

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

ERIC HARPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000538

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Counsel's performance was constitutionally deficient for failing to investigate and present evidence of Petitioner's intellectual impairment and age as mitigation during Petitioner's guilty plea?

STATEMENT

Petitioner Eric Harper was indicted by the Spartanburg County Grand Jury on September 29, 2017, for resisting arrest, armed robbery, and possession of a deadly weapon during the commission of a violent crime, in regard to an incident occurring at an ATM on August 6, 2017. App. 154-55; App. 157-58. On October 27, 2017, Petitioner was also indicted for second degree burglary, third degree burglary, shoplifting, and two counts of petit larceny for multiple incidents occurring between July 20th through 26th, 2017. App. 160-61; App. 163-64; App. 166-67; App. 169-170; App. 172-73. Petitioner turned 17 only three days before the first incident.

Petitioner's case proceeded to a guilty plea on April 25, 2018, before the Honorable J. Derham Cole. App. 1. Petitioner was represented by Thomas A.M. Boggs (Counsel), while the State was represented by Spenser Holloman Smith. App. 1. By agreement, the second-degree burglary charge was reduced to third degree, and the possession of a deadly weapon charge was dismissed. The State further recommended all remaining charges run concurrently. App. 3-4.

During Petitioner's plea, Counsel asserted the following in mitigation:

[COUNSEL]: There really is not much to say. He admits everything about it. I think it's tragic. He's 17 years old.

.....

He also understands that if he got the bare-minimum he wouldn't be 17 when he got out. He'd be over 25 years old. He would be—he'd be an adult by then.

Judge, he's—he's the most unlikely candidate if you look at him to be a criminal.

COURT: I agree with that. He looks very pleasant and sounds very pleasant, but his actions look differently.

[COUNSEL]: Yeah. He sure did. If you looked at him, you'd say no. But he's here today saying he did do it and all of the witnesses say he did it. It's just tragic, a young fellow like this.

Whether he can be salvaged, I don't know, Judge. I hope so. I hope you'll consider the low end of the sentence range. Hopefully, he can get out and make something of himself.

He does live with his mother who is here in town. Unfortunately, I didn't get in touch with her, couldn't get in touch with her. I was hoping she would be here. But he's had kind of a tortured life, and a lot of it he's brought on himself. Maybe this will straighten him out. Maybe he can come out and make something of himself.

We are asking the Court to consider the low end of the sentence range. Thank you.

App. 32, l. 21—App. 34, l. 4. The trial court accepted Petitioner's plea, and imposed the following sentences: thirty (30) years for armed robbery, suspended to fifteen (15) years active time, followed by five (5) years' probation and \$1638.37 restitution; ten (10) years for resisting arrest to be served consecutively to armed robbery, suspended to five (5) years' probation; five (5) years for each third-degree burglary charge to run concurrently; and thirty (30) days each for both petit larceny charges and shoplifting, satisfied by time served. App. 36. Petitioner appealed, and remittitur was sent on July 13, 2018. App. 38-40; App. 49.

On April 2, 2019, Petitioner file his application for post-conviction relief (PCR). App. 51. An evidentiary hearing was held April 21, 2022, before the honorable G.D. Morgan, Jr. App. 77. Petitioner was represented by Susannah Ross (PCR Counsel), while Chelsey Marto represented the State. App. 77. PCR Counsel asserted *inter alia* that Counsel was ineffective for failing to investigate Petitioner's intellectual impairment, or present evidence to the plea court of it. PCR Counsel further argued that Counsel failed to argue to the plea court that it must consider Petitioner's youth as mitigation pursuant to Aiken v. Byars.¹ App. 82, l. 5—App. l. 12.

¹ 410 S.C. 534, 765 S.E.2d 572 (2014).

Petitioner testified that, since being incarcerated, he received mental health therapy approximately every two weeks. App. 84, ll. 2-18. He was also placed on a regimen of medications, including Haldol. App. 84, l. 19—App. 86, l. 12; App. 129—135. He further indicated that he only went to the ninth grade in school, and has yet to pass the GED exam despite taking classes for it. App. 86, l. 13—App. 87, l. 4. Petitioner did not see a mental health counselor prior to his guilty plea; accordingly, he did not bring the matter to Counsel’s attention because he did not know he had mental health issues. App. 88, ll. 20-24; App. 94, ll. 5-9. Petitioner further indicated that he did not “understand everything that was going on during his guilty plea.” App. 87, ll. 22-24. Finally, when the State inquired why he decided to plead guilty, Petitioner testified that he felt “[he] just had to take the plea, because [he] thought [he] was going to get ten years.” App. 93, ll. 19-21.

Petitioner’s father, Lee Harper (Father) testified at the evidentiary hearing too. He stated that Petitioner had a lower intellectual functioning, and was slow at home and at school. Father also testified that Petitioner only made it to the ninth grade, and that he and Petitioner’s mother attended multiple IEP meetings with the school about it. App. 98, l. 23—App. 98, l. 25. Father also provided an example of how Petitioner’s lower intellectual functioning manifests itself:

[FATHER]: I see the same Eric sitting up here talking—the same Eric I seen when he was in the eighth grade and seventh grade. And all the IP—all of—all of those meetings and counseling I went to. You could ask Eric, “Did you put those lights in up there?” He’s going to tell you—if you say it enough, “You put them lights in up there, didn’t you?”

“Yes, ma’am.” He going to repeat what you say.

[PCR Counsel]: Uh-huh.

[FATHER]: Whatever you tell him, he gonna repeat it. I sit—that’s why I was back there shaking my head. This is the same Eric that was in the eighth grade. All the counseling and

meetings we went to, is done right now. He hadn't changed; he—you know, he—to me, he have got worsen.

App. 97, l. 25—App. 98, l. 14.²

Father also indicated that, despite calling and visiting the public defender's office multiple times, Petitioner's attorney never spoke with either Father or his spouse. App. 103. Further, the public defender's office never notified him when Petitioner's plea hearing would occur even though he had left a handwritten note containing the telephone numbers of himself and Petitioner's mother with the front desk personnel. App. 104; App. 106; App. 109. In fact, the only time Petitioner's attorney would speak with Father was well after the guilty plea. App. 100, ll. 8-23; App. 102, l. 25—App. 104, l. 7.

Counsel could not be called as a witness because he passed away prior to Petitioner's evidentiary hearing. App. 81, ll. 11-13. However, PCR Counsel did call the prosecutor from Petitioner's guilty plea. App. 110, ll. 18-25. During his testimony, the prosecutor recalled speaking with Counsel about Petitioner, and that Counsel "did not think [Petitioner] was, you know, the brightest, you know, fellow, the brightest bulb, but never anything about getting him evaluated." App. 120, l. 24—App. 121, l. 2.

The PCR court dismissed Petitioner's application by written order on March 20, 2023. App. 137. As to whether Counsel failed to investigate and present evidence in mitigation regarding Petitioner's age and intellectual disability, the PCR court ruled as follows:

Here, the mitigation strategy was reasonable. Counsel stated that [Petitioner] was seventeen years old at the time of the plea and that he was an unlikely candidate for a criminal. (Tr. 32-33). Counsel pleaded the Court for a lenient sentence so [Petitioner] could "get out and make something of himself." (Tr. 33). He stated that [Petitioner] was accepting responsibility for his actions by pleading. (Tr. 33-34). He stated [Petitioner] had a

² See also App. 100, l. 24—App. 102, l. 4; App. 104, l. 8—App. 105, l. 14.

tortured life, which he largely brought on by himself. (Tr. 33-34). This was a reasonable approach and Counsel was not deficient for exercising it.

Additionally, there has been no showing that had [Petitioner's] intellectual disability been brought up, a different sentence would have been issues [sic]. Accordingly, relief is denied on this ground.

.....

[Petitioner] claims Counsel was ineffective for failure to call [Petitioner's] parents in mitigation. The transcript reflects that Counsel wanted [Petitioner's] mother present at the plea hearing but was unable to reach her. (Tr. 33). Further, as outlined above, Counsel's mitigation strategy was reasonable and [Petitioner] has failed to meet his burden of proof in showing that had this been brought up in mitigation, a different sentence would have been issued. Accordingly, relief is denied.

.....

[Petitioner] has failed to present sufficient evidence of an intellectual disability that undermines the validity of the plea. Further, based upon a review of the defense file and the transcript, the Court finds that any intellectual disability did not impact his ability to effectively communicate with Counsel or his understanding of the plea. This is also not sufficient to change Counsel's recommendations as to the plea. Accordingly, relief is denied.

.....

[Petitioner] claims Counsel was ineffective for failure to ensure [Petitioner's] parents were involved in the process leading up to the plea and for ensuring they were present at the plea. Beyond using [Petitioner's] parents as mitigation witnesses, this Court finds [Petitioner's] parents had no bearing on the decision to plead or [Petitioner's] understanding of his decision to plead. Accordingly, relief is denied.

App. 149-151. As such, the PCR court denied Petitioner's application. App. 152-53.

This petition follows.

ARGUMENT

Counsel's performance was constitutionally deficient for failing to investigate and present evidence of Petitioner's intellectual impairment and age as mitigation during Petitioner's guilty plea.

“Guilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474, 25 L.Ed.2d 747 (1970). In Hill v. Lockhart, the United States Supreme Court applied the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to claims of the same against plea counsel. 474 U.S. 52, 57, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985). “The performance prong of Strickland requires a defendant to show that counsel’s representation fell below an objective standard of reasonableness.” Lafler v. Cooper, 56 U.S. 156, 163, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012) (internal quotations omitted).

“The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding.” Lafler, 56 U.S. at 165, 132 S.Ct. at 1385, 182 L.Ed.2d 398. “Sentencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process.” Easter v. State, 355 S.C. 79, 81, 584 S.E.2d 117, 119 (2003). Further, “individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country.” Lockett v. Ohio, 438 U.S. 586, 602, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978). “Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account.” Id. “And where sentencing discretion is granted, it generally has been agreed that the sentencing judge’s ‘possession of the fullest information possible concerning the defendant’s life and characteristics’ is ‘[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.” Id. 438 U.S. at 602, 98 S.Ct. at 2964, 57 L.Ed.2d 973

(emphasis and alterations in original) (quoting Williams v. New York, 377 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed.2d 1337 (1949)). Accordingly, “there exists a right to counsel during sentencing in both noncapital and capital cases.” Lafler, 56 U.S. at 165, 132 S.Ct. at 1385-86, 182 L.Ed.2d 398. “Even though sentencing does not concern the defendant’s guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because ‘any amount of [additional] jail time has Sixth Amendment significance.’” Id. 56 U.S. at 165, 132 S.Ct. at 1386, 182 L.Ed.2d 398 (quoting Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001)).

“A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); see also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (“Without a doubt, ‘[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.’”) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Lounds v. State, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting Ard, 372 at 331-32, 642 S.E.2d at 597); see also Sneed v. Smith, 670 F.2d 1348, 1353 (4th 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th 1968)).

The duty to investigate extends to exploring the medical and mental health history of the defendant. See, e.g., McKnight, 378 S.C. at 46, 661 S.E.2d at 361; see also Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (“Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder.”). “In assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538 (2003). “In light of these standards, our principal concern in deciding whether [counsel] exercised ‘reasonable’ professional judgment is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of [Petitioner’s] background *was itself reasonable*” Wiggins v. Smith, 539 U.S. 510, 523, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003) (internal citations omitted) (internal alterations omitted) (emphasis in original).

“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background... may be less culpable.” Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989) (quoting California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O’Connor, J., concurring)); see also Porter v. McCollum, 558 U.S. 30, 41, 130 S.Ct. 447, 454, 175 L.Ed.2d 398 (2009). More specifically, “impaired intellectual functioning is inherently mitigating: ‘[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal.’” Tennard v. Dretke, 542 U.S.

274, 287, 124 S.Ct. 2562, 2571, 159 L.Ed.2d 384 (2004) (quoting Atkins v. Virginia, 536 U.S. 304, 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)).

Instead, Counsel should have investigated Petitioner's mental impairments further, as well as contacted Petitioner's parents prior to any sentencing hearing. The prosecutor testified regarding his conversations with Counsel about Petitioner's mental capacity. Specifically, he recalled that Counsel "did not think [Petitioner] was, you know, the brightest, you know, fellow, the brightest bulb, but never anything about getting him evaluated." App. 120, l. 24—App. 121, l. 2. In other words, Counsel was aware of Petitioner's low intellectual functioning, but failed to investigate further. Had he done so, he would have discovered Petitioner's school records showing he failed to complete the 9th grade, and multiple IEP's. This reasonably should have led Counsel to speak with Petitioner's parents. In the present case, "counsel performed virtually no investigation," either of Petitioner's parents who could have provided the court with information regarding Petitioner's mental impairment and challenges it presented in Petitioner's life, or of documentation supporting the same. Andrus v. Texas, 140 S.Ct. 1875, 1883, 207 L.Ed.2d 335 (2020).

Counsel failed to reach out and talk with either of Petitioner's parents prior to the guilty plea and sentencing hearing. As such, it is unsurprising that Petitioner's parents were not present at the hearing itself: Counsel never contacted them—neither to be present at hearings, nor even for a simple conversation to investigate Petitioner's background. This much was proven by Father's testimony at Petitioner's evidentiary hearing. Father indicated that, despite calling and visiting the public defender's office multiple times, Petitioner's attorney never spoke with either of Petitioner's parents. App. 103. Further, the public defender's office never notified Father when Petitioner's plea hearing would occur even though he had left a handwritten note

containing the telephone numbers of himself and Petitioner's mother with the public defender's office front desk personnel. App. 104; App. 106; App. 109.

In other words, Counsel "ignored pertinent avenues for investigation of which he should have been aware." Porter, 558 U.S. at 40, 130 S.Ct. at 434, 175 L.Ed.2d 398. He knew or should have known that Petitioner may have had an intellectual impairment, yet failed to conduct any investigation whatsoever. His conversation with the prosecutor, and his refusal to contact Petitioner's parents even after their multiple attempts to contact him on the telephone, in person at Counsel's office, and by leaving a hand-written note, reveal as much. See Andrus, 140 S.Ct. 1875, 1883, 207 L.Ed.2d 335 ("Clearly, 'the known evidence would [have] le[d] a reasonable attorney to investigate further.'") (alterations in original) (quoting Wiggins, 539 U.S. at 527, 123 S.Ct. 2527, 156 L.Ed.2d 471). In short, contrary to the PCR court's ruling, "counsel's failure to investigate and develop evidence of [Petitioner's] mental impairment was not a carefully considered strategic choice." Gray v. Branker, 529 F.3d 220, 231 (4th Cir. 2008). Rather, Counsel's performance was constitutionally deficient because his "decision not to investigate did not reflect reasonable professional judgement." Andrus, 140 S.Ct. 1875, 1883, 207 L.Ed.2d 335; see also Gray, 529 F.3d at 231 ("Counsel's failure to conduct an investigation into mental health evidence was not the result of 'reasonable professional judgments'") (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674).

Petitioner was also prejudiced by Counsel's deficient performance. To show prejudice, courts "do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" Porter, 558 U.S. at 44, 130 S.Ct. at 455, 175 L.Ed.2d 398 (quoting Strickland, 466 U.S. at 693-94, 104 S.Ct. 2052). Here, had Counsel

done his due diligence to investigate, he would have discovered ample mitigation evidence that Petitioner had a lower intellectual functioning. As Father testified³: Petitioner was slow at home and at school; he only made it to the ninth grade; and he required multiple IEP meetings with the school about it. App. 98, l. 23—App. 98, l. 25. Father further provided a practical example of Petitioner’s mental impairment:

[FATHER]: I see the same Eric sitting up here talking—the same Eric I seen when he was in the eighth grade and seventh grade. And all the IP—all of—all of those meetings and counseling I went to. You could ask Eric, “Did you put those lights in up there?” He’s going to tell you—if you say it enough, “You put them lights in up there, didn’t you?”

“Yes, ma’am.” He going to repeat what you say.

[PCR Counsel]: Uh-huh.

[FATHER]: Whatever you tell him, he gonna repeat it. I sit—that’s why I was back there shaking my head. This is the same Eric that was in the eighth grade. All the counseling and meetings we went to, is done right now. He hadn’t changed; he—you know, he—to me, he have got worsen.

App. 97, l. 25—App. 98, l. 14. Had Counsel completed even the most cursory of investigations—contacting Petitioner’s parents, obtaining school records, etc—in a minimal effort to fulfill his constitutional obligation to investigate Petitioner’s intellectual impairment, then he should have obtained an evaluation. As Petitioner’s subsequent psychiatric records indicate, Petitioner is “functioning with borderline intellect,” and possesses “poor” levels of both insight and judgment as it relates to behaviors. App. 129; App. 131; App. 133; App. 135.

Instead, Counsel essentially highlighted his lack of knowledge and investigation regarding Petitioner’s background and mental infirmity when, during sentencing, he told the plea

³ See State v. Williams (386 S.C. 503, 516, 690 S.E.2d 62, 69 (2010) (“We have long held that a lay witness may testify as to a defendant’s mental status.”)).

court that “[t]here really is not much to say. He admits everything about it. I think it’s tragic. He’s 17 years old.” App. 32, ll. 21-23. Counsel’s in-court mitigation further devolved to talking about Petitioner’s outward appearance: “Judge, he’s—he’s the most unlikely candidate if you look at him to be a criminal.” App. 33, ll. 10-11. The plea court agreed regarding the irrelevant aspect of Petitioner’s appearance during the sentencing hearing, and then predictably turned to the far more relevant topic of conduct: “I agree with that. He looks very pleasant and sounds very pleasant, but his actions look differently.” App. 33, ll. 12-13. However, because Counsel failed to investigate Petitioner’s background, he likewise failed to respond to the court’s concerns regarding Petitioner’s conduct with the inherently mitigating evidence of Petitioner’s mental impairment so the court could view him in a category less culpable than typical offenders. See, e.g., Tennard, 542 U.S. at 287, 124 S.Ct. at 2571, 159 L.Ed.2d 384 (“impaired intellectual functioning is inherently mitigating: ‘[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal.’”).

Counsel’s mitigation argument likewise cast Petitioner’s age⁴ as a negative factor rather than as a mitigating circumstance when asking for a merciful sentence. See Aiken, 410 S.C. at 543, 765 S.E.2d 576-77 (affirming “it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution.”). For example, in pleading Petitioner’s mitigation case *Counsel flatly indicated he did not know if his own client was salvageable*, and that he hoped Petitioner could make something of himself after he got out of prison:

⁴ Aiken, 410 S.C. at 537 n.1, 765 S.E.2d at 573 n.1 (“In South Carolina, pursuant to Section 63–19–20 of the South Carolina Code (2010), a juvenile is a person less than seventeen years of age. However, Miller extends to defendants under eighteen years of age and therefore for the purposes of this opinion we consider juveniles to be individuals under eighteen.”).

Yeah. He sure did. If you looked at him, you'd say no. But *he's here today saying he did do it and all of the witnesses say he did it. It's just tragic, a young fellow like this.*

Whether he can be salvaged, I don't know, Judge. I hope so. I hope you'll consider the low end of the sentence range. Hopefully, he can get out and make something of himself.

App. 33, ll. 14-21. In other words, rather than highlighting the “features of youth”⁵ as mitigation factors for a lesser sentence, Counsel nearly wondered aloud if Petitioner was even salvageable.

⁵ As summarized in Miller v. Alabama, 567 U.S. 460, 471-72, 132 S.Ct. 2455, 2465-66, 183 L.Ed.2d 407 (2013), juveniles have “diminished culpability and greater prospects for reform” compared to adults. The Court went on to explain this position as follows:

First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable ... to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].”

Our decisions rested not only on common sense—on what “any parent knows”—but on science and social science as well. In Roper, we cited studies showing that “[o]nly a relatively small proportion of adolescents’ “ who engage in illegal activity “develop entrenched patterns of problem behavior.” And in Graham, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “deficiencies will be reformed.”

Id. (internal citations omitted).

Finally, Counsel indicated not only that Petitioner lived with his mother⁶ but also that Petitioner lived a “tortured life,” much of which “he’s brought on himself.” App. 33, l. 22—App. 34, l. 1. Counsel completed his mitigation by indicating prison might “straighten [Petitioner] out,” after which “[m]aybe he can come out and make something of himself.” App. 34, ll. 1-2. With that presentation, Counsel asked the court to impose a sentence on the low end of the available range. App. 3-4. In sum, [a]lthough [C]ounsel nominally put on a case in mitigation..., the record leaves no doubt that [C]ounsel’s investigation to support that case was an empty exercise.” Andrus, 140 S.Ct. 1875, 1882, 207 L.Ed.2d 335.

Had Counsel conducted a reasonable investigation, he would have contacted Petitioner’s parents—who tried numerous times in vain to contact Counsel. One or both could have been present to show the plea court that Petitioner indeed had family support. Further, Counsel would have been apprised and in possession of powerful mitigation evidence regarding Petitioner’s background that was entirely relevant to sentencing: Petitioner’s impaired intellectual functioning, as well as how it impacted his upbringing and background, is inherently mitigating evidence that would place Petitioner in a category viewed by society as less culpable than the average offender. See Penry, 492 U.S. at 319, 109 S.Ct. at 2947, 106 L.Ed.2d 256 (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendant who commit criminal acts that are attributable to a disadvantaged background... may be less culpable.”); see also Tennard, 542 U.S. at 287, 124 S.Ct. at 2571, 159 L.Ed.2d 384 (“impaired intellectual functioning is inherently mitigating: ‘[T]oday our society views mentally retarded offenders as categorically less culpable than the

⁶ It is notable that Counsel hoped Petitioner’s mother would be present, despite the fact that he did not contact her before the plea, and then highlighted to the court that she was not present for her own son’s sentencing hearing even though she lived in-town. App. 33, 22-24.

average criminal.”). Moreover, Counsel “essentially would have had ‘nothing to lose’ and ‘everything to gain’ by presenting this evidence.” Council v. State, 380 S.C. 159, 176, 670 S.E.2d 356, 364-65 (2008). Accordingly, Petitioner was prejudiced by Counsel’s deficient performance.

CONCLUSION

For the foregoing reasons, Petitioner Eric Harper respectfully requests that this Honorable Court reverse the PCR Court, reverse his sentences, and remand his case for new sentencing.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2023.