constitutionally obligatory investigation in a capital case, and thus rendered constitutionally deficient representation pursuant to *STRICKLAND.*

The legal holdings are essentially that there cannot be a knowing, voluntary, and intelligent waiver of evidence that was not known by a defendant, where that evidence, after re-weighing mitigating and aggravating circumstances would not warrant death.

What more could petitioner have done to protect a fair process to protect his appellate rights, and to challenge to challenge the constitutionality of his incarceration. Petitioner hired a well known criminal attorney, rejected guilty pleas pre-trial, asserted his innocence, and maintained his innocence throughout. Petitioner wished not to waive mitigation evidence, a persuasive mitigation defense, a penalty phase, or his appellate rights, which was the only means by which to challenge the constitutionality of his conviction, and of counsel's ineffectiveness. Petitioner had no alternative, as the mitigation evidence was never known, the penalty phase process was never discussed.

Mischaracterization of Evidence and Conflated Interference in the Proceedings

Petitioner's counsel claimed to present the Jokelson attorneys to testify in mitigation, however all three of the Jokelson attorneys testified at the April 26, 2013 Evidentiary Hearing that capital counsel never prepared them for any testimony, and the PCRA court rejected this alleged defense proffered by capital counsel. See Appendix E, (PCRA Court Opinion) at pg.5 fn. Finding capital counsel deficient, but rejecting relief, stating petitioner received a life sentence prevents him from demonstrating prejudice.

The PCRA Court also improperly relied on COMMONWEALTH V. TIMCHAK, 69 A.3d 774 (Pa.Super. 2013) for the proposition that counsel's failure to investigate did not cause prejudice where that failure did not influence defendant's decision to plead guilty. In that case, Timchak instructed his counsel that he was guilty and wanted to take responsibility for his actions. Thus, Timchak's decision to plead guilty was made well before the plea discussions had even begun and counsel's advice was even rendered. That is a far cry from the instant case, where it took multiple lawyers an extended period of time to emotionally terrorize Petitioner into waiving his penalty phase and appellate rights. And, unlike Timchak, capital counsel's advice in the instant matter regarding the appellate waiver was irretrievably tainted by his own inability to have any meaningful discussions with Petitioner because capital counsel was unprepared to proceed. Thus, the PCRA court's determination that Petitioner was not prejudiced by counsel's derelictions was error.

The Jokelson attorneys were present during the day which a penalty phase was scheduled simply to show support for Petitioner, however, capital counsel in being woefully unprepared" exploited this opportuity and expoited the Jokelson attorneys. Off-the-cuff capital counsel summoned the Jokelsons to enter the record as counsel in spite the Jokelsons not being criminal attorneys:

THE COURT:"Mr. Glass, did you wish to proceed with the penalty phase sir?

PETITIONER: "Yes"

Capital counsel: "What"

Petitioner: "Yes"

Capital counsel: "Judge may we have a moment?"

Derek Jokelson: "May I your honor?"

Mr. Barry (ADA): "You may state your name for the record"

Derek Jokelson: "Derek Jokelson, Your Honor, member of the Bar"

Capital counsel: "An Attorney"

The Court: "Yes, I know that. I just wanted the record to reflect who it is."

(Defense confer with defendant)

See Appendix J (Sentencing N.T. pg. 18 line 23-pg. 19 line 15).

The Court: "Okay. So did you all wish to talk to your client or are we ready to start presenting evidence? Do you want to talk to him in the booth?"

Derek Jokelson: "I think so"

The Court: "Go ahead"

Derek Jokelson: "I'm a stranger to the proceedings up to this point, Your Honor. It seems to me as a matter of logic it would be unnecessary since the jury has found what the jury has found."

See Appendix J, Id. at pg. 34 line 4-14

Petitioner asserted his innocence, and Derek Jokelson was so involved that he cajoled petitioner into admitting guilt, and regaled the court to call the supervisor of the District Attorney's Office to persuade acceptance of this waiver without any guilt admission. This request was rejected by the prosecution, and counsel and the court worked in unison to urge petitioner to admit guilt. Id. October 22, 2008 N.T., pg. 34 line 15 thru pg. 35 line 10. The United States Supreme Court recently rejected this practice in MCCOY V. LOUISIANA, 2018 U.S. LEXIS 2802 (allowing defense counsel to concede guilt, at the guilt and sentencing phases of a capital trial, violated the Sixth Amendment and warranted a new trial because it constituted structural error since counsel's admission blocked the defendant's Sixth Amendment right to make fundamental choices about his own defense).

Capital counsel summoned the Jokelsons to advise petitioner (in an attorney-client way) to enter this waiver, expressing the view to the Jokelsons that petitioner had no potential appellate issues. However, this basis was misplaced, as counsel cannot assess his own effectiveness. The United States Supreme Court rejected this practice in KNOWLES V. MIRZAYANCE, 556 U.S. 129 S. Ct. 2009, U.S. LEXIS 2329 (finding no "nothing to lose" precedent for attorneys to use advising defendants).

Furthermore, the PCRA court has since found that capital counsel was constitutionally deficient in failing to investigate. Notably, capital counsel had just two days prior preserved at least two appellate claims:

Capital Counsel: "I have a couple of objections to the closing."
See Appendix L, October 17, 2008 N.T. pg. 89 line 4-5.

Capital Counsel: "I strongly object to that. That's not in evidence."
Id. at pg. 144 line 3-5. Capital counsel reserved several additional issues for appeal during trial.

Petitioner was jack potted and blindsided with a waiver ultimatum, and was never given an option as to what mitigation evidence was available, and how it could be presented.

The very first words that capital counsel stated on the day the penalty phase was to begin were; "We're not ready. We're just not ready." Appendix J (N.T. pg. 3 line 3). Capital counsel himself was aware that he failed to prepare for a capital case as the constitution requires. Capital counsel then began to misrepresent facts of alleged witnesses which he had spoken to and interviewed, however during April 26, and April 29, 2013 evidentiary hearing, it was made clear that capital counsel had not spoken to "any" of petitioner's family members: See Appendices M and N, (Evid. Hear. N.T.):

Inez Glass (Petitioner's sister) testified that counsel never spoke with her at all. April 26, 2013 N.T. pg. 249 line 10-12.

Priscilla Glass (Petitioner's mother) testified that counsel never spoke to her. April 26, 2013 N.T. pg. 283 line 22 thru pg. 284 line 2 and pg. 286 thru pg. 287 line 3.

Reuben Glass (Petitioner's father) testified that the first time counsel mentioned a penalty phase was after a verdict was read one day prior to sentencing. April 29, 2013 N.T. pg. 7 lines 24-25, and pg. 21 thru pg. 22 line 24.

Petitioner himself testified that counsel never mentioned a penalty phase whatsoever. Id., April 29, 2013 N.T. pg. 73 line 7.

Derek Jokelson testified that counsel never spoke to him in preparation. April 26, 2013 N.T., pg. 236 line 7-9.

David Jokelson testified "never was he asked to testify." April 26, 2013 N.T. pg. 269 line 24 thru pg. 270 line 3.

Neil Jokelson testified "he had not been prepped." April 26, 2013 N.T. pg. 184 line 8.

Doctor Steven E. Samuel's Expert Findings

The PCRA court granted funds to retain expert forensic psychiatrist Steven E. Samuel, to evaluate petitioner. To investigate potential mitigation evidence which capital counsel failed to uncover. The following is a summary of Dr. Samuel's conclusions as to what should have been done at the criminal trial and as to mitigation:

a) That Doctor Orrin Devinsky (who was Chief of the Department of Neurology at NYU Medical School), as well as Elkhonon Goldberg, Ph.D., (a Clinical Professor of Neurology also at NYU), whom initially examined petitioner for his brain injuries in 1995. Should have been contacted by counsel, and should have testified at the penalty phase hearing.

b) That the defendant should have been administered neurological and neuropsychological assessments prior to the 2008 trial.

c) It was likely that the brain damage Mr. Glass sustained in 1998 would have continued to affect him in 2008 trial.

d) That as a result of Dr. Samuel's examination and testing, it was Dr. Samuel's opinion that the defendant continued to suffer from mild to moderately severe neuropsychological deficits, and the doctor concluded that the defendant's brain functioning was impaired, which was the same conclusion reached by Dr. Goldberg and Dr. Devinsky in 1995.

e) That the defendant's family and friends should have been prepared to offer penalty phase testimony, those people including the defendant's father Reuben Glass; mother Priscilla Glass; sisters Inez, Iisha, Saffiyah, and Saleemah Glass, sister Syreeta Robinson, brother Glenn Butler, and step mother Jane Malloy.

f) Dr. Samuel believes that the defendant was abusing marijuana, Percocet and large quantities of alcohol daily at a time proximal to the crimes in question, and that the doctor concluded that the defendant would have been diagnosed with alcohol abuse, cannibis abuse and narcotics abuse at the time proximal to these crimes, and same could be mitigating factors to have been presented to a jury. See Appendix I, Dr. Samuel's forensic report of evaluation.

Mischaracterization of Testimonial Evidence

In denying relief the Magistrate in it's (R&R) report states that "petitioner testified that Mr. McMahon (capital counsel) played no role in his decision to waive his appellate rights." Appendix C, Magistrate R&R, pg. 16. However, this is a mischaracterization of facts, as petitioner never gave such testimony. The Magistrate unfairly and improperly deduced this hypothesis from the following testimony offered by petitioner four years later, at the April 29, 2013 evidentiary hearing:

> Mr. Rudenstein (petitioner's previous PCRA counsel): "When you were talking to the folks that day, everybody that was there and everybody that talked to, were you looking at Mr. McMahon as your primary advisor or any of the Jokelsons or anyone else?"
>
> Petitioner: "Listen, I never really paid Mr. McMahon no mind from day one. I gave him his defense. I gave him his opening statements. I did that. He never did nothing. That's why I said when he came to see me, he never discussed a defense.
>
> Anyway, I wasn't -- I wasn't listening to his opinion. It was Neil -- it was the Jokelsons that coaxed me into taking a waiver. They shrouded me with two on one side, and Jack was whispering things, but it was them rubbing my back as I said it. "Go through with it," you know, and all that kind of stuff. I -- no way in the world I would have did it."

Appendix N, pg. 81 line 25 thru pg. 82 line 19.

For the Magistrate to state that "petitioner testified that capital counsel played no role in his decision to waive his appellate rights," is an utter mischaracterization. As petitioner never decided to enter a waiver, the decision was made by a barrage of attorneys whom bullied petitioner, were constitutionally deficient, and that were non-criminal attorneys. Petitioner's testimony should have denoted the fact that capital counsel never prepared for this capital case in the trial phase, the only phase in the proceeding that petitioner could have "gave him [counsel] his defense." What should have been deduced and inferred from this testimony is that because petitioner was overwhelmed with three non-criminal attorneys whom were sitting at the bar of the court as counsel, (See Appendix J, N.T. pg. 36 line 21-23), that they relentlessly urged petitioner to enter this waiver. That petitioner refused to listen to capital counsel's opinion to enter this waiver, hence why capital counsel improperly summoned the Jokelson attorneys to advise petitioner under the guise of criminal attorneys. And that counsel never "discussed a defense with Petitioner."

The PCRA court also used solely this testimony by Petitioner to infer "petitioner generally ignored" capital counsel to deny relief, however this inference is misplaced, and neither court cites any decisional law or precedent to support such rash summary dismissals. Petitioner did not testify that "capital counsel played no role in his decision to enter a waiver, absolutely incorrect."

Next, the Magistrate and the PCRA court uses the fact that Petitioner did not know at "the moment" that capital counsel was not prepared, and fuses the former mischaracterization that petitioner allegedly ignored capital counsel's input, to arbitrarily deny petitioner relief. Capital counsel "himself" during his lengthy testimony during the evidentiary hearing, never "hinted" at an idea of Petitioner ignoring his input. See Appendix M (Capital counsel's testimony) at pg. 3-157. Further, the appellate court's cites no support, or authority for this Petitioner did not know at the time finding. In any event, nearly any defendant whose counsel are later found to be deficient would not know at the time, which is why relief should be granted for counsel's deficient stewardship.

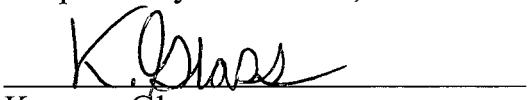
PREJUDICE

Petitioner earnestly and humbly ask your magnamimous court whether prejudice in this instance must be to determine a reasonable probability that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. (Quoting STRICKLAND, 466 U.S. at 695). Petitioner respectfully request a New sentencing hearing, and Restoration of his Appeal rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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