**MOTION TO DECLARE [THE DEFENDANT] INCOMPETENT TO STAND TRIAL IN**

**A CAPITAL PROCEEDING**

**HISTORY OF DEFENDANT’S MENTAL ILLNESS**

**OVERVIEW**

It is “fundamental to an adversary system of justice” that a defendant may not be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 172 (1975). *See Pate v. Robinson,* 383

U.S. 375 (1966). Subjecting an incompetent defendant to a trial offends fundamental principles of due process in the Fourteenth Amendment of the United States Constitution. The standards for trial competency as set forth in *Dusky v. United States*, 362 U.S. 402 (1960) and *Drope* are well-known and often affirmed by the Supreme Court. Under *Dusky*, a defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . a rational as well as factual understanding of the proceedings against him” to be competent to stand trial. 362 U.S. at 403. To this *Drope* adds that a defendant must be able to “assist in preparing his defense” to be adjudicated competent. 420 U.S. at 171.

These standards relate both to a defendant’s awareness and understanding of the trial proceedings as well as his or her ability to assist counsel and develop a defense theory and trial strategy. In a death penalty trial, both of these elements require a higher standard of mental functioning than in other proceedings. A capital trial is incomparably complex because it involves a sentencing phase in which all details of a defendant’s life are presented in mitigation. *Lockett v. Ohio*, 438 U.S. 506 (1978). Capital trials are also unique in the maximum sentence available and the extraordinary stakes in their outcomes. *Gardner v. Florida*, 430 U.S. 349, 363

(1977). These unparalleled complexities and challenges demand significantly more competency from a defendant as well as his attorney. Common sense and Supreme Court precedent both mandate that a determination of competency cannot be divorced from its context; thus, where more is demanded of a defendant and the “consequences of an erroneous determination of competence are dire,” *Cooper v.* Oklahoma, 517 U.S. 348, 364 (1996), a higher level of competency is required.

The Court has held that competency determinations can depend on the context. *Indiana v. Edwards*, 554 U.S. 164 (2008). In *Edwards*, the Court held that a state can deny a defendant his constitutional right to self-representation if the defendant is “borderline-competent” or in a “gray area” of competency. *Id.* at 165. The Court similarly recognized heightened standards of competency where the stakes of the procedure at issue were higher or the complexity of the necessary decisions mandated such a determination. *See Rees v. Peyton,* 384 U.S. 312 (1966).

Even in *Godinez v. Moran*, when the Court held that the standard to waive the right to counsel and stand trial were the same, the Court based its decision in part on the fact that “the decision to plead guilty . . . is no more complicated than the sum total of the decisions that a defendant may be called on to make during the course of a trial.” 509 U.S. 387, 398 (1993).

This contextual definition of competency based on the complexity of the client’s role is fundamental to a fair capital trial. While a defendant who is deemed “borderline-competent” under *Indiana v. Edwards,* 554 U.S. 164, 165 (2008), may be competent to stand trial in a non- capital proceeding, he will not meet the demands of a death penalty trial where the issues are

more complex and the stakes are higher. [Discuss how the defendant in this case is incompetent

to stand trial in a capital case.]

The unique complexities of a capital trial, its extremely high stakes, and the heightened

importance of the client’s relationship with his or her attorney all demonstrate that [this

defendant] does not meet the *Dusky* and *Drope* standards in the specific context of a capital proceeding. The Court’s reasoning in *Godinez v. Moran*, 509 U.S. 389 (1993), *Indiana v. Edwards*, 554 U.S. 164 (2008), and *Atkins v. Virginia*, 536 U.S. 304 (2002), among other cases, demonstrates that the Eighth Amendment’s ban on cruel and unusual punishment requires that a capital defendant achieve a heightened level of competency, reasoning, and ability to consult with counsel during a death penalty trial.

Fundamentally, the State’s heightened interest in the reliability of capital trials under the Eighth Amendment mandates that the trial court’s competency determination be made with greater certainty in a death penalty case. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (discussing the constitutionally-mandated heightened interest in the reliability of a capital trial because of the finality of execution). The probability of prejudice inherent in trying a capitally incompetent defendant creates an unacceptable risk that the death penalty will be imposed for arbitrary reasons in violation of the Eighth Amendment, *Furman v. Georgia*, 408

U.S. 238, 274 (1972) (Brennan, J., concurring).

Trying a capitally incompetent defendant also unconstitutionally interferes with the defendant’s right to effective assistance of counsel. The American Bar Association (ABA) imposes special requirements on capital defense attorneys, as do Pennsylvania’s Rules of Criminal Procedure. *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003); Pa. R. Crim. P. 801. These heightened standards of capital competency for the *attorney* are inexorably linked to a defendant’s competency to stand trial. The *Dusky* and *Drope* formulations emphasize the centrality of the

role of counsel in a competency determination. Thus, where more is required of counsel, it follows that more is required of the client in order to render counsel’s representation constitutionally effective. In order for a capital defense attorney to meet a standard of “reasonableness under prevailing professional norms,” *Strickland v. Washington*, 466 U.S. 668, 688 (1984), in a death penalty case, he or she must be working with a capitally competent defendant. A capitally incompetent defendant will render capital counsel presumptively ineffective, particularly during the sentencing phase.

# TRYING A CAPITALLY INCOMPETENT DEFENDANT IN A CAPITAL

**PROCEEDING VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH**

**AMENDMENTS OF THE UNITED STATES CONSTITUTION**

1. **Evolving standards of decency dictate that putting a capitally incompetent defendant on**

**trial violates the Eighth and Fourteenth Amendments.**

1. The United States Supreme Court has recognized that competency during criminal proceedings is not a unitary concept.

It is unconstitutional to put an incompetent criminal defendant on trial. *Pate v. Robinson*, 383 U.S. 375 (1966). The Court has articulated its standard for competency to stand trial and repeatedly emphasized the fundamental importance of a defendant meeting this standard. The constitutional “test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as

factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). The Court expanded on the *Dusky* test in *Drope v. Missouri* and held that a defendant must be able to “assist in preparing his defense” in order to be “subjected to a trial.” 420 U.S. 162, 171 (1975). Thus, “[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial.” *Riggins v. Nevada*, 504

U.S. 127, 139-40 (1992) (Kennedy, J., concurring).1 The importance of being sufficiently competent to “assist in preparing [one’s] defense” cannot be overstated, as it preserves all other rights that may be asserted during an adversarial proceeding.

The Court recently analyzed the competency standards contextually when it held that the definitions of competence are not the same for all aspects of a trial. In *Indiana v. Edwards*, 554

U.S. 164 (2008), the Court delineated its competency doctrine and ruled that the requirements of competency to stand trial while represented by an attorney are lower than those necessary to go

to trial *pro se*. Like [defendant in this case], Edwards had “serious thinking difficulties and delusions” and was therefore only “borderline-competent.” *Id.* at 168, 171. In other words, the defendant’s mental state was in a “gray area between *Dusky’s* minimal constitutional requirement that measures a defendant’s ability to stand trial and a somewhat higher standard

that measures mental fitness for another legal purpose.” *Id.* at 172. The Court held that Edwards’ uncertain mental capacity allowed the state to deny the defendant his right to self-representation (established under *Faretta v. California*, 422 U.S. 806 (1975)) in the interests of a just outcome

of the adjudication. *Edwards*, 554 U.S. at 164.

1 The Court has cited Justice Kennedy’s concurrence in *Riggins* favorably in the majority opinion of *Sell v. United States*, 539 U.S. 166, 181 (2003).

It follows from the reasoning in *Edwards* that the Court “cannot isolate the term ‘competent’ and apply it in a vacuum, divorced from its specific context. A person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin A monolithic

approach to competency is true neither in life nor the law.” *Godinez v. Moran*, 509 U.S. 387, 413 (1993) (Blackmun, J., dissenting).

*Indiana v. Edwards* is only one of many examples in which the Court used context to determine the appropriate standard of competency for a criminal defendant. In *Godinez v. Moran*, 509 U.S. 387 (1993), the Court held that the standards of competency to stand trial and plead guilty (thereby waiving the right to counsel) were the same, reasoning in part that “while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of the decisions that a defendant may be called on to make during the course of a trial.” 509

U.S. at 398. The majority’s rationale derived from the fact that the process of pleading guilty and the decisions inherent therein are not *more complicated* than the decisions that a defendant must make at trial.2

This principle, that complexity of the proceeding is related to competence, clearly underlies the Court’s holdings concerning competency standards in other criminal proceedings. Two prominent examples are *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam) and *Ryan v.*

*Gonzales*, 133 S. Ct. 696 (2013). These cases are relevant here because a capital trial is *qualitatively* different from and exponentially more complex than a non-capital trial and is a unique proceeding in the American criminal justice system. *See* Section A(2), *infra*. A capital

2Justice Kennedy identified this particular line of reasoning about the complexity of the defendant’s task as his point of departure with the majority of the Court. *Moran*, 509 U.S. at 402-03 (Kennedy, J., concurring).

trial should be considered a different “legal purpose,” *Edwards*, 554 U.S. at 172, than a non- capital trial and therefore merits a higher standard of competency.3

In *Rees v. Peyton*, the Court held that in order to be sufficiently competent to waive all discretionary appellate review in a capital case, a defendant must have “a capacity to appreciate his position and make a rational choice.” 384 U.S. 312, 314 (1966) (per curiam). This standard, “in the present posture of things,” *id.*, is higher than the *Dusky* standard articulated six years earlier. Important to the Court’s finding was that the defendant might have been suffering from a “mental disease” that could have “substantially affect[ed] his capacity” to make a rational decision. 374 U.S. at 314. Because of the certainty of execution resulting from waiver of all future appeals, the Court ruled that the defendant must have an elevated understanding of his

legal choices and their inevitable consequences. [Defendant in this case] similarly faces the most severe penalty that our system can mete out, and a heightened level of certainty in determining

[his] competency is required.

The Court recently held that there is no statutory (or constitutional) right to competency during a habeas corpus proceeding in *Ryan v. Gonzales*, 133 S. Ct. 696 (2013)*.* The Court reasoned that habeas proceedings are “backward-looking [and] record-based” and that “counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner’s competence.” *Id.* at 704. The Court further observed that the client has a relatively small role in habeas proceedings, which are limited to “the record that was before the state court that adjudicated the claim on the merits.” *Id.* at 705. In his opinion for a unanimous Court, Justice Thomas thoroughly demonstrated the contextual basis for recognizing a constitutional right to

3 *See* David Freedman, *When Is a Capitally Charged Defendant Incompetent to Stand Trial?*, 32 INT’L J.L. & PSYCHIATRY 127 (2009) (arguing that the complexities of trial preparation for a capital sentencing phase and the gravity of the decisions that a client must make suggest that a “functional” and contextual determination of competency is required in capital cases).

competency at trial, thereby supporting the argument made here. In *Ryan*, the nature of the proceeding and the defendant’s role in that proceeding were crucial factors in determining whether establishing a right to competency was appropriate in the first place. It follows that the level of competency required will depend on the nature and complexity of the proceedings.

[Defendant] is incompetent to stand trial in a capital proceeding under *Indiana v.*

*Edwards*, 554 U.S. 164, 171 (2008). [Revisit details about defendant’s mental illness that

demonstrates his/her disorganized thinking, lack of cognitive capacity, among others that are

relevant]. Coupled with the Court’s decisions in *Indiana v. Edwards* and *Godinez v. Moran*, *Ryan* and *Rees* demonstrate that the complexity of the criminal proceedings as well as the severity of their possible consequences permeate the Court’s determinations about the standards for competency (or lack thereof, as is the case in *Ryan*).

State4 and federal courts have also employed this contextual definition of competency. In *Chavez v. United States*, the Ninth Circuit articulated a clear version of the reasoning later adopted in *Indiana v. Edwards*, 554 U.S. 164 (2008):

Trial courts must assess a defendant’s competence with specific reference to the gravity of the decisions the defendant faces The test for competence is

thus traditionally stated in different terms depending upon the decisions and consequences presented to the defendant by the particular proceeding. It might be constitutionally fair to require a marginally competent defendant to make certain kinds of decisions, but not others.

656 F.2d 512, 518 (9th Cir. 1981). Thirty years prior to the Court’s ruling in *Edwards*, the Ninth Circuit captured its reasoning by ruling that a “marginally competent” defendant may be unable

4 The Supreme Court of Pennsylvania has held that determinations of competency in some cases can be based on the complexity of the task at hand. Specifically in the realm of a witness’s competency to give testimony, the Court held that “[o]ne guideline for the exercise of discretion is that the degree of capacity required for testimonially competent perception, recollection, and narration is proportionate to the complexity of the event testified to.” *Com. v. Ware*, 329 A.2d 258, 269 (Pa. 1974).

to make some decisions that are more complex or have more severe consequences. While it is true that *Chavez* referenced different standards to plead guilty and to stand trial, its reasoning is directly applicable to a capital proceeding because of the unique complexity of the sentencing phase and the strategic decisions inherent therein. *See* Section A(2), *infra*. The Ninth Circuit’s proposed solution involved a more sophisticated evaluation of competency that included “the defendant’s ability to understand proceedings of various levels of complexity and to understand and rationally choose between alternative courses of action and their possible consequences.” *Chavez*, 656 F.2d at 519. The Ninth Circuit recognized that there exist “various levels of complexity” that correspond to the stakes of the decisions that a defendant must make in tandem with his or her lawyer. These higher-level decisions require a greater degree of cognitive function from the defendant.

A death penalty proceeding is unique in both its complexity and the severity of the consequences if it is imprecisely adjudicated, and therefore we urge this court to rule that

[defendant] is not competent to stand trial in a capital proceeding.

1. The incomparably complex bifurcated capital trial and its corresponding demands on a capital defendant require a higher demonstration of competency to meet those demands.

A capital trial is a unique proceeding in our criminal justice system and therefore a heightened standard of competency for a capital defendant is constitutionally required. The sentencing phase of a capital trial in particular imposes onerous demands on a defendant and his or her lawyer that are not involved in a unitary trial, and the consequences of failing at those

demands are grave.5 In a capital trial, a defendant’s entire life, and often the lives of previous generations of his family,6 must be examined to uncover mitigating evidence.

The burdens on a capital defendant and his counsel during the sentencing phase originate from the necessity of making a persuasive and comprehensive showing of mitigation. The Constitution prohibits states from limiting the type of evidence that can be admitted in mitigation. Any evidence that speaks to the “diverse frailties of humankind” must be allowed. *Woodson v.*

*North Carolina*, 428 U.S. 280, 304 (1978). The Court has repeatedly held that the sentencing body cannot “be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence other than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Pennsylvania’s statutory sentencing procedure mirrors this broad constitutional rule and designates eight separate mitigating factors. The last of these factors includes “[a]ny . . . evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” 42 Pa. Cons. Stat. Ann. § 9711(e)(8) (West 2013). Because Pennsylvania requires the sentencing jury to weigh evidence of aggravation and mitigation in determining the appropriate punishment, the necessity of uncovering as much mitigating evidence as possible is particularly acute. *Id.* § 9711(c)(2). The vast amount of information that

5 *See generally* J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court’s Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461, 468-69 (2012) (“The capital trial requires a nuanced understanding of the bifurcated sentencing proceeding; an ability to work, both intellectually and emotionally, with several attorneys, investigators, mitigation experts, forensic experts, and a host of mental health professionals; a keen sense of strategy; and the ability to set aside common approaches to criminal trials, such as arguing innocence, in favor of legal strategies, such as trying to convince the jury to sentence the defendant to life in prison.”).

6 *See generally* Craig Haney*, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995).

an attorney must gather, with the assistance of his or her client, is crucial in the individualized sentencing decision that will determine life or death.

The complexity of the necessary investigation for the penalty phase of a capital trial is evident in the American Bar Association’s (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) [hereinafter *ABA Guidelines*]. The *ABA Guidelines* set forth standards that counsel must meet that are unique to capital cases. Guideline 4.1(A)(1) establishes that a capital “defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1,7 an investigator, and a mitigation specialist.” *Id.* at 952. A capital defendant not only must work with one attorney to strategize his case, he must work with four different members of his defense team, all of whom have different roles that he must understand. A defendant has a task that is far more intricate in a capital case than in a non-capital case. The plain fact that he must assist four different members of his interdisciplinary counsel team (as opposed to one in a non-capital proceeding) indicates that his ability to assist counsel must reach a higher level of competency.

[Insert information about defendant’s mental illness that might specifically impair his ability in

this respect].

Not only does the ABA instruct states to provide a four-person team for capital defendants, that team must include a mitigation specialist to help strategize for the penalty phase. *Id.* at 954. This interdisciplinary defense team is required because “the defendant’s psychological and social history and his emotional and mental health are often of vital importance to the jury’s decision at the punishment phase,” *id.* at 956. The ABA also recognizes the breadth of the task counsel and his or her client face when gathering mitigating evidence:

7 Guideline 5.1 outlines the special qualifications for capital counsel. *ABA Guidelines* at 961.

“areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant’s moral culpability for the offense or otherwise supports a sentence less than death.” *Id.* at 1060.

The complexity of the sentencing phase in a capital trial is unique to a death penalty proceeding. The lawyer’s role in the penalty phase is thus specialized: “death penalty cases have become so specialized that defense counsel in such cases have duties and functions definably different from those of counsel in ordinary criminal cases.” *ABA Guidelines* at 990. Given that one of the core elements of the *Dusky* and *Drope* competency formulations is the ability to “consult with counsel” in order to “assist counsel,” the complexity of a capital trial calls for a heightened determination of competency. Otherwise, a defendant will be unable to assist his counsel in preparing a defense strategy.

A court’s competency determination is crucial for ensuring that a defendant can present the jury with enough mitigating evidence to make an accurate sentencing determination. During the penalty phase, “the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital proceeding, assessments of character and remorse carry great weight and may, perhaps, be determinative of whether the offender lives or dies.” *Riggins v. Nevada*, 504 U.S. 127, 143-44 (1992) (Kennedy, J., concurring). A capitally incompetent defendant who is unable to assist counsel in uncovering mitigating evidence is vulnerable to a sentencing determination that is arbitrary and inaccurate. As Justice Kennedy also points out, the risk of prejudice for an

incompetent defendant during the sentencing phase is especially “acute.” *Id*. at 143. [Details of

defendant’s mental illness and risk of prejudice during the sentencing phase in particular]. This risk of prejudice during a sentencing hearing, which will determine whether the defendant lives

or dies, is constitutionally impermissible under the Eighth and Fourteenth Amendments, and requires a heightened level of competence in the defendant.

1. Society’s heightened interest in the reliability of a death penalty adjudication dictates that a capitally incompetent defendant not be tried in a capital proceeding.

A second aspect in which a capital trial is completely unique is in the severity of the sentence that the defendant faces. It is axiomatic that death is a punishment qualitatively different than any other “in its pain, in its finality, and in its enormity.” *Furman v. Georgia,* 408

U.S. 238, 287 (Brennan, J., concurring). For a capital defendant, “the consequences of an erroneous determination of competence are dire,” *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996), because the “finality of death precludes relief,” *Furman*, 208 U.S. at 290 (Brennan, J., concurring). Any proceeding for which death is a possible punishment “calls for a greater degree of reliability.” *Lockett v. Ohio*, 430 U.S. 586, 604 (1978). Capital trials require a higher level of confidence in the determination of competency so that capital defendants can preserve the other rights fundamental to a fair trial.

The Court has recognized that there is a high risk of error during a competency hearing. In *Cooper*, the Court held that it is unconstitutional to require a defendant to prove competence by clear and convincing evidence. 517 U.S. at 348. The Court reasoned that the “inexactness and uncertainty attached to [competency] proceedings” dictate that a defendant who has already shown himself incompetent by a preponderance of the evidence should not have to make a higher evidentiary showing. *Id.* at 353 (alteration original) (internal quotation marks omitted).

The “inexactness” and “uncertainty” of competency proceedings raise Eighth Amendment

questions in a capital trial, in which society has a heightened interest in reliability of the outcome.

Because “death . . . differs more from life imprisonment than a 100-year prison term differs from one of only a year . . . there is a corresponding difference in the need for reliability in the determination that death is an appropriate punishment.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1978). Relying on an “inexact” competence adjudication calls the result of the entire death penalty trial and the fairness of the sentence into question.8

In a capital proceeding, the “consequences of an erroneous determination of competence are dire,” and a defendant incorrectly adjudicated as competent “may be unable to exercise other rights deemed essential to a fair trial.” *Cooper,* 517 U.S*.* at 364. The Court also noted that “[w]ith the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense The importance of these rights and decisions

demonstrates that an erroneous determination of competence threatens the basic fairness of

the trial itself.” *Id.* Competency proceedings themselves are often inaccurate and speculative.9 Given both the fundamental nature of the competency determination and the heightened interest in reliability that we as a society have in a death penalty proceeding, an elevated standard of competency for capital trials is essential to avoid inflicting cruel and unusual punishment.

Because [defendant] is capitally incompetent, there is an increased risk that the death penalty will be unconstitutionally imposed for “arbitrary” reasons, *Furman v. Georgia*, 408 U.S.

8 There is evidence that psychiatrists are already considering the seriousness of the charge and severe consequences of the capital competency adjudication when making their evaluations of criminal defendants, at least in part because competency determinations are so inexact. *See* Alex Buchanan, *Competency to Stand Trial and the Seriousness of the Charge,* 34 J. AM. ACAD. PSYCHIATRY L. 458–65 (2006).

9 *See generally* John T. Philipsborn*, Searching for Uniformity in Adjudications of the Accused's*

*Competence to Assist and Consult in Capital Cases,* 10 PSYCHOL. PUB. POL'Y & L. 417 (2004) (examining the widely variant standards and procedures used to determine capital defendants’ competency and proposing reforms).

238, 242 (Douglas, J., concurring), as the product of [his] inability to participate in the necessary complex strategy associated with the sentencing phase. In *Atkins v. Virginia*, the Court held that intellectually disabled (“mentally retarded”) defendants are categorically exempt from the death penalty under the Eighth Amendment. 536 U.S. 304 (2002). Important to the Court’s decision were the special concerns of exposing an intellectually disabled defendant to a capital trial:

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty,” is enhanced . . . by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation. . . . Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses Mentally retarded defendants in the aggregate face a

special risk of wrongful execution.

*Id.* at 320-21 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (citations omitted). These concerns apply with equal force to defendants who are in a gray area of competency.10 The ability to “give meaningful assistance to counsel” is of special importance for competency to

stand trial, since it is a core prong of the standard set forth in *Dusky v. United States*, 362 U.S.

402 (1960). [Insert details about defendant’s inability to communicate with counsel effectively] A defendant who cannot meaningfully communicate with his or her attorney to prepare the tactically complex psychosocial history for the penalty phase faces the same “special risk of wrongful execution,” *Atkins*, 536 U.S. at 321, as a defendant who is intellectually disabled. The characteristics of a capitally incompetent defendant “undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.” *Atkins*, 536 U.S*.* at 316. This risk of error in a capital proceeding cannot be tolerated under the Eighth Amendment.

10 *See* J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court’s Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461, 507 (2012).

# A capital trial with a capitally incompetent defendant violates the defendant’s Sixth

**Amendment right to effective assistance of counsel.**

As detailed in Section A(2) *supra*, the complexity of the sentencing phase of a capital trial requires both the attorney and the client to undertake enormous investigative responsibilities on which the life of the defendant depends. A capitally incompetent defendant is unable to assist

counsel in preparing mitigating evidence for the sentencing phase. [Details about defendant’s

mental illness - in what ways specifically can he or she not assist counsel?] Not only must a capital defendant possess a “rational as well as factual understanding of the proceedings against him,” *Dusky*, 362 U.S. at 403, he must also appreciate the strategic implications of how his decisions affect his attorney’s ability to present a compelling case for mitigation during the penalty phase.11 An attorney with a capitally incompetent client is thus presumptively unable to meet a standard of “reasonableness under prevailing professional norms,” *Strickland v.*

*Washington*, 466 U.S. 668, 688 (1984), according to the *ABA Guidelines.* An attorney who is unable to adhere to these guidelines cannot effectively represent his or her client in a capital case. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (recognizing the *ABA Guidelines* as the professional standard for ethical representation in capital cases).

* 1. The role of counsel is absolutely critical in the *Dusky* and *Drope* standards for competency.

11 *See* J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court’s Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461 (2012).

As the Court articulated in *Indiana v. Edwards*, the presence of counsel is a central fixture of the test for competency to stand trial: “By setting forth a standard that focuses directly upon a defendant’s ability to consult with his lawyer, *Dusky* and *Drope* assume representation by counsel and emphasize counsel’s importance.” 554 U.S. 164, 165 (2008) (citations omitted).

The importance of effective representation at trial cannot be overstated. Capital counsel has a uniquely specialized role that is “definably different” from the role of counsel during other criminal proceedings, *ABA Guidelines* at 990. Not only is more required of the client in a capital case, more is required of his or her attorney in preparing a nuanced defense. An attorney cannot meet his or her representational obligations unless the defendant is fully capitally competent.

While it is true that the defendant’s right to competence does not “flow from the Sixth Amendment” right to counsel, *Ryan v. Gonzales*, 133 S. Ct. 696, 703 (2013), competency during trial is vital in preserving the benefits of representation by counsel, benefits that are all the more crucial in a capital case. *Riggins v. Nevada*, 504 U.S. 127 (1992). In *Ryan v. Gonzales*, 133 S. Ct. 696 (2013), the issue before the Court was a statutory right to competence in a habeas corpus proceeding. The Court distinguished this statutory right from the constitutional right to competence during a trial based on the relationship between the defendant and counsel.

It stands to reason that the benefits flowing from the right to counsel *at trial* could be affected if an incompetent defendant is unable to communicate with his attorney. For example, an incompetent defendant would be unable to assist counsel in identifying witnesses and deciding on a trial strategy. . . . Notwithstanding the connection between the right to competence at trial and the right to counsel at trial, we have never said that the right to competence *derives from* the right to counsel.

*Ryan*, 133 S. Ct. at 703 (emphasis original). Even while denying the existence of a right to competence during habeas corpus litigation, the Court noted the fundamental relationship between client competency and attorney performance at *trial*. The Court recognized in *Ryan* that

competency at trial is fundamental to effective representation. Similarly, the Court has “held that a defendant’s right to effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.” *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring). The task of cooperating with an attorney “in an active manner” is significantly more complex in a capital case than in a non-capital case. The heightened demands placed on capital defense attorneys under the *ABA Guidelines* mean that capital attorneys depend even more on their clients’ cooperation in capital cases, especially during the sentencing phase. The risks of trying a capitally incompetent defendant are magnified under this view, because the defendant’s diminished capacity to cooperate with his lawyer will severely inhibit counsel’s ability to ethically and effectively represent him.

There is, in sum, a concrete link between a defendant’s competency to stand trial and his attorney’s ability to represent him effectively. *Ryan*, 122 S. Ct. at 703; *Riggins*, 504 U.S. at 144. It stands to reason that death penalty counsel will be unable adequately to represent a client who cannot reach the higher levels of cognition required to participate in the enormously complex proceedings. Without the defendant’s assistance in preparing mitigating evidence, for example, an attorney will not be able to meet his or her obligations under the *ABA Guidelines*.

* 1. The American Bar Association has imposed rigid performance standards on death penalty counsel.

Both the ABA and Pennsylvania have established heightened qualification and performance standards for capital counsel. The *ABA Guidelines* “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all

persons facing the possible imposition or execution of a death sentence in any jurisdiction.” *ABA Guidelines*, 31 Hofstra L. Rev. 913, 919 (2003). Indeed, the *ABA Guidelines* are “not aspirational . . . [i]nstead, they embody the current consensus about what is required to provide effective defense representation.” *Id.* at 920. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003)

(identifying the *ABA Guidelines* as the prevailing standard of professional norms in capital cases). Guideline 5.1 articulates several of the national standards for qualifications of capital defense counsel. Among them are “skill in the management and conduct of complex negotiations and litigation . . . [and] skill in investigation, preparation, and presentation of mitigating evidence.” *ABA Guidelines* at 962. The ABA recognizes the increased complexity and heightened consequences of a capital case in its description of the qualifications for an attorney to act as defense counsel in death penalty cases.

Similarly, Pennsylvania has outlined special qualifications for capital defense attorneys.

These qualifications include training in investigating mitigating evidence, experience with at least eight “significant” cases where the charge carries a penalty of at least ten years, and education in the ethical considerations “particular to capital defense representation.” Pa. R. Crim.

P. 801(1)(c), (2)(iii), (2)(vii). Both the national and Pennsylvania-specific guidelines reflect the commonsense understanding that the gravity of the stakes in a capital case necessitate higher levels of capacity for capital counsel. “[I]t is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master.” *ABA Guidelines* at 923. Courts also have embraced this notion. In *State v. Davis,* for example, the New Jersey Supreme Court observed that: “The best intentions and the most devoted of efforts do not necessarily equate

with capital competence. We expect capital defense counsel to have an expertise regarding the special considerations present in capital cases.” 561 A.2d 1082,1089 (1989).

More specifically, the *ABA Guidelines* emphasize the importance of a strong attorney- client relationship in a capital case. Guideline 10.5 articulates the exceptionally demanding relationship between a capital defense attorney and his or her client. Guideline 10.5(C) specifically stipulates that an attorney must engage in “continuing interactive dialogue with the client” about all matters relevant to the case, including the “development of a defense theory” and the “presentation of the defense case,” among others. *Id.* at 1005. Under these standards, “[s]ome decisions require the client’s knowledge and agreement; others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.” *Id.* at 1008. Given the nature of a capital proceeding and the myriad life-or-death decisions in which a client must participate, this relationship is taxing on both defendant and his counsel. “Establishing a relationship of trust with the client is essential . . . to overcome the client’s natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense.” *Id.* The effectiveness of an attorney’s representation will depend a great deal on the strength of his or her relationship with the defendant, and this relationship is a core element of the Supreme Court’s test for competency to stand trial. *Dusky*, 362 U.S. at 403. The necessary relationship is not possible if a client is incompetent to stand trial in a capital proceeding.

Capitally incompetent defendants such as [defendant] are “severely impaired in ways that make effective communication difficult,” *ABA Guidelines* at 1007. Without effective communication, an attorney will be unable to investigate any and all possible mitigating evidence thoroughly. “[I]t is critically important to construct a persuasive narrative in support of the case for life,” *id.* at 1061, and therefore aggressively investigating and compiling all

mitigating evidence may be the most important task a capital defense attorney completes during the course of the proceedings.

* 1. Counsel for a capitally incompetent defendant is presumptively ineffective.

The uniquely extensive investigation required for counsel to be effective during the penalty phase imposes high demands on both the client and his lawyer. Since the ability to “assist in preparing his defense,” *Drope*, 420 U.S. at 171, is a necessary prong in determining trial competency, an attorney’s investigative abilities are thus dependent on his or her client. In a capital case, this dependency takes on heightened significance because of the nature and extent of the mitigating evidence that an attorney must uncover in the course of a capital trial. Because mitigating evidence “may carry great weight and, perhaps, be determinative of whether the offender lives or dies,” *Riggins v. Nevada,* 504 U.S. 127, 144 (1992) (Kennedy, J., concurring), the attorney’s investigative responsibilities are strict and require a defendant who is more

competent than [defendant]. [Insert details about defendant’s specific incapacities related to

helping counsel discover mitigating evidence]

Guideline 10.7 of the *ABA Guidelines* imposes exacting investigatory responsibilities on capital counsel. The ABA recognizes that “penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history [T]his begins with the

moment of [the client’s] conception.” *ABA Guidelines* at 1022. During this investigation, an attorney must specifically explore medical history, social history, educational history, military service, and employment history, among other factors. *Id.* at 1023. A capitally incompetent client will be categorically less able to assist in these tasks than a competent defendant. This

disadvantage ultimately renders the attorney unable to uncover all relevant mitigating evidence, and the jury will not be able to make its constitutionally mandated individualized sentencing determination.

The case law lends support to the ABA’s emphasis on mitigating evidence. Many of the successful ineffective assistance of counsel claims arise out of the sentencing phase of a capital trial when an attorney has failed to investigate and present mitigating evidence. The Supreme Court has held counsel to the standards set forth in the *ABA Guidelines* and has repeatedly found ineffective assistance of counsel during the penalty phase. In *Williams v. Taylor*, for example, the defendant’s lawyer had made some effort to put on evidence during the penalty phase. 529

U.S. 362, 369 (2000). Given the plethora of available, highly persuasive mitigating evidence and counsel’s failure to discover it, the Court held that his performance was unconstitutionally ineffective. *Id.* at 395-98. Similarly, the Court found in *Wiggins v. Smith* that counsel’s performance was ineffective because of his “failure to investigate thoroughly” all mitigating evidence. 539 U.S. 510, 526 (2003). Counsel’s duty during a sentencing phase is nothing less than “develop[ing] the most powerful mitigation case possible.” *Id. See also Rompilla v. Beard*, 545 U.S. 374 (2005) (holding that counsel had a duty to investigate any aggravating evidence that the prosecution may present during the sentencing phase, even when there is little or no mitigating evidence to be presented on behalf of the defendant).

These Supreme Court precedents emphasize the importance of counsel’s investigative duties during the sentencing phase. It is undisputed that the sentencing phase is an inherent part of the development of a coherent defense theory. When a client does not demonstrate capital competency, he is unable to point an attorney to persuasive mitigating evidence, either because he cannot conceptualize the strategic importance of such evidence or because he is unable to

recall events or relate the identity of witnesses. [Tailor this section to specifics of client’s mental

illness and how it will prevent his attorney from discovering mitigating evidence].

Examples of ineffective assistance of counsel during the penalty phase abound. *See, e.g., Blystone v. Horn*, 664 F.3d 397 (3d Cir. 2011); *Marshall v. Hendricks*, 313 F. Supp. 2d 423, 448 (D.N.J. 2004) (holding that counsel’s performance was “constitutionally deficient because

[he] . . . failed to consult with [defendant] during the penalty phase”) *aff'd sub nom. Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005); *Marshall v. Hendricks*, 307 F.3d 36, 99 (3d Cir. 2002) (“[C]ounsel’s general duty to investigate takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.”) (quoting *Strickland v. Washington*, 466 U.S. 668, 706 (1984) (Brennan, J., concurring)). The prevalence of successful ineffective assistance of counsel claims during the penalty phase demonstrates that counsel’s performance during sentencing is subject to strict standards. Given the heightened complexity of the penalty phase adjudication in capital cases, the relationship between attorney and client takes on increased importance and involves greater demands on both.

These cases also illustrate that a client’s ability to assist his attorney during the penalty phase is particularly important in Pennsylvania’s capital sentencing scheme. In *Jermyn v. Horn*, for example, the Third Circuit affirmed the district court’s grant of habeas corpus relief when counsel did not adequately investigate mitigating evidence. 266 F.3d 257 (3d Cir. 2001). The lower court had held that counsel was “ineffective in not investigating and presenting the available mitigating evidence, and that these errors had been prejudicial during the penalty phase.” *Id.* at 305. The court also held that this deficiency is particularly prejudicial in

Pennsylvania, a state that mandates that a death verdict be unanimous and requires the jury to weigh aggravating and mitigating circumstances in making its sentencing decision. 42 Pa. Cons. Stat. Ann. § 9711 (West 2013). The district court held that because “[i]n Pennsylvania, the jury’s sentence of death has to be unanimous . . . and the balancing of aggravating and mitigating circumstances is not a simple arithmetic process . . . convinc[ing] just one juror that the childhood abuse was a sufficiently mitigating factor” would have resulted in a life sentence. *Jermyn*, 266 F.3d at 305 (quoting *Jermyn v. Horn*, CIV. A. 1:CV -97-634, 1998 WL 754567 (M.D. Pa. Oct. 27, 1998)). The effectiveness of counsel during the penalty phase is therefore of

special importance in Pennsylvania’s capital sentencing procedure. Because [defendant] is

capitally incompetent, [he] is less able to assist counsel in discovering the evidence necessary to make an effective case for a life sentence. Even one piece of mitigating evidence may cause the jury to return a verdict for life. Capital counsel’s responsibilities in this regard are vital, and a capitally incompetent defendant will risk being unfairly or arbitrarily sentenced to death if he cannot assist his attorney in uncovering all available mitigating evidence.

The ability to assist counsel in preparing his defense is always a core element in a court’s determination of competency to stand trial under *Dusky* and *Drope*. Where a defendant is not capitally competent, counsel is presumptively ineffective during the penalty phase. The Court has held that circumstances of a certain “magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *United States v.*

*Cronic*, 466 U.S. 648, 659-60 (1984). An inability to present comprehensive and persuasive mitigating evidence, or discover whether such evidence exists, is such a circumstance where

counsel cannot be constitutionally effective without a fully capitally competent client. Where, as here, a defendant’s inability to point an attorney towards relevant and life-saving mitigating evidence will determine whether he lives or dies, we must require a higher level of competency

from [defendant] in order to meet these demands.

\* \* \*

Wherefore, based upon all of the above arguments, the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and the parallel clauses of the

Pennsylvania Constitution, [Defendant] respectfully requests that the Commonwealth declare him incompetent to stand trial in a capital proceeding.