IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY

COMMONWEALTH OF PENNSYLVANIA :

V. : No. CP 39 CR 0055-1994 HARVEY MIGUEL ROBINSON :

# DEFENDANT’S *EX PARTE* MOTION FOR TWO-MONTH CONTINUANCE

The defendant, Harvey Miguel Robinson, by his attorney, Daniel Silverman, Esquire, respectfully requests that the Court re-schedule this trial until mid-June 2011 because counsel cannot be prepared to effectively represent the defendant before that time, and in support thereof respectfully represents the following:

1. Facts Necessitating Continuance
   1. Defendant is scheduled for a capital re-trial beginning April 4, 2011.
   2. Since the moment undersigned counsel was appointed on September 17, 2010, he has been diligently preparing for trial. He has reviewed voluminous materials, conducted extensive legal research, drafted and filed abundant and complex legal motions, supervised the gathering of mitigating evidence, and repeatedly met and consulted with colleagues and experts in the field of capital litigation among many other tasks. On average, counsel has been working on this case several hours a day, including weekends, and for the past few months has been working practically non-stop just on this case. Counsel has cleared out his calendar between now and June 2011 in order to prepare this case the proper way.
   3. On January 10, 2011, the defense team, including the mitigation specialist, met to gauge the status of the mitigation investigation. It became clear immediately that there was no possible way that counsel could effectively represent the defendant at trial if trial were to commence April 4, 2011. To date, the mitigation specialist has reviewed over 10,000 pages of materials and compiled a list of witnesses to be interviewed (many of whom are very difficult to locate 18 years after the incident) and records to be obtained (many of which are still missing). The mitigation specialist undertook this massive record review as soon as she received all the records several weeks after her appointment on October 13, 2010. It had been our estimation that there would be much less need to conduct the prototypically substantial investigation into the defendant’s life history because of the posture of the case – that counsel on the defendant’s PCRA matter would have conducted most if not all of this investigation and that we would simply avail ourselves of that investigation.
   4. It is now clear that there are at least dozens, literally dozens, of witnesses that will need to be located and interviewed that have not yet been interviewed. We will need to obtain and review records from several different sources, including several of the defendant’s juvenile placements, which are still missing. Birth records have now become critical because of the recently discovered information suggesting that the defendant may have had fetal alcohol syndrome, a likely cause of the dramatic drop in IQ that the defendant experienced between ages 6 and 14. Those records are still missing. If the evidence supports a diagnosis of fetal alcohol syndrome, the defendant will need to retain an expert in that field to prepare a report and testify. We have uncovered new evidence of serious familial abuse. As in most cases of this sort, the family does not reveal these matters without long, hard work by the defense team to build rapport and gain trust, and this process has only just begun with this family and the witnesses

who will be necessary to present this evidence. We need the criminal records of nine family witnesses who had close contact with the defendant when he was a child, and that will take some time. Once those records, as well all others, are received there will doubtless be additional investigation to conduct.

* 1. It is unclear what, if any, work Gavin Holihan, Esquire performed on this case since his appointment on April 1, 2008. He did file two motions during the time he represented the defendant before undersigned counsel was appointed. Mr. Holihan’s first motion was a request for discovery. Despite the fact that he had been appointed April 1, 2008, he did not request discovery until October 15, 2009, over 18 months after he was first appointed. His second and only other motion was to request funds for an investigator, a motion he did not file until April 7, 2010, two years after he was appointed.1 In addition, since undersigned counsel was appointed, he has had great difficulty contacting Mr. Holihan. Mr. Holihan failed to return telephone calls or email messages so many times that undersigned counsel simply gave up trying to contact him, much less asking him to do any work on this case. In addition, Mr. Holihan has shown no interest in this case, and in many months has not lifted a finger to make any contact with undersigned counsel. Consequently, undersigned counsel has had to prepare this case these past few months as though barely anything at all had been done on it. We submit that the amount and quality of legal and mitigation services performed by undersigned counsel, the mitigation specialist and the *pro bono* defense team counsel has put in place are substantial in light of the limited time period with which we have had to work.2

1 It does not appear as though Mr. Holihan ever retained or contacted an investigator.

2 We respectfully request that Mr. Holihan be withdrawn as counsel on this case.

* 1. Louise Luck, the mitigation specialist in this case, has extensive experience in these matters. She believes that a continuance of close to one year is necessary to accomplish what needs to be done. Because of undersigned counsel’s full-time commitments as a college professor, however, he cannot try this case after September 2011 (unless it takes place over the summer). Counsel is on sabbatical this spring 2011 semester and needs to try the case either before school resumes in September 2011 or over the summer of 2012. We therefore propose mid-June 2011 as a start date for the trial. One option may be for the Court to conduct jury selection starting April 4, 2011 and begin the trial proper in mid-June.

1. Governing Legal Principles

The Sixth Amendment entitles a criminal defendant to more than mere legal representation; an accused has the right to the effective assistance of competent counsel. Powell

v. Alabama, 287 U.S. 45, 58, (1932). To fulfill that constitutional guarantee and render effective

assistance of counsel, counsel must be given adequate time to prepare for a case. Powell, 287

U.S. at 71 (inadequate case preparation can jeopardize an accused's right to effective assistance of counsel).

While “the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the denial of adequate time for appointed counsel to confer, to consult with the accused, and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.” Avery v. Alabama, 308 U.S.

444, 446 (1940). “The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.” Powell, 287 U.S. at

59. Obtaining adequate time to properly prepare for representing a person facing death is essential.

Defense counsel face difficult and time-consuming tasks in capital cases, especially considering that they operate without the resources available to the government. When a person's life is at stake, counsel are required to exhaustively explore every factual and legal aspect of the “defendant's character . . . and any of the circumstances of the offense . . .,” Lockett v. Ohio, 438

U.S. 586, 604 (1978). Moreover, a capital trial is different from all other cases, not just by degree, but by kind. Counsel is functioning under the burden of the realization that the Commonwealth here is seeking the ultimate penalty of death.

In Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court noted certain minimum

tasks that must be completed by counsel to assure than an individualized sentencing determination can be made in assessing a defendant’s moral culpability. Wiggins, 539 U.S. at

535 (citing Penry v. Lynaugh, 492 U.S. 302, 319 (1989)). Likewise, a guilt-phase investigation is

also governed by ABA standards. The ABA Guidelines, Guideline 11.4.1, Investigation (1989) (relied on by the Supreme Court in Wiggins) expressly provide: “Counsel should conduct

independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel’s entry into the case and should be pursued expeditiously.”

The ABA Guidelines further specify that counsel should investigate (1) potential witnesses, including “eyewitnesses or other witnesses having purported knowledge of events surrounding the offense” and (2) “physical evidence or expert reports relevant to the offense.” ABA Guideline 11.4.1, Section D.3 and D.5, Investigation (1989).

Additionally, the Commentary to Guideline 11.4.1, Investigation, provides: “Counsel’s duty to investigate is not negated by the express desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile.” The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel’s evaluation and advice amount to little more than a guess. See also Jennings v.

Woodford, 290 F.3d 1006, 1014 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003) (“Attorneys

have considerable latitude to make strategic decisions . . . once they have gathered sufficient evidence upon which to base their tactical decisions.”). Case law applying the Wiggins standard

demonstrates that, when a potentially helpful witness is identified, counsel has a duty to contact the witness and investigate the substance of the witness’s knowledge. See Lawrence v.

Armontrout, 900 F.2d 127 (8th Cir. 1990).

The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. ed. 2003) set forth the expectations of the profession concerning the obligations of counsel in capital cases. Of particular note, Guideline

10.7 states: “Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty The investigation regarding

penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.”

The Commentary to Guideline 10.5 provides: “Because the sentence in a capital case must consider in mitigation, ‘anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,’ ‘penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.’ In the case of the client, this begins with the moment of conception.”

The ABA Guidelines then provide that counsel are obligated to explore: Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use; pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage); Family and social history, including physical, sexual or emotional abuse, family history of mental illness, cognitive impairments, substance abuse, or domestic violence, poverty, familial instability, neighborhood environment and peer influence, other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias, cultural or religious influences, failures of government or social intervention; Educational history; Military service; Employment and training history; and Prior juvenile and adult correctional experience. (Commentary, at 81-82).

The 2003 ABA Guidelines note that “counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.” Guideline 10.5A. Further, “counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case.” Guideline 10.5C.

In addition, counsel at every stage must exercise professional judgment in accordance with the Guidelines and consider all legal claims potentially available. Counsel must thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted, and evaluate each potential claim in light of the unique characteristics of death penalty law and practice. Guideline 10.8.

Significantly, counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the

prosecution’s case in aggravation. Guideline 10.11A. Counsel must consider, in developing their evidence and making strategic decisions with regard to the presentation of such evidence, witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death; expert and lay witnesses with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense; to give a favorable opinion as to the client’s capacity for rehabilitation or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor; witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served; witnesses who can testify about the adverse impact of the client’s execution on the client’s family and loved ones; demonstrative evidence such as photos, videos, and physical objects. Guideline 10.11.F.1-5.

The 2003 ABA Guidelines detail additional duties of counsel in a capital case. The above outlines the extent of the duties required of the defense team with regard to their investigatory duties and with their duties to assemble a qualified defense team of appropriate experts for the penalty phases of the capital proceedings.

The United States Supreme Court has emphasized the duties of capital case counsel to conduct a thorough investigation. See, e.g., Rompilla v. Beard, 545 U.S. 374 (2005)(even when a

capital defendant and his family members have suggested that no mitigating evidence is

available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase); Wiggins v. Smith, 539 U.S. 510 (2003) (counsel's failure to fully investigate

Wiggins' background and present mitigating evidence of his unfortunate “excruciating life history” violated his Sixth Amendment right to counsel); Williams v. Taylor, 529 U.S. 362, 395-

96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant’s “nightmarish childhood,” borderline mental retardation, and good conduct in prison). Following the requirements of a complete and thorough investigation established in Wiggins, the United

States Court of Appeals for the Eighth Circuit in White v. Roper, 416 F.3d 728 (8th Cir. 2005),

reversed a death sentence when defense counsel failed to conduct a complete investigation and identify and call as a witness an individual who would have provided strong testimony of mistaken identity. The court stated the “presumption of sound trial strategy founders on the

rocks of ignorance, as in Wiggins v. Smith, 539 U.S. 510, 527-28 (2003).” Id. at 732.

Other circuits agree and have reversed for failure to conduct an adequate investigation. See, e.g., Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel’s duty to

investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder); Jermyn v. Horn, 266 F.3d 257, 307-08 (3rd Cir. 2001) (counsel ineffective for failing

to investigate and present evidence of defendant’s abusive childhood and “psychiatric testimony explaining how Jermyn’s development was thwarted by the torture and psychological abuse he suffered as a child”); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir.), cert. denied, 122 S. Ct.

2645 (2002) (counsel ineffective for failing to investigate and present evidence of client’s brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining “the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child”).

Here, counsel has endeavored to be diligent in attempting to fulfill his responsibilities as outlined by the ABA Guidelines. These Guidelines upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. See American Bar

Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 939 (2003)(outlining the 2003 revisions to the Guidelines). Included in the Guidelines is the requirement that the capital defendant “receive the assistance of all expert, investigative, and other ancillary professional services . . . appropriate . .

. at all stages of the proceedings." Id., at 952.

Capital cases are fundamentally different from other criminal cases, not only in the severity of the potential penalty but also in the nature of the evidence and information that must be developed. Sensitive facts need to be disclosed to members of the defense team who are essentially strangers to the defendant. Developing the necessary level of trust can take many months. Then, evaluation by relevant experts must follow. The process can be an incrementally slow one, particularly where the witnesses are uncooperative or cannot be located without much difficulty.

Wiggins makes clear that only after a thorough and diligent investigation into both the

guilt and penalty phases of the capital trial can counsel make any reasonably informed trial strategy decisions. These decisions clarify the responsibilities of counsel in a capital case,

particularly as they relate to preparation for and presentation in the penalty phase. In addition to the usual requirements for trying a difficult homicide case, counsel in a capital case is required, pursuant to the revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, to thoroughly investigate the background and circumstances of the client in order to prepare a case for the penalty phase. Given the severity and irrevocability of a death sentence, extraordinary obligations are properly placed on counsel to prepare and try such a case.

J. Miller, The Defense Team in Capital Cases, 31 Hofstra L. Rev. 1117, 1119-1120 (2003).

Without adequate time to develop the relationship of trust required for effective representation in a capital case, counsel may never learn or be able to present the most crucial facts about the defendant, facts without which any possible understanding of his actions is impossible. In Ungar v. Sarafite, 378 U.S. 575 (1964), the Supreme Court explained: “The matter

of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Avery v. Alabama, 308 U.S. 444. A myopic insistence

upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v. Fretag, 348 U.S. 3. There are no mechanical tests

for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. Nilva v. United States, 352 U.S. 385; Torres v.

United States, 270 F.2d 252 (9th Cir.); cf. United States v. Arlen, 252 F.2d 491 (2nd Cir.).”

Sarafite, 378 U.S. at 598-90.

Consistent with the Supreme Court’s decision in Sarafite, other federal courts have held

that the denial of a motion for continuance raises constitutional concerns “if there is an

unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.” United States v. Gallo, 763 F.2d 1504, 1523 (6th Cir. 1985) (citation omitted), cert.

denied, 474 U.S. 1068 (1986). See, e.g., United States v. King, 664 F.2d 1171, 1173 (10th Cir.

1981); United States v. Verderame, 51 F.3d 249 (11th Cir. 1995); United States v. Poston, 902

F.2d 90, 96 (D.C. Cir. 1990) (denial of a continuance to allow new counsel to prepare implicates the Sixth Amendment right to counsel).

Here, undersigned are of the firm belief that to require the defendant to proceed to trial on April 4, 2011, would deprive the defendant of his constitutional right to the effective assistance of counsel as mandated by both the Constitution of the United States and the pronouncements of the Supreme Court of the United States regarding representation in capital cases.

1. The Defendant Requests an Order Rescheduling the Trial Date in this Matter

Given these obligations and duties, counsel is bound to request more time because our failure to secure adequate time to perform the minimally required functions of counsel would result in providing ineffective counsel. Therefore, counsel respectfully requests that the Court take note that we cannot meet the deadline of April 4, 2011. Should the Court require additional detail, counsel can prepare and file a supplemental document detailing both the extent of the investigation and preparation that has been completed and that remains to be done in this case. Such additional filing would need to be provided to the Court *ex parte* and under seal in order to protect attorney-client privileged and work product protected information.

Conclusion

Counsel respectfully requests that the Court continue the original trial date of April 4, 2011, to no sooner than June 13, 2011, so that the defendant’s Sixth Amendment right to

effective assistance of counsel can be satisfied. The defendant submits that the ends of justice are best served by granting this motion, and that they outweigh the interest of the public and the defendant in a speedy re-sentencing.

Respectfully submitted,

# SILVERMAN & ASSOCIATES, P.C.

BY: /s/ Daniel Silverman