


No. 19-7476

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IN THE  
*Supreme Court of the United States*

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TIMOTHY WAYNE KEMP,

*Petitioner,*

—v.—

DEXTER PAYNE, DIRECTOR,  
ARKANSAS DEPARTMENT OF CORRECTIONS,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**BRIEF FOR *AMICUS CURIAE* AMERICAN BAR  
ASSOCIATION IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The American Bar Association (ABA) is the largest voluntary association of attorneys and legal professionals in the world. Its members include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.<sup>2</sup>

Since its founding in 1878, the ABA has advocated for the improvement of the justice system. Part of its mission is to serve the public and the legal profession by advocating for the ethical and effective representation of all clients.

Although the ABA takes no position on the death penalty itself, it believes that the death penalty must be enforced in a fair and unbiased manner, with appropriate procedural protections. It considers the right to effective assistance of counsel and the preservation of the writ of habeas corpus to be essential elements of a judicial system that permits the death penalty. In 1986, the ABA founded the ABA

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<sup>1</sup> No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. Timely notice of intent to file this brief was provided and all parties consented to the filing of this amicus brief.

<sup>2</sup> Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.



Death Penalty Representation Project to provide training and technical assistance to judges and lawyers in death penalty jurisdictions. Through its work, the ABA is the leading national authority on norms for capital defense.

Specifically, in 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment of Performance Counsel in Death Penalty Cases* (ABA Guidelines), which were designed to “amplify previously adopted [ABA] positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel.” ABA Guidelines, intro. cmt. (1989).<sup>3</sup> The Guidelines were the result of an in-depth process for ascertaining the prevailing practices for capital defense across the country. In February 2003, the ABA approved revisions to the ABA Guidelines to update and expand upon the obligations of lawyers in death penalty jurisdictions to ensure due process of law and justice.

In *Strickland v. Washington*, 466 U.S. 668, 688 (1984), the Supreme Court held that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” While the Guidelines are not prescriptive, they describe the prevailing professional norms at the time of their publication, as recognized by this Court. *Id.* at 688 (“Prevailing norms of practice as reflected in American Bar Association standards and the like

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<sup>3</sup> ABA Guidelines, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/aba\\_guidelines/](https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/) (last visited Feb. 24, 2020).

... are guides to determining what is reasonable, but they are only guides.”). The Guidelines offer quantitative and qualitative benchmarks for determining whether counsel performed reasonably. They have been cited favorably by courts in more than 350 reported opinions and adopted in substantive part by numerous capital jurisdictions.

The ABA routinely tracks the use of the Guidelines in capital cases and its staff are nationally recognized experts on the requirements for defense efforts in capital cases. Based on this expertise, the ABA has identified a trend of which this case is emblematic. Some courts disregard evidence of prevailing professional norms at the time of the challenged performance, including the ABA Guidelines. The courts’ subsequent conclusions about whether counsel’s performance was reasonable are therefore not tethered to any benchmark or standard of professional norms in place at the time of the representation. Such outcomes are both antithetical to this Court’s jurisprudence addressing the evaluation of the effective assistance of counsel claims and problematic in protecting the meaning of assistance of counsel under the Sixth Amendment.

The issues raised in this case are important and worthy of the Court’s consideration. The ABA submits this brief as *amicus curiae* in support of Petitioner and respectfully requests that the Court grant the petition for certiorari to address the proper evaluation of attorney performance in cases raising ineffective assistance of counsel claims.

## SUMMARY OF ARGUMENT

Timothy Wayne Kemp has demonstrated, and the district court below has recognized, that he would likely not have been sentenced to death had his attorneys presented to the sentencing court the more complete mitigation evidence subsequently presented to the habeas court. Both the district court and the Eighth Circuit have also acknowledged that trial counsel's performance was inconsistent with ABA standards and other evidence of professional norms as they existed at the time of Kemp's trial. But both courts nevertheless concluded that counsel's performance was "reasonable" under the Sixth Amendment. These incompatible findings on the two prongs of the *Strickland* test are the direct consequence of the lower courts' failure to consider evidence of prevailing professional norms, a problem that has become widespread among state and federal courts determining claims of ineffective assistance of counsel.

The standard governing the Sixth Amendment's right to counsel remains today what this Court first articulated in *Strickland v. Washington*: counsel's performance must be reasonable under "prevailing professional norms." But the Eighth Circuit and district court, like many other courts, seized on language in *Bobby v. Van Hook*, 558 U.S. 4 (2009), to justify a wholesale abandonment of not only relevant ABA standards, but also of the "prevailing professional norms" inquiry. The result is a standard for ineffective assistance of counsel that is devoid of substance, one where a prisoner could meet the extremely high burden of

showing that counsel's performance made a fatal difference in the outcome of the case, and yet a court could conclude without supporting evidence that counsel's performance was reasonable.

The Court should grant the petition to restore the "prevailing professional norms" analysis to its proper place in the Sixth Amendment framework and to reaffirm that courts should look to available evidence of prevailing professional norms to assess counsel's performance, departing from those norms only when there is a reason to do so.

## ARGUMENT

### **I. The unusual posture of this case provides an opportunity to correct a pervasive error in the application of *Strickland v. Washington*.**

This case presents the Court with a rare opportunity to evaluate and correct the troubling misapplication of its foundational decision in *Strickland*, 466 U.S. at 688. Instead of following this Court's instruction that the reasonableness of counsel's performance should be evaluated based on prevailing professional norms, habeas courts routinely disregard those norms and substitute an unsupported judgment of what reasonableness entails. This error is routinely masked by a court's finding, in the alternative, that even if counsel's performance was deficient, it was not prejudicial. *Rhode v. Hall*, 582 F.3d 1273, 1286-87 (11th Cir. 2009) (finding no deficient performance but noting even if performance was deficient, there was no prejudice); *Coble v. Davis*, 682 F. App'x 261, 280-82 (5th Cir.

2017) (affirming district court's ruling that counsel's performance was not deficient, but even if it was, petitioner's ineffective assistance of counsel claim failed due to lack of prejudice).

Here, the Court has been presented with findings that expose the defects in the analysis being conducted by numerous courts. The district court found that better performance from Kemp's trial counsel likely would have changed his sentence from death to life. The district court and Eighth Circuit also agreed that counsel's performance fell below prevailing professional norms, but inexplicably concluded that counsel's performance was not deficient. The logical and legal flaws in these decisions expose a more extensive problem that will likely continue unabated without this Court's attention: the widespread failure of habeas courts to consider prevailing professional norms.

**A. Counsel's failure to hire a mitigation investigator or perform a more robust background investigation fell below relevant benchmarks for reasonable counsel performance.**

Kemp challenges his counsel's performance on several grounds, including that his attorney was constitutionally ineffective by failing to uncover reasonably available, relevant evidence that could have been offered in mitigation. A review of the record shows that Kemp is correct. Had his attorney fulfilled his duty to conduct a thorough investigation of Kemp's background consistent with the Sixth Amendment and prevailing professional norms, the lawyer would

have discovered evidence that would have likely saved Kemp from a sentence of death.

Kemp's attorney conducted the mitigation investigation alone, with no assistance from other attorneys or a mitigation specialist. He admitted that he failed to take steps that would have yielded significant mitigation evidence. App. B 33. Although he interviewed four people from Kemp's past, Kemp's attorney did not learn the full extent of Kemp's abusive childhood or discover that he had fetal alcohol spectrum disorder and post-traumatic stress disorder. App. B 33-34. As a result, this evidence was not presented at either of Kemp's two trials.

The district court recognized that had this "compelling" evidence been properly investigated and presented in mitigation, it would have made the difference between life and death for Kemp. App. B 26. But both the district court and the Eighth Circuit ruled that the investigation performed by Kemp's counsel was sufficiently thorough to discharge his duty to provide effective assistance of counsel. App. A 18-19; App. B 29-32.

The longstanding constitutional benchmark used to measure an attorney's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523-24 (2003). Since *Strickland* was decided, and consistent with the "prevailing professional norms" inquiry imposed by it, this Court has recognized that the ABA Guidelines and other ABA standards specifically reflect "well-defined norms" that are "guides to determining what is

reasonable.” *Strickland*, 466 U.S. at 688; *see also Florida v. Nixon*, 543 U.S. 175, 191 (2004).

Kemp offered significant evidence showing the mitigation investigation was not conducted in a manner consistent with then-prevailing professional norms. Kemp offered the testimony of Sean O’Brien, an experienced capital attorney and law professor, who testified that “[p]revailing professional norms in 1994 and 1997 called for ‘a fully staffed defense team [with] two lawyers and an investigator and a mitigation specialist.’” App. A 15. The district court found that O’Brien’s testimony was “admissible evidence on what a *reasonable* capital defense attorney would have done in 1994 and 1997.” App. B 32-33 (emphasis added). Consistent with that testimony, the commentary to the 1989 ABA Guidelines states that “counsel cannot adequately perform the necessary background investigation without the assistance of investigators and others.” App. A 15. Kemp also offered more than 18 professional journal publications or training materials that predated or coincided with Kemp’s two trials that addressed various issues presented by Kemp’s background, including fetal alcohol spectrum disorder. Pet. at 12.

**B. The Eighth Circuit failed to engage substantively with prevailing professional norms at the time of Kemp’s sentencing and resentencing hearings.**

The district court and Eighth Circuit did not engage with this evidence on the prevailing professional norms in 1994 and 1997, maintaining that “[a]lthough the Supreme Court has looked to sources such as the ABA Standards in assessing the reasonableness of counsel’s performance . . . the Court has emphasized that such sources serve only as guides.” App. A 16; *see also* App. B 32. Instead, the courts found the performance of Kemp’s attorney to be reasonable merely by comparing it favorably to other cases in which counsel’s performance was deficient. *See* Russell Stetler & W. Bradley Wendel, *The Norms of Capital Representation*, 41 HOFSTRA L. REV. 635, 676-681 (2013) (discussing inherent problems with use of ineffective assistance cases as benchmark for the *Strickland* standard.) The courts did not look to any benchmarks or other professional standards to evaluate the reasonableness of the attorney’s performance. These decisions are grounded in the erroneous assumption that the advisory nature of the Guidelines means that they may be disregarded as irrelevant without reasoning or justification for doing so, and without identification of other evidence of prevailing professional norms.

Specifically, the Eighth Circuit’s opinion disregarded prevailing professional norms, including the ABA Guidelines, testimony from an expert witness describing the standard of care at the time of



both sentencing proceedings, and relevant Arkansas Supreme Court jurisprudence. App. A 15. The Eighth Circuit did not engage in any legal analysis concerning what constituted prevailing professional norms at the time in order to conduct the *Strickland* inquiry and instead summarily concluded that counsel's performance was not deficient.

The Eighth Circuit decided that the conduct of Kemp's counsel, including conducting his own mitigation investigation, failing to contact additional family members and failing to identify Kemp's fetal alcohol spectrum disorder, was reasonable. The court baldly concluded that "[i]n 1994 and 1997, there was no absolute requirement that counsel hire—or seek funds to hire—an investigator or mitigation specialist" but that all trial counsel was obligated to do was "conduct a thorough investigation of the defendant's background." App. A 16. The court did not consider evidence of what would have been considered a "thorough investigation" at that time. The court substituted its subjective view of appropriate conduct without engaging in any meaningful way with the prevailing professional norms for the capital defense bar in 1994 and 1997.

But the performance prong of the *Strickland* inquiry is "necessarily linked to the practice and expectations of the legal community." *Eaton v. Wilson*, No. 09-CV-261-J, 2014 WL 6622512, at \*94 (D. Wyo. Nov. 20, 2014) (citing *Strickland*, 466 U.S. at 688). Those practices and expectations are reflected in the collections of professional norms themselves, which have been compiled for the express purpose of providing a normative baseline to measure counsel

performance. For example, the ABA Guidelines were the culmination of years of work to articulate and draft standards by various organizations of advocates. Russell Stetler & Aurélie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731, 741-42 (2015). The ABA Guidelines thus “distill the combined experiences of numerous individuals working in all parts” of the capital defense field. Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 903 (2003). As the History to Guideline 1.1 states, “these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.” ABA Guidelines, Guideline 1.1(A); *see also* Freedman, 31 HOFSTRA L. REV. 903 at 903 n.5 (ABA Guidelines “serve as a benchmark for measuring whether. . . lawyers are rendering effective assistance in individual cases”).

Courts thus must identify the prevailing norms at the time and then compare counsel’s performance to those norms to resolve the factual aspect of the mixed question of law and fact inquiry. *E.g.*, *Johnson v. Bagley*, 544 F.3d 592, 599 (6th Cir. 2010) (comparing ABA Guidelines regarding witnesses and evidence at penalty phase of capital case to counsel’s performance during investigation phase of trial); *Hamblin v. Mitchell*, 354 F.3d 482, 492 (6th Cir. 2003) (finding counsel’s performance deficient for electing not to investigate or prepare mitigation case because of statement from client, a practice directly advised against in ABA Guidelines). Otherwise, the “prevailing professional norms” inquiry is devoid of substance and contrary to *Strickland*.

**II. The Court should grant certiorari to provide guidance concerning the inquiry into prevailing professional norms under *Strickland* and how evidence of these norms is to be adduced.**

**A. The Eighth Circuit’s analytical errors are representative of a larger trend.**

Like the Eighth Circuit and the district court here, a review of the caselaw demonstrates that other federal and state courts have determined that evidence of prevailing norms is irrelevant to the *Strickland* inquiry. As justification for the departure from *Strickland*, courts frequently seize upon this Court’s 2009 *per curiam* decision in *Bobby v. Van Hook*, 558 U.S. 4 (2009). The misinterpretation of this narrow decision threatens to undermine much of the foundation of *Strickland*. See Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA’s Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279, 1286-87 (2018).

For example, in *Coleman v. Thaler*, a Texas district court rejected a claim that trial counsel’s mitigation performance was deficient, noting that: “Petitioner pitches most of her argument that there was not a thorough mitigation investigation on the contents of the [ABA Guidelines]. Even if petitioner had provided the court with reasoned factual support for a contention that the ABA Guidelines were not followed, the court would not be persuaded.” No. 4:11-CV-542-A, 2012 WL 171549, at \*16 n.10 (N.D. Tex. Jan. 20, 2012) (citing *Van Hook*, 558 U.S. at 13-14 (Alito, J. concurring)). Federal courts in California,

Florida, Mississippi, Ohio, South Carolina, and Utah reached similar conclusions. *E.g.*, *Dickey v. Davis*, 231 F. Supp. 3d 634, 674 (E.D. Cal. 2017); *Rhodes v. Sec’y, Dept. of Corr.*, Case No. 8:09-cv-1350-T-17TBM, 2010 WL 3819358, at \*30 (M.D. Fla. Sept. 30, 2010); *Walker v. Epps*, Civil Action No. 1:97-CV-29KS, 2012 WL 1033467, at \*57 (S.D. Miss. Mar. 27, 2012); *Fulks v. United States*, 875 F. Supp. 2d 535, 556-57 (D.S.C. Aug. 20, 2010); *Hasan v. Ishee*, Case No. 1:03-cv-288, 2010 WL 6764154, at \*4 (S.D. Ohio Dec. 29, 2010); *Lafferty v. Crowther*, Case No. 2:07-CV-322, 2016 WL 5848000, at \*3-4 (D. Utah Oct. 5, 2016).

State courts have followed this trend as well. In *State v. Craig*, the Ohio Court of Appeals selectively relied on *Van Hook* in order to sidestep any inquiry into “prevailing professional norms.” No. 24580, 2010 WL 1052203, at \*3-4 (Ohio Ct. App. Mar. 24, 2010). A virtually identical approach was taken by the Court of Criminal Appeals of Oklahoma. *Coddington v. State*, 259 P.3d 833 (Okla. Crim. App. 2011). And, by attributing the “limited relevance” language from the concurring opinion in *Van Hook* to the full Court, the Pennsylvania Supreme Court has gone so far as to reject the entire line of case law, starting with *Strickland*, that recognizes the relevance of restatements of norms. *Com. v. Spatz*, 627 Pa. 257, 328–29 (Pa. 2014). The court categorically ruled that the ABA’s opinions could not be utilized by courts to assess attorney performance. *Id.* (“The unanimous U.S. Supreme Court in *Van Hook* addressed at some length the limited relevance of the ABA Guidelines in identifying practice norms, and thus the *inability of the ABA’s opinions to serve as a basis to assess attorney performance.*”) (emphasis added).

Unmoored from the prevailing professional norms inquiry required by *Strickland*, courts often reach summary conclusions based on the court's own ideas of "reasonableness." For example, in *Coleman v. Thaler*, the court failed to explain the basis for its substantive conclusions at all. 2012 WL 171549, at \*16. In *Walker v. Epps*, the court ruled that counsel's performance was based on nothing more than the court's own notions of adequacy. 2012 WL 1033467, at \*57.

By contrast, other courts correctly assess the evidence of prevailing professional norms at the time and then compare counsel's performance to those norms. In *Morris v. Beard*, the court noted that its first function was to identify the prevailing professional norms at the time of the trial, and then "determine whether trial counsel's conduct at sentencing fell below these norms and, if so, whether the petitioner suffered prejudice thereby. Civil No. 01-3070, 2012 WL 4757868, at \*10 (E.D. Pa. Oct. 5, 2012). "One source for determining the prevailing professional norms is found in the American Bar Association standards for criminal justice." *Id.* Similarly, in *Canape v. State*, the court examined various standards to conclude that "[c]ounsel's failure to utilize an investigator under the circumstances was inconsistent with prevailing professional norms around the time of his performance." No. 62843, 2016 WL 2957130, at \*3 n.7 (Nev. May 19, 2016). Likewise, in *Sasser v. Kelley*, the court recognized that the ABA Guidelines were not binding, but that they were evidence that counsel's failures were unreasonably deficient "without some articulated reason why postconviction counsel would deliberately ignore

them. . . .” 321 F. Supp. 3d 900, 917 (W.D. Ark. 2018); *see also Hooks v. Workman*, 689 F.3d 1148, 1201 (10th Cir. 2012) (“We judge counsel’s performance by reference to prevailing professional norms, which in capital cases include the [ABA Guidelines].”) (internal citations and quotations omitted); *Chatman v. Walker*, 773 S.E.2d 192, 202 (Ga. 2015) (affirming circuit court finding of deficient performance for failure to investigate mitigation evidence and rejecting State’s argument that circuit court erred by relying on ABA Guidelines, instead agreeing that circuit court had properly evaluated counsel’s performance for reasonableness under prevailing professional norms).

**B. *Bobby v. Van Hook* did not disturb the robust body of jurisprudence that supports reliance on the ABA Guidelines for evidence of prevailing professional norms.**

*Bobby v. Van Hook* did not alter the *Strickland* framework. Indeed, the Court relied almost exclusively on *Strickland* to overturn the Sixth Circuit. Citing *Strickland*, the Court explained that “[r]estatements of professional standards . . . can be useful as ‘guides’ to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.” *Van Hook*, 558 U.S. at 7. That is precisely what the qualifier “prevailing,” as included in *Strickland*’s articulation of the operative standard, means—and it is exactly what *Strickland* meant when it directed courts to “evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. In *Van Hook*, the Court then described the differences

between the ABA Guidelines that existed at the time of the trial and those that were published in 2003 and relied on by the Sixth Circuit, concluding: “Judging counsel’s conduct in the 1980’s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial—was error.” 558 U.S. at 17.

Shortly after *Van Hook*, this Court revisited and reaffirmed its Sixth Amendment standards in *Padilla v. Kentucky*. 559 U.S. 356 (2010). In articulating the *Strickland* standard, the Court emphasized that “[t]he first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community.” *Id.* at 366. Citing *Van Hook*, the Court emphasized that ABA standards are “only guides” and not “inexorable commands,” but nevertheless noted that “these standards may be valuable measures of the prevailing professional norms of effective representation . . . .” *Id.* at 366-367. Relying on various standards promulgated by National Legal Aid and Defender Association, the Department of Justice, and the ABA, as well various books, treatises, and journal articles, the Court concluded that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* at 367; *see also Missouri v. Frye*, 566 U.S. 134, 145 (2012) (referring to ABA Standards and noting that although “the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.”). Thus, *Padilla* serves to reaffirm that the ABA Guidelines and other

standards remain relevant to the assessment of prevailing professional norms.

**C. Prevailing professional norms remain integral to the performance prong of *Strickland*.**

Although this Court has avoided any rigid definition of professional norms, *Strickland* and its progeny show that consideration of whether an attorney's performance was reasonable is inextricably linked to the underlying inquiry of "prevailing professional norms." While nothing in *Strickland* deemed prevailing professional norms, as reflected in the ABA Guidelines, inexorable commands; nothing in *Strickland* permitted courts to disregard prevailing professional norms either.<sup>4</sup> The flurry of judicial pronouncements on where the ABA Guidelines belong in the Sixth Amendment framework obscures the real issue: courts must engage with evidence in making the factual determination of what the prevailing professional norms in fact are. They must have some benchmark against which to compare attorney performance to determine whether it is reasonable.

The Court need look no further than the instant case to divine the reasons why. The Sixth Amendment and this Court's precedents require counsel to conduct a thorough mitigation

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<sup>4</sup> The Court recently struck down a lower court's attempt to disregard medical evidence in the context of intellectual disability claims. *See Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) ("[B]eing informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.").



investigation and ensure that all reasonably available, relevant evidence is presented to the jury during sentencing. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Presenting an effective mitigation case requires knowledgeable professionals to develop a detailed picture of the defendant’s life experiences, background, and character and is often the only way defense counsel can humanize their clients to save their lives. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (evidence of defendant’s background is necessary component of sentencing phase “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 or mental problems, may be less culpable than defendants who have no such excuse.”). As the courts below recognized, Kemp’s counsel failed to uncover and present reasonably available evidence on Kemp’s background and life experiences that would have prevented Kemp’s death sentence. These facts demonstrate precisely why the prevailing professional norms in 1994 and 1996 included having a mitigation specialist or other person to assist the lead attorney in investigating, developing, and presenting facts about the mitigation case—because otherwise, reasonably available evidence remains undiscovered and counsel is unable to fulfill his duty to conduct the thorough investigation that is required by *Strickland*.

Although both the Eighth Circuit and the district court recognized that courts consider professional norms, neither court engaged meaningfully with any of the prevailing professional norms for the capital defense bar during the relevant time period. While the ABA Guidelines or other

evidence on standards of practice are “only guides,” they are *guides*—and should be, at the very least, *considered* as part of a definitive finding by the reviewing court as to what constitutes the prevailing norms at issue in the case. *Van Hook*, 558 U.S. at 7 (quoting *Strickland*, 466 U.S. at 688). Unless a reviewing court establishes “prevailing norms” and measures counsel’s performance against those norms, it is not conducting the analysis required by *Strickland*. Disregarding benchmarks and standards of professional practice like the ABA Guidelines and other evidence of prevailing professional norms deprives *Strickland* of its meaning and, ultimately, defendants of their constitutional right to counsel.

**CONCLUSION**

The Court should grant the petition for certiorari.

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Respectfully submitted,

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