

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

United States of America,	)	
Plaintiff,	)	
	)	No.
v.	)	Hon.
	)	Judge
,	)	
Defendant.	)	

Defendant \_\_\_\_\_'s Memorandum in Support of His Motion for Extension of  
Time to File Sentencing Memorandum & to Continue Sentencing Date

Both the government and the United States Probation Office argue that \_\_\_\_\_, age \_\_\_\_\_, should be sentenced to prison for the rest of his life. *See* PSI at \_\_\_\_\_ and "Government's Official Version" attached to the PSI at \_\_\_\_\_. As a point of comparison, just 1/10 of 1% of all persons sentenced in federal court received such an extraordinary sentence in FY 2003. United States Sentencing Commission, *2003 Sourcebook of United States Sentencing Statistics*, Table 14. That percentage was virtually unchanged from the year before. *See* Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2003* at 436 (31<sup>st</sup> ed.)(referencing 2002 U.S. Sentencing Commission statistics). Although the Supreme Court held in *Glover v. United States*, 531 U.S. 198, 203 (2001), that "any amount of actual jail time has Sixth Amendment significance," with the exception of a death sentence, no sentence deserves greater scrutiny than a sentence of life imprisonment.

It is with the enormity of the potential sentence in mind that we approach the task of representing \_\_\_\_\_ at sentencing before this Court.

And it is because of the enormity of the potential sentence and the many tasks we are required to undertake before sentencing, that we ask this Court to grant us an extension of time to complete our work.

To be an effective sentencing advocate, defense counsel must comply with case law, ethical rules and general advocacy principles such as the ABA Standards. *See generally American Bar Association Standards for Criminal Justice*, ch. 18, "Sentencing Alternatives & Procedures" (2d ed. & 1986 Supp.); The Sentencing Project, *The Ten Principles of Sentencing Advocacy* (December 2003)(available at [www.sentencingproject.org](http://www.sentencingproject.org)). As the ABA recognizes: "We note at the outset that the first step toward assuring proper protection for the rights to which defendants are entitled at sentencing is recognition by defense counsel that this may well be the most important part of the entire proceeding." ABA Standards, Commentary to Standard 18-6.3 at p. 18-437-38.

Of all defense counsel's obligations at sentencing, one stands out – counsel's duty to investigate. The law makes clear that this duty not only encompasses investigation of factual defenses at trial, but also the investigation of possible mitigating circumstances at sentencing. The duty to investigate can

be found in both the ABA Standards and the case law. As the ABA explains:

“The lawyer also has a substantial and important role to perform in raising mitigating factors . . . . This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.” *ABA Standards for Criminal Justice*, ch. 4, “The Defense Function,” Commentary, to Standard 4-4.1, Investigation and Preparation, at 4-55 (2d ed. & 1986 Supp.)(hereafter “ABA Standards”). *See also* National Legal Aid & Defender Association, *Defender Legal Services Standards*, “Obligations of Counsel in Sentencing,” Guideline 8.1(a)(5)(“ Among counsel’s obligations in the sentencing process are: (5) to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted”).

Just this year, the Supreme Court took the opportunity to reiterate the critical nature of the lawyer’s role in investigating sentencing mitigation and to reaffirm the importance of the ABA Standards as “guides to determining what is

reasonable’” under the Sixth Amendment. *See Rompilla v. Beard*, 125 S. Ct. 2456, 2466 (2005), *quoting Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

*Rompilla* involved a capital sentencing. The Court went out of its way to point out that original defense counsel did in fact conduct a mitigation investigation. They spoke with family members and even hired three mental health experts. *Id.* at 2462-63. But in defense counsel’s view, all of their investigation came to naught. According to the Supreme Court, it was not until new lawyers later entered the case that anyone was able to “identif[y] a number of likely avenues the trial lawyers could fruitfully have followed in building a mitigation case.” These avenues included the defendant’s history of alcohol addiction, his school records and most importantly in that case, records of Rompilla’s prior convictions. *Id.* at 2463.

In reaching the conclusion that prior counsel’s mitigation efforts rendered them ineffective, the Court quoted ABA Standard 4-4.1 in its entirety, noting that its meaning was unmistakable. *Id.* at 2465-66. ABA Standard 4-4.1 begins with this admonition: “It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.”

Following this principle, the Sixth Circuit in *Mason v. Mitchell*, 320 F.3d 604, 622-23 (6<sup>th</sup> Cir. 2003), held that even when a defendant's background information "may amount to little more than 'slim evidence of mitigation, . . . it is *something*. And what is most important, it was [the defendant's] *only* shield from a death sentence.'" Quoting *Mapes v. Coyle*, 171 F.3d 408, 426 (6<sup>th</sup> Cir.), *cert. denied*, 528 U.S. 946 (1999)(emphasis in original). The Court in *Mason* went on to hold that defense counsel's failure to independently investigate Mason's history, character and background, or to hire any mitigation or mental health experts, was "inexplicable." With that, it remanded the case for a Sixth Amendment ineffective assistance of counsel hearing in the district court.

As this Court well knows, a meaningful mitigation investigation requires time. That is why adequate preparation time for sentencing is considered critical. *See, e.g., ABA Standards*, ch. 18, "Sentencing Alternatives & Procedures," Commentary to Standard 18-6.3, Duties of Counsel, at 18-445 (2d ed. & 1986 Supp.)("Both case law and model standards recognize that the effective assistance of counsel at sentencing is impossible without a sufficient opportunity for preparation"). Principle IV of *The Ten Principles of Sentencing Advocacy* puts it this way: "Comprehensive preparation that commences early in a case is the key

to effective sentencing advocacy. \* \* \* It cannot be done at the last moment or on short notice. It must begin as early as possible in a case.”

Interestingly, the Seventh Circuit recently decided the case of *United States v. Karl Cunningham*, 2005 U.S. App. LEXIS 24468, No. 05-1774 (7<sup>th</sup> Cir. Nov. 14, 2005), where it made clear the critical role psychiatric evidence can play in sentencings after *Booker*. The Seventh Circuit emphasized the importance of the “extensive documentation” of Mr. Cunningham’s psychiatric history that was provided by defense counsel to the court and relied on that documentation in remanding the case for resentencing. *Id.* at 6. Recognizing that “diminished mental capacity is a ground stated in the sentencing guidelines themselves for a lower sentence,” the Seventh Circuit’s view was clear: “A judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight.” *Id.* at 14.

We have set out the law at some length here not only because [redacted] is facing a potential life sentence, but also because a comprehensive review of the relevant case law and standards demonstrates there is much work that still needs to be done to effectively represent [redacted] at sentencing. It is clear that we alone cannot complete the necessary work, we must find and hire others to participate as well. Because of the compelling need for a collaborative effort at

sentencing and because it seems impossible to us to be able to complete all of the work necessary here in the time frame we originally believed would be possible, we are asking this Court to

Therefore, we respectfully ask this Court

Respectfully submitted,

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