ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
SEP 26 2014
S.C. Supreme Court

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner respectfully moves this Court for an order (1) vacating the denial of the petition for writ of certiorari, entered September 11, 2014, (2) granting rehearing, and, (3) granting the petition for writ of certiorari. Petitioner brings this Court's attention to the fact that trial counsel was ineffective, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by failing to adequately prepare and rebut evidence that Petitioner shot the decedent with premeditation while the decedent was behind the store counter. How the decedent came to be shot was critical to the extent of Petitioner's culpability.

In addition, petitioner seeks rehearing because this Court may have overlooked the fact that trial counsel was ineffective for failure to call James Aiken to testify that petitioner could adapt to prison, and would be a "low risk" of being any danger "to staff, inmates, or the general public."

App. 2971. Petitioner further seeks rehearing because trial counsel's decision not to investigate Petitioner's family history in Michigan, where he was born and raised, was not reasonable. The Michigan witnesses that testified during the PCR hearing would have conveyed to the jury that Petitioner was a good person, and not an aggressive person by nature, and asked for mercy. This evidence was important for the life and death decision the jury had to make particularly since the trial facts that follow make this a most troublesome death penalty case.

Two scenarios of what occurred

Everyone knew the third shift clerk at Nikki's convenience store, James Mahoney, carried a gun in his waistband behind his back. That gun was a .44 Magnum. Keith Fowler, whose wife owned the store, testified in addition to Mahoney's .44 Magnum bulldog revolver, there were a .45 and a .32 caliber Magnum kept under the counter. App. 1347, l. 23 – 1348, l. 20.

Petitioner testified at the PCR hearing that he knew Mahoney from patronizing the store. He was sure Mahoney recognized him on the night of the incident. Petitioner also knew there was a security camera that monitored what occurred in the convenience store. App. 2266, l. 24 – 2267, l. 5.

Defense counsel Michael Morin testified at the PCR hearing that petitioner had consistently told him he went into the store to purchase beer and cigarettes and that he put them on the counter. The photographs of the store and the diagram of the store are before this Court to review. Morin recalled that Petitioner did not have quite enough money -- just some small change short to buy the beer and cigarettes. He asked the clerk to "let him slide because he was in there all the time. Then the clerk made some offensive remarks to [petitioner] and told him he'd have to leave or what have you. Mr. Moore didn't want to. That the clerk pulled out a gun and Mr. Moore immediately tried to

disarm him for his own safety. Then after he got that gun away from the, him, the clerk pulled out a second gun and shot him and he [Petitioner] returned fire." App. 2511, ll. 11-25.

Petitioner, at the PCR hearing, described what happened largely the same way as Morin. He asked Mahoney to allow him to take some small change out of the little container on the counter since he had put his change there in the past to help others similarly situated. Petitioner remembered he was eleven or twelve cents short, but Mahoney told him he could not take change out of the container to have enough to purchase his beer and cigarettes. He reminded Mahoney that he had contributed to the small change cup in the past. Mahoney was not a big man. Petitioner really did not think he was intimidated by Mahoney, even though he knew that Mahoney always kept a pistol in his waistband behind his back. App. 2267, l. 10 – 2268, l. 20.

Mahoney told Petitioner to get his "black ass out of my store." App. 2268, ll. 3-9. When Mahoney told him to get "my black ass out of the store, that's when I, I must have said something like I'm not going nowhere." He may have cursed back at Mahoney. Mahoney reached under the counter and came back up with "a pistol in his hand." "I automatically responded and, and I wouldn't allow him to point the pistol at me. So, I reached for it. We struggled over that particular pistol, and it fired, it went off, and it jammed, and that's how I was able to get it from his hands." App. 2268, l. 3 – 2274, l. 13.

Mahoney then reached behind his back, pulled out the .44 Magnum and shot petitioner with it. Petitioner recalled he was able to fire three or four shots at Mahoney and Mahoney fell to the floor. Petitioner denied that he pointed the gun at Terry Hadden, who was playing the video poker machine. Petitioner admitted he grabbed the bag of money and left. App. 2268, l. 3 – 2274, l. 13.

Hadden's trial testimony

Defense counsel Morin repeatedly acknowledged during the PCR hearing that discrediting Hadden's trial version of what occurred was critical. App. 2384, ll. 12-23; 2398, l. 13 – 2399, l. 23; 2400, l. 4 – 2401, l. 15; 2549, l. 16 – 2550, l. 13.

At trial, Hadden described petitioner as "a big guy." Petitioner walked into the store at about three o'clock that morning. Hadden was playing the video poker machine and he claimed he heard Mahoney say: "What the hell do you think you are doing?" Hadden said he turned around and he saw petitioner had Mahoney by both of his hands. Hadden claimed that petitioner got a weapon away from Mahoney and told him not to move. Hadden claimed petitioner shot at him so he fell to the floor and played dead. App. 1204, l. 12 – 1209, l. 17.

Hadden agreed that everyone could see that Mahoney carried a gun in his back waistband. App. 1212, ll. 7-13. Defense counsel Morin's cross-examination of Hadden consisted of less than ten pages of transcript. Hadden's only concession to defense counsel was his acknowledgement that nowhere in his statement to the police did he tell them that petitioner had held Mahoney's hands down. App. 2224, ll. 8-10. However, Hadden insisted that he told the police at some point. App. 1227, ll. 12-19.

Lesser-included offense and self-defense

Morin further testified he tried to present evidence to obtain a voluntary manslaughter instruction "[w]ithout him [Petitioner] testifying, the best we could try to do is a get a [voluntary] manslaughter." App. 2494, l. 12 – 2495, l. 3. Morin said he discussed voluntary manslaughter and self-defense with petitioner. App. 2495, ll. 1-5.

Morin told the PCR judge that petitioner refused to plead guilty in return for a life sentence. Morin agreed repeatedly that Petitioner was consistent in what he said occurred in the store that

morning. Morin claimed petitioner was not interested in testifying, which Morin agreed would have helped him get jury instructions on self-defense and voluntary manslaughter. App. 2515, l. 9 – 2517, l. 5; App. 2532, ll. 7-21.

Morin testified that the state did not really have a clear theory of what occurred in the store that morning, but they put it to the jury that petitioner went into the store with the intention of robbing it. Morin said on cross-examination: "[I]t didn't really [matter] how many shots were going off because he's contended he is defending himself, and, and I think, in any argument, the fact that you've got a gun, a .45 pointed in your face or chest, that right there causes a defensive reaction. Whether it's to run or fall down or take the gun. And then when you get shot, you return fire. That's not unreasonable I didn't think, and I was concerned about the bullets and, and the other things that had to do with where Mr. Mahoney was so that we could develop that, that, that defensive struggle between two armed, one man armed twice, one [Petitioner] not armed, now they're both armed, now they're both shot. That's the - - that right there is where we were trying to go with it, and how many times the .45 got shot, once the gun's pointed at you, you, you kind of - - he's kind of reacting." App. 2549, l. 16 – 2550, l. 8.

Morin talked with two retained experts only one time each. Strangely, as the PCR judge acknowledged in the order of dismissal, "*Mr. Morin did not tell his experts what Moore said had occurred.*" App. 2898. (emphasis added). "Mr. Morin met with both his pathologist and his crime scene expert, at the same time, to discuss their findings." App. 2898. (emphasis added).

As will be argued infra, this is certainly unusual since surely Morin in his practice now as a solicitor, has the police brief the pathologist with their version of what law enforcement thought occurred. Morin only spoke to Dr. McMahon, forensic pathologist and potential witness, "only one

time." Morin did not talk to the State's crime scene investigator, Paul Dorman, at all before trial. App. 2371, l. 15 – 2372, l. 2.

The unfortunate part of this case was, as Investigator Dorman said during the trial, the video in Nikki's was not working. "The video. The whole system was turned off. It wasn't working at all . . . it was inoperable." App. 1331, l. 15 – 1333, l. 23. Dorman testified at trial: "I don't remember a tape being in the machine." App. 1333, ll. 22-23.

The bag containing the items petitioner was going to purchase, the beer and cigarettes, became a critical piece of evidence. Dorman testified on cross-examination by Morin:

> Q. This is a photograph of the bag, is that right?
>
> A. Yes, sir, it is.
>
> Q. And the bullet was fired from what side of the counter based on this bag?
>
> A. **Looking at the bag, it was fired from the outside in**. I believe that's - -
>
> Q. Well, this bag is on what part of this counter?
>
> A. There is the counter.

App. 1327, ll. 4-11. (emphasis added).

This ineffective cross left the jury with impression that petitioner's gun may have fired the shot from outside the counter into the counter area. When properly questioned at PCR, Dorman made it clear that the bullet that *went through the bag* containing the two beer cans **came from behind the counter**. (i.e. *it was fired by Mahoney*). App. 2206, l. 24 – 2208, l. 6.

Although the bag was a critical piece of evidence, all Morin could say at PCR was: "I don't remember this bag." App. 2356, l. 10- 2357, l. 12. Dorman testified unequivocally at the PCR

hearing that the bullet that went through the bag "came from the server side toward the customer side" and that the exit hole "would be on the customer side." App. 2207, l. 11 – 2208, l. 6.

From his single conversation with Dr. Carol McMahon and crime scene reconstructionist Donald Girndt, Morin recalled they both believed petitioner fired shots from behind the counter and Morin admitted he did not consult with any other potential experts. He admitted he did not attempt to relay to them what Petitioner said actually occurred. App. 2358, l. 8 – 2363, l. 2. Morin reasoned: "I mean obviously Mr. Moore had told me consistently what his part, version was and that was fine. But I needed to be able to have somebody telling me what their professional opinion was so that, when I got to the point where I was gonna (sic) be faced with cross-examining them, I would have some education as to what that evidence may reflect." App. 2361, l. 25 – 2362, l. 6. Morin admitted he thought there were "holes in this [the state's] story." App. 2362, l. 18 – 2363, l. 10.

However, in addition to not telling his retained experts what Petitioner consistently said happened, Morin acknowledged he did not attempt to engage a crime scene reconstruction expert or crime scene expert to testify following the negative opinions of McMahon and Girndt. App. 2363, ll. 8-10.

When Morin was asked to admit that it would have been helpful to have a crime scene reconstruction expert testify and corroborate available helpful evidence which came out at PCR, that "the .45 was fired as it was shooting out toward the customer side," Morin answered: "Without any more thoughts than what you've gave (sic) me, I don't know that it would have." App. 2373, ll. 7-16.

One bullet wound, or two

At the PCR hearing, Dr. Sandra Conradi testified that "the cause of death is a single gunshot wound to the chest with perforation of the heart . . . which means bleeding into the sac around the heart causing the heart to become unable to beat." App. 2326, ll. 16-20. Dr. Conradi acknowledged on cross-examination that it was "a close range wound" but that the decedent was only shot one time and "he could've been conscious for seconds to a minute or two . . ." App. 2331, l. 10 – 2389, l. 20.

Dr. Conradi had trained Dr. John David Wren who was the state's pathologist at trial. Dr. Wren testified during the trial the decedent was shot "21 and a half inches from the top of his head . . . and then he had another gunshot wound in his lower right arm." Dr. Wren stated the second wound could have been a re-entry wound, but he said the wound, while not a contact wound, the gunshot was only "12 to 15 inches away." App. 1492, l. 15 – 1502, l. 9.

Dr. Wren, in contrast to Dr. Conradi, testified "this person probably lived six to ten, maybe fifteen minutes. He could have live fifteen minutes, but I would say less than ten minutes." App. 1502, ll. 10-12. Dr. Wren opined: "This person bled to death." App. 1502, ll. 4-12.

Order of dismissal

In the order of dismissal the PCR court wrote: "Mr. Morin reviewed the physical evidence with both his crime scene expert and his investigator. Counsel's investigation and the information that the state provided to him through discovery revealed that Moore did not have a handgun on him when he entered Nikki's and that both the murder weapon (a .45 caliber handgun) and a .44 caliber revolver, originated with the victim. There were a number of shots fired at the store and a number of shell casings. He had his experts to assist him in reviewing the physical evidence and determining what the physical evidence indicated as to the relative positions of Moore and Jamie

Mahoney and what had occurred. Also, Mr. Morin reviewed the physical evidence with his crime scene expert, Donald Girndt, and he provided Girndt with crime scene photographs. Mr. Morin met with his pathologist and his crime scene expert, at the same time, to discuss their findings." App. 2897 – 2898.

The PCR court wrote of its belief that Moore was shot by the clerk in self-defense and it found some significance in the fact petitioner was "just a few short blocks to Spartanburg Regional Hospital and receiving treatment for his serious gunshot wound, Moore [instead] drove approximately six miles in the opposite direction. Moore did not drive to the hospital or even his own home, but directly to George Gibson's house." App. 2900.

The court wrote that Dr. McMahon's testimony would have been harmful to petitioner and the court found that counsel was not ineffective for failing to retain and call Dr. Conradi because "counsel is not required to search for another expert who will testify favorably. Counsel is not required to 'expert shop.'" App. 2901 – 2902. The Court's dismissive comment about "expert shopping" is inaccurate. See Rompilla v. Beard, 545 U.S. 374 (2005)(counsel retained pitiful "expert" on gun markings to exclude defendant as shooter whom solicitor destroyed in closing argument -- three qualified experts testified at PCR and defendant granted new trial for IAC). Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

As seen, Dr. Conradi testified that the decedent was only shot once, and that he died within seconds or minutes. His pain did not linger. The court stated that Conradi's testimony would have hurt Petitioner because she also opined that the decedent was shot at close range. App. 2904.

The order stated that Paul Dorman, the state's crime-scene technician, "was not the state's expert at trial" even though he was a state's witness. The PCR court rejected petitioner's contention that defense counsel was ineffective for failing to cross-examine Dorman to reveal, as came out at

the PCR hearing, that the victim shot at petitioner first with the .45 caliber revolver. **App. 2197, l. 11 – 2208, l. 6**. Interestingly, the judge wrote that the PCR testimony of Dorman, a life-long law enforcement officer, was not credible. App. 2906.

The court wrote that petitioner did not prove prejudice even if this useful testimony had been admitted because several factors could have contributed or caused the shell casings to end up behind the counter. The Court found it was impossible to tell how the shell casings ended up behind the counter, and the court wrote that found petitioner's version of the shooting implausible. The court also stated there was overwhelming evidence of "Moore's guilt of these crimes." App. 2907.

Discussion

As seen, Morin did not even tell Dr. McMahon and Donald Girndt petitioner's "consistent," - - Morin's words - - version of what occurred in Nikki's store that morning to his retained experts. The videotape at the store was not working, which left the jury to speculate about what had occurred. Petitioner, who Morin agreed was consistent in his version, turned down an offer to plead guilty.

Petitioner testified during the PCR hearing that defense counsel made it very clear that if he testified at his trial that his prior record would come before the jury. Petitioner also said defense counsel did not explain or emphasize to him that his testimony might be necessary for the judge to charge the jury on self-defense and voluntary manslaughter. App. 2280, l. 1 – 2281, l. 24. Morin conversely maintained that petitioner "had no interest" in testifying.

While Morin thought there were "holes" in the state's version of what occurred, he did not even bother to tell his retained experts what petitioner said had occurred at the store that morning. At PCR, Dorman clearly stated that the shot *through the bag* with the beer cans petitioner was going to purchase came from *behind* the counter towards petitioner. This was critical evidence, yet the

jury was left with the impression at trial that the shot came from the "outside in," meaning, in a normal sense of the words, that the shots came *from the customer side of the store toward the counter* and the decedent.

Further, the PCR court's finding that Dr. Conradi's testimony would have been damaging to petitioner in its totality is simply incorrect. Dr. Conradi's testimony that the clerk was shot at close range one time was consistent with petitioner's testimony that he frantically reacted to the decedent pulling a gun on him, cursing, and telling him to get out of the store. Dr. Conradi's testimony that the decedent was only shot one time and died quickly far outweighed any downside it had. It contradicted Dr. Wren's testimony that decedent was shot twice – a very critical distinction that would create reasonable doubt of the state's version.

This is a highly unusual death penalty case since self-defense and voluntary manslaughter, given Morin's PCR testimony about what petitioner consistently told him prior to trial, would have been verdict options had petitioner testified. The worst case scenario was that Petitioner intended for this to be a larceny or common-law robbery since he did not have a firearm with him.

If the jury found Petitioner intended to steal money but was not armed it could have reasonably found that the murder was not the natural or probable consequence of the larceny. It could have further concluded that the state had failed to prove beyond a reasonable doubt that the homicide was the natural or probable consequence of a plan to steal money from the store, and Petitioner would have been entitled to an acquittal on the murder charge. Cf. State v. Peterson, 287 S.C. 244, 246-247, 335 S.E.2d 800, 801 (1985).

It is highly implausible that Petitioner anticipated that the decedent would point a firearm at him and that petitioner would successfully disarm the decedent and exchange gunfire with him. It

was therefore critical at both the guilt phase and penalty phase that the Dorman and Conradi PCR testimony was given to the jury.

Defense counsel was ineffective in cross-examining state's witness Paul Dorman during the trial to elicit testimony that gunshot *did go through petitioner's bag from behind the counter.* Defense Counsel Morin did not even bother to interview Dorman prior to the trial even though his forensic testimony was very important.

The PCR court's refusal to call Dorman anything other than a neutral witness was, respectfully, as unusual as law enforcement not giving the pathologist their version of how a shooting occurred. Defense counsel was deficient for failing to provide his retained experts with petitioner's version of what had occurred, and for failing to find available expert testimony of Dr. Conradi, or somebody similar to her, and for not cross-examining Dorman with the evidence that the hole in the bag was from a shot fired by the decedent. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's performance fell below an objectionable standard of reasonableness. See Franklin v. Catoe, 346 S.C. 563, 570-571, 552 S.E.2d 718, 722 (2001).

Morin's failure to interview Dorman, and his inept cross-examination of him constituted deficient performance. It was completely unreasonable under prevailing professional norms and therefore constituted deficient performance under the Sixth Amendment. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Dorman's PCR testimony was critical guilt phase evidence, and strong evidence in mitigation at the penalty stage. Evidence that petitioner was being shot at, and shot at first, would have entitled him, at a minimum, to a voluntary manslaughter instruction. Even if not manslaughter, the testimony was strong evidence of the statutory mitigating circumstance that the "defendant was provoked by the victim into committing the murder." See S.C. Code §16-3-20

(C)(b)(8). Morin's decision not to interview Dorman prior to trial and not to tell his experts petitioner's consistent version of how the shooting came about was objectively unreasonable. It was not a reasonable strategic decision. See Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008).

Defense counsel's failure to interview Dorman so that he could effectively cross-examine him was unreasonable since defense counsel could easily have interviewed Dorman and discovered there was available evidence corroborating petitioner's testimony, a game changer in this case demonstrating a reasonable probability the outcome would have been different. See Cobbs v. State, 305 S.C. 209, 408 S.E.2d 223 (1991).

Further, the judge's conclusion that the PCR testimony of Dorman, a life-long law enforcement officer, was not credible applies the wrong standard of credibility, and is legal error. App. 2906. See State v. Jenkins, 848 N.W.2d 786, 797 (Wis.2014)(holding that "[i]n assessing the prejudice caused by defense trial counsel's performance, i.e., the effect of the defense trial counsel's deficient performance, **a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible"**)(emphasis in original); Commonwealth v. Johnson, 966 A.2d 523, 541 (Pa. 2009)(recognizing "that assessing credibility for purposes of Strickland prejudice *is not necessarily the same thing as assessing credibility at a trial*," finding no case from the United States Supreme Court setting "forth a standard for credibility determinations in the Strickland prejudice context" and explaining that "credibility assessments in the Strickland context are not absolutes, *but must be made with an eye to the governing standard of a 'reasonable probability'* that the outcome of the trial would have been different"). (emphasis added). The judge, in his order of dismissal, simply adopted the state's version of what occurred in the store that day in finding Dorman's testimony on this subject not credible. Witnesses are presumed to tell the truth, and there was nothing in this record from which the PCR judge could

have legitimately found Dorman's PCR testimony on this seemingly dispositive matter not credible. See State v. George, 113 S.C. 154, 102 S.E. 284-285 (1920).

Defense counsel's deficient performance was prejudicial to petitioner because the state was able to argue that petitioner entered the store with the intent to rob it – though it was undisputed he was not armed with a gun -- and shot a helpless clerk in cold blood. This is a much different version of events than what Morin admitted petitioner had consistently told him: Everyone knew that the decedent was always armed, Petitioner knew there was a video camera in the store, and Petitioner only returned fire in self-defense after the decedent pointed a gun at him and ordered him out of the store because he did not have enough money to purchase beer and cigarettes. Petitioner's consistent statement about what occurred should have been presented to the retained experts, and Dr. Conradi or another similarly situated expert should have been retained, and Dorman would have stated at trial that the shot came from behind the counsel had defense counsel's cross-examination not been so deficient.

In the final analysis, the jury never learned of readily available evidence that a gun was fired toward Petitioner from behind the counter, and the bullet went through the grocery bag towards Petitioner. The evidence of Investigator Dorman and Dr. Conradi were critical at both the guilt stage (self-defense or voluntary manslaughter), and the penalty phase trial (Petitioner's culpability and the suffering of the decedent), and rehearing is absolutely justified.

PRISON ADAPTABILITY EVIDENCE

Sentencing Proceeding

The prosecution presented evidence of Petitioner's prior convictions through multiple witnesses, including the victims of prior crimes and court officials. Petitioner's trial counsel did nothing to counter the prosecution's case that Petitioner posed a future danger. Trial counsel

presented only two witnesses, Petitioner's girlfriend, Lynda Byrd, and his stepson, James Byrd, during the penalty phase of the trial. Neither witness presented by trial counsel countered the prosecution's evidence of future dangerousness.

The prosecution called Jacqueline Walker, an employee of the Wayne County Clerk of Court in Detroit, Michigan, to testify. App. 1648, ll. 3-19. Through Walker, the prosecution entered certified copies of Petitioner's criminal record from Wayne County. App. 1649, l. 12 – 1650, l. 7. The record revealed Petitioner had been convicted for unlawful possession of a weapon in 1985. App. 1650, ll. 8-11.

Next, the prosecution called Bill Nixon, the Chief Deputy Clerk for the County of Macomb in Michigan, to testify. Nixon testified that the records indicated Petitioner was charged with breaking and entering a building with intent and was convicted on May 15, 1987. App. 1653, ll. 20-24. The record included an additional form in which Petitioner was asked to explain in his own words what happened. Petitioner's statement was "Pushed open front door of Broadway Market. Entered store and removed two handguns and $10 in quarters. When officers arrived - - but I ran away." App. 1654, ll. 4-10. On cross-examination, Nixon clarified that Petitioner had been charged with breaking and entering, but had pled guilty to attempt to break and enter, a lesser-included offense. App. 1654, l. 22 – 1655, l. 2.

David Saad, a parole and probation officer from the Michigan Department of Corrections, testified on behalf of the prosecution. App. 1655, l. 24 – App. 1656, l. 1. Saad prepared a presentence investigation report prior to Petitioner being sentenced for attempted breaking and entering. App. 1656, ll. 5-8. Saad testified that as part of his investigation for the report, he asked Petitioner what happened. Saad recalled Petitioner explained he broke into a building that he selected at random and stole two handguns and a roll of quarters. Later, Petitioner turned

himself into the police. When Saad questioned Petitioner about the cause of his behavior, Petitioner stated he was addicted to cocaine, both in the rock and powder form. App. 1657, ll. 6-24.

Next, the prosecution called Michelle Crowder to testify. She testified that in 1991, she was in a Sub Station restaurant with her fiancé. Petitioner walked in and stood in line behind her. Petitioner then grabbed her purse. When Crowder turned around, Petitioner punched her in the left side of her neck. Crowder fell to the ground as a result of the punch, landing on her purse. Crowder testified Petitioner then kicked her. Crowder's fiancé tackled Petitioner, but Petitioner beat him up, sending him to the hospital. Petitioner then left the restaurant. App. 1659, l. 4 – 1660, l. 7.

Valerie Wisniewski testified that she worked at Rack Room Shoes on September 13, 1991 in Spartanburg. Around closing time, Petitioner entered the store, jumped over the door where she was located, pushed her against a counter and ordered her to give him the money in the register. App. 1663, ll. 12-23. While she was screaming, the assistant manager, David Kivet, opened the register and gave Petitioner the funds. App. 1664, ll. 18. Petitioner then left the store. App. 1664, ll. 12-16.

Gail Moffitt, an employee of the Spartanburg County Clerk of Court, testified on behalf of the prosecution. App. 1665, ll. 23-25. Through Moffitt, the prosecution painstakingly detailed Petitioner's criminal record. She testified that in August 23, 1994, Petitioner was convicted of common law robbery, which was the incident involving Rack Room Shoes and Wisniewski. App. 1667, ll. 3-17. According to Moffitt, Petitioner was convicted of driving under suspension, second offense and driving under suspension, third offense on September 15, 1993. App. 1667, l. 18 – 1668, l. 2; App. 1668, ll. 14-21. He was also convicted of habitual

traffic offender on two occasions. App. 1668, ll. 3-10; App. 1668, l. 22 – 1669, l. 6. Petitioner had a second driving under suspension, third offense on July 13, 1995, and driving under suspension, fifth offense and sixth offense on January 18, 1996. App. 1669, l. 7 – 1670, l. 11. On August 7, 1997, Petitioner was convicted of assault and battery of a high and aggravated nature. App. 1670, ll. 12-24.

During the prosecutor's closing argument, he referred to Petitioner as a "career criminal." App. 1722, l. 3. The prosecutor also attacked Petitioner's request for mercy. After noting that mercy may exist in the form of probation or relatively small prison sentences, the prosecutor detailed Petitioner's criminal record and opined that the time for mercy "ha[d] come and gone." App. 1723, l. 14 – 1724, l. 7. According to the prosecutor, Petitioner "had chance after chance after chance" and "had ample opportunity." As such, the prosecutor argued, Petitioner had hurt too many people too bad[ly] for too long for mercy in this case. App. 1724, ll. 15-22. He further argued Petitioner had engaged in "a steady, continuous, gradual pattern of escalating violence" and "sixteen years of escalating violent acts." App. 1724, ll. 2-3; App. 1724, ll. 20-21. The prosecutor asked the jury to give Petitioner "what he ha[d] earned for [fifteen] years. ... Fifteen years of victimizing people; [fifteen] years of disregarding other people's well-being." App. 1725, ll. 3-7. He concluded his argument by asking the jury "to sentence him to what he has earned for a lifetime of violent crimes. Death." App. 1725, ll. 22-24.

Adaptability Evidence Presented at PCR hearing

Petitioner called James Aiken to testify during his PCR hearing. Aiken was the president of a jail and prison consulting firm dealing with all aspects of criminal justice as it pertains to confinement facilities and systems. App. 2098, ll. 8-12. Aiken was a graduate of Benedict College and held a master's degree in criminal justice from the University of South Carolina.

App. 2098, ll. 16-19. Aiken worked for the South Carolina Department of Corrections beginning in 1971. He worked in sixteen prisons within the state system. App. 2098, l. 24 – 2099, l. 14. Thereafter, he worked for the Indiana Department of Corrections and the United States Virgin Islands corrections system. App. 2099, ll. 15-18. Subsequently, he began his consulting firm. App. 2099, ll. 18-21.

Without objection, Aiken testified as an expert in the field of classifications of inmates and the security of staff and inmates within those institutions and classifications. App. 2107, ll. 16-23. Aiken reviewed the classification and history of Petitioner. App. 2108, l. 25 – 2109, l. 8. Aiken determined Petitioner could be "adequately managed while in confinement status and that the South Carolina Department of Corrections can adequately manage him." App. 2112, ll. 16-20.

Aiken testified that he was prepared for Petitioner's trial, but was not called to testify as a witness. App. 2097, l. 24 – 2098, l. 3. Aiken would have testified the same in 2001 as he did during the post-conviction relief hearing. App. 2113, ll. 1-4.

On cross-examination, Aiken admitted Petitioner had received several disciplinary write-ups while on death row, including a verbal altercation with staff concerning opening a window and attempting to possess a cell phone. App. 2117, ll. 5-20; App. 2118, ll. 11-18. Additionally, Aiken testified Petitioner received disciplinary write-ups while incarcerated in Spartanburg County, including refusing a direct order from an officer, abuse of telephone privileges, and arguing with a correctional officer. App. 2119, l. 25 – 2121, l. 23.

Aiken also reviewed Petitioner's criminal record. Aiken disagreed that Petitioner's record showed a history of escalating violence. App. 2122, l. 20 – 2123, l. 7. Aiken opined Petitioner's actions did not reflect that he was a predator and unable to adapt to prison. App.

2124, ll. 8-13. According to Aiken, Petitioner did not "come anywhere near the level of predator inmate population and the intensive type of management that's required for that type of population." App. 2127, ll. 12-15. Aiken further concluded that the prison system could adequately manage Petitioner for the remainder of his life. App. 2126, ll. 4-5.

Trial counsel, Michael Morin, testified that that he could not think of a reason not to call an adaptability expert to testify even if doing so would have allowed the prosecutor to introduce evidence of Petitioner's infractions within the county detention center.[1] App. 2497, ll. 13-23. Morin recognized the state would argue that based upon the infractions, Petitioner refused to follow the rules, and as a result, the attorney would have to "weigh that back and forth." App. 2499, ll. 9-18.

Keith Kelly, who also served as trial counsel, consulted with Aiken prior to Petitioner's trial. His recollection was that Aiken would have testified that the Department of Corrections could house Petitioner and keep the population safe. "In other words, he's never gonna get out and we can control him." App. 2649, ll. 13-25. Additionally, Aiken would have testified that Petitioner was "not a monster" and was "not uncontrollable." App. 2650, l. 1.

Kelly testified that he decided not to call Aiken to testify because the prosecution had a witness from Michigan to testify concerning Petitioner's lengthy record in Michigan. Kelly believed the state would have used the witness to rebut Aiken's testimony. App. 2650, ll. 5-18. Kelly testified that he wanted to keep out evidence relating to Petitioner's discipline while

[1] As will be discussed in greater detail infra, the prosecution can introduce evidence of an individual's conduct in the county detention center without waiting for the defense to open the door.

incarcerated and such evidence would have been admitted had Aiken testified. App. 2650, l. 23 – 2651, l. 14.

On cross-examination, Kelly admitted that the potential state's witness from Michigan was not an expert; rather, the witness was a records custodian. App. 2686, l. 23 – 2687, l. 2. Kelly maintained that based on Petitioner's previous incarceration and "whatever disciplinaries may have been documented as a result," he decided not to call Aiken. App. 2687, l. 24 – 2688, l. 4.

Order of Dismissal

Concerning Petitioner's claim that trial counsel provided ineffective assistance by failing to present evidence of his adaptability to prison through the retained expert, the PCR court found "counsel made a reasonable strategic decision not to present Aiken's testimony." The PCR court further found no prejudice resulted from counsel's decision.

The court's order summarized Aiken's testimony, including that Petitioner "would be of low risk of presenting a future danger in the prison system" and that Petitioner could "be controlled in a prison environment for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general public." App. 2971. The court found Aiken was present at the trial and prepared to testify favorably on Petitioner's behalf. App. 2972. Additionally, the court found that the prosecution was prepared to introduce the testimony of a records custodian from Michigan concerning Petitioner's misconduct while incarcerated there. Kelly, who could not recall the nature of those records, decided not to call Aiken in fear of the state calling the witness from Michigan. App. 2972.

The PCR court concluded trial counsel's decision not to call Aiken was reasonable because the presentation of Aiken's testimony would have resulted in the prosecution being

allowed to present damaging testimony in reply. The court found "Respondent significantly impeached [Aiken's] opinion of [Petitioner]'s adaptability with a contrary history of disciplinary infractions that [Petitioner] has committed while incarcerated." App. 2974. The PCR court was particularly concerned about Petitioner's possession of a cell phone and cell phone charger while on death row, which was considered a major infraction by the institution. App. 2974. The PCR court characterized Aiken as "dismissive of all the disciplinary infractions that Respondent elicited" as he testified that these infractions would not alter his opinion of Petitioner's ability to adapt to life in prison. App. 2974. The PCR court admitted that Respondent did not impeach Aiken with an offense listed on the mitigation investigator's report that Petitioner allegedly absconded from parole in Michigan; however, the PCR considered this in its analysis. [2] App. 2975.

As a result, the PCR court concluded that the numerous disciplinary infractions that Petitioner committed in South Carolina prior to trial would have minimalized the effectiveness of Aiken's testimony. The court held "[t]his is particularly true if there [were] further evidence of misconduct that [Petitioner] committed in the Michigan incarcerations, as there appears to be." App. 2975 (emphasis added). Thus, the court found "Aiken's expert testimony would have been of slight value, at best, *and that it would have permitted the introduction of evidence that would be damaging to the defense's case in mitigation.*" App. 2975. (emphasis added).

[2] The only evidence before the PCR court of Petitioner's alleged absconding was the mitigation investigator's report.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. The United States Supreme Court explained the ABA Guidelines provide evidence of the well-defined and prevailing professional norms. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins v. Smith, 539 U.S. 510, 524 (2003)(citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)). The 1989 Guidelines also provide that trial counsel should consider presenting evidence of the client's rehabilitative potential and expert testimony concerning such. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6(B)(6) & (8)(1989).

The purpose of the sentencing phase of a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the defendant. Woodson v. North Carolina, 428 U.S. 280 (1976); State v. Stewart, 283 S.C. 104, 107, 320 S.E.2d 447, 450 (1984); State v. Owens, 346 S.C. 637, 665, 552 S.E.2d 745, 760 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Haselden, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003). The United States Supreme Court held that a penalty phase jury may consider any aspect of a defendant's character or record and any circumstances of the offense

that the defendant proffers as a basis for a sentence less than death as a mitigating factor. Lockett v Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

In Skipper v. South Carolina, 476 U.S. 1, 4 (1986), the United States Supreme Court held that evidence of good behavior of a previously-incarcerated defendant is relevant evidence in mitigation of punishment. Skipper sought to introduce the testimony of two jailers and a regular visitor to the jail, who would have testified that Skipper adjusted well to life in jail. Id. at 2. This testimony would have allowed the jury to draw favorable inferences concerning Skipper's character and his probable future conduct if sentenced to life imprisonment. Id. at 4. The Court held there was no question that such inferences were mitigating because they may serve as a basis for a sentence less than death. Id. "The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

As explained by the Skipper Court, "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Id. Thus, evidence that a defendant would pose a danger in the future may be treated as an aggravating factor in capital sentencing proceedings. Jurek v. Texas, 428 U.S. 262, 275-276 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek, 428 U.S. at 271. In Nance v. Ozmint, 367 S.C. 547, 556, 626 S.E.2d 878, 882-883 (2006), this Court noted that one of the many failings of trial counsel was his failure to present "adaptability evidence at the sentencing hearing." During the PCR proceedings, Nance presented considerable adaptability evidence, including his selection as the Manning Correctional Institution's Inmate of the Year, his nomination for the Department of

Corrections' Inmate of the Year, his singing in the prison choir, his participation in other Christian activities, and a jail administrator's description of him as a "model inmate." Id. at 556-557, 626 S.E.2d at 883.[3]

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). In fact, this Court has held that the prosecution may introduce testimony that a defendant has attempted a similar crime to that for which the defendant is on trial during the penalty phase because the evidence is relevant to the defendant's individual characteristics and predisposition to commit similar crimes. State v. Green, 301 S.C. 347, 358, 392 S.E.2d 157, 162-163 (1990). Evidence of a defendant's violent behavior in prison is relevant to future dangerousness, an issue properly before the sentencing jury. State v. Shafer, 352 S.C. 191, 198-199, 573 S.E.2d 796, 799-800 (2002).

As explained by this Court, "it is well-settled evidence of the defendant's behavior in prison is admissible in capital sentencing because it bears upon his character." State v. Hughes, 336 S.C. 585, 591-592, 521 S.E.2d 500, 503-504 (1999)(holding evidence that defendant killed a sleeping cellmate by stabbing him with a shank was admissible as evidence of the defendant's character and future dangerousness). There is a tension between evidence regarding the defendant's adaptability to prison life, which is admissible, and evidence regarding prison life in general, which is not admissible. State v. Burkhart, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). However, when the prison conditions are narrowly tailored to demonstrate the defendant's personal behavior in those

[3] The Third Circuit Court of Appeals found trial counsel rendered ineffective assistance by failing to present, among other things, evidence of the defendant's adaptability to prison. Blystone v. Horn, 664 F.3d 397, 427 (3d Cir. 2011).

conditions, then the evidence is admissible. Id. Although the issue was not preserved for appeal, in State v.Whipple, 324 S.C. 43, 52, 476 S.E.2d, 683, 688-689 (1996), this Court held the introduction of Whipple's disciplinary record by the prosecution was not in error as the records were relevant to a matter properly before the jury – Whipple's adaptability. As explained in State v. Tucker, 324 S.C. 155, 173-174, 478 S.E.2d 260, 270 (1996), a defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case.

Relying upon Burkhart, this Court later held the prosecution's introduction during its case-in-chief of a video recording of a capital defendant refusing an order of prison guards and the guards using pepper spray to force his compliance was "probative on the issue of the defendant's adaptability to prison life, which is a legitimate concern in the sentencing phase of a capital case." State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). This Court held "[t]he video recording presented the jury with competent evidence to showcase Torres' character and an actual routine prison situation." Id. Although the prosecution had introduced evidence of Torres' prior convictions and his inability to abide by conditions of parole, this Court held the video was still admissible as it "was unique in its application to a specific parameter held by this Court to not be arbitrary in the sentencing phase of a capital murder trial." Id. at 625-626; 703 S.E.2d at 230.

Without question evidence of a defendant's future adaptability to prison life is admissible during the penalty phase as it is evidence of a mitigating circumstance. Exclusion of such testimony is reversible error. State v. Matthews, 291 S.C. 339, 348-349, 353 S.E.2d 444, 449-450 (1986); State v. Patterson, 290 S.C. 523, 530-531, 351 S.E.2d 853, 857 (1986); State v. Riddle, 291 S.C. 232, 235-236, 353 S.E.2d 138, 140-141 (1987), overruled on other grounds by

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The District Court for the Western District of Texas granted habeas relief to a death-sentenced inmate based, in part, upon trial counsel's failure to present testimony from an expert that the probability of the defendant being a danger in the future was "'very low'" and failure to utilize records from a state rehabilitation center to demonstrate the defendant's good behavior and attempts to rehabilitate while in custody. Martinez-Macias v. Collins, 810 F.Supp. 782, 819-821 (W.D. Tex. 1991), affirmed by Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. On the other hand, this Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

In Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), this Court held trial counsel's decision not to present evidence of Drayton's ability to adapt to prison was not ineffective assistance of counsel. Trial counsel testified during post-conviction proceedings that he decided not to present adaptability evidence because the evidence included unfavorable psychiatric evaluations, poor disciplinary reports, and some accounts of misconduct while incarcerated. Id.

at 10, 430 S.E.2d at 521. This Court noted that Drayton's past actions in juvenile detention and when incarcerated as an adult reflected "a mixed picture of his ability to function in a prison setting." As such "[a]n attempt to develop favorable evidence of future adaptability would have opened the door for the prosecution to reveal Drayton's earlier misconduct in prison." Id. at 11, 430 S.E.2d at 521.

Petitioner's trial counsel testified that he did not present testimony of Aiken because to do so would have opened the door for the prosecution to present evidence of Petitioner's prior discipline record in Michigan. The PCR court determined trial counsel employed sound strategic reasoning, and thus, trial counsel rendered effective assistance. However, the basic premise is flawed. As explained supra, evidence of Petitioner's conduct while in prison was admissible by the prosecution without waiting for Petitioner to open the door to such testimony. This Court and the United States Supreme Court have held that a defendant's conduct while in prison is relevant to the defendant's character, adaptability to prison, and future dangerousness, all of which are proper considerations of a penalty phase jury. Thus, trial counsel's decision not to call Aiken based upon a fear of opening the door to presentation of harmful evidence by the prosecution was unfounded. The PCR court's determination that trial counsel employed sound strategy is legal error.

Although Drayton, supra, appears to support the PCR court's order that trial counsel made a valid strategic decision concerning the admission of adaptability evidence, the case law is clear – the prosecution was not required to wait for Petitioner to present evidence of his ability to adapt. Petitioner's prison record was relevant to his character, his future dangerousness, and his ability to adapt to life in prison; therefore, nothing prevented the prosecution from presenting this

evidence during its case-in-chief. Unlike the Drayton evidence, Aiken's testimony was very favorable to Petitioner, not interlarded with damaging evidence as that in Drayton.

In addition, concluding that the evidence of Petitioner's conduct while incarcerated in Michigan was harmful is entirely speculative. Neither the trial record nor the PCR record contained evidence of what was contained within Petitioner's prison records in Michigan. Even the PCR court order admitted that its decision was based upon speculation when the court noted that there "appear[ed]" to be evidence of misconduct by Petitioner while in Michigan, but could point to no evidence of such as Respondent failed to produce any of the records or attempt to impeach Aiken with the records. In any event, the State had *already* presented evidence on this issue from Michigan witnesses in its case-in-chief, including his probation agent.

Prejudice

"When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998)(quoting Strickland, 466 U.S. at 695 (1984)). As this Court noted "the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

Prejudice is apparent in this case in light of the minimal case presented by trial counsel during the penalty phase and the weak case for death offered by the prosecution. The only evidence presented during the penalty phase by Petitioner was from his wife and stepson who testified that Petitioner continued to be a good parent while in prison and asked for mercy. The

prosecutor's case in aggravation concerned the circumstances of the crime at issue and Petitioner's prior criminal record. Although the victim's family suffered a tremendous loss and Petitioner's argument in no way seeks to minimize the loss suffered by the family, the circumstances of the crime were not of the brutal or torturous nature as is typical of most death penalty cases. The evidence adduced during the guilt phase and penalty phase was undisputed that Petitioner did not enter the convenience store with a murder weapon and Petitioner was shot by a bullet fired by the victim. Although Petitioner had a lengthy criminal record, the majority of his convictions were for traffic offenses. The prosecution used Petitioner's criminal record to demonize him and argue he had "earned" death.

Evidence of an undisputed and respected expert in the field of classifications of inmates and the security of staff and inmates within those institutions and classifications was "not self-serving evidence a jury would naturally tend to discount." See Skipper, 476 U.S. at 8. Due to the damaging character evidence presented by the state, Petitioner's character could not have been further damaged by the presentation of adaptability evidence or evidence of misconduct while in prison in Michigan, if such evidence existed. See Council, 380 S.C. at 175, 670 S.E.2d at 364. Like the attorneys in Council, "[t]rial counsel essentially would have had 'nothing' to lose' and 'everything to gain' by presenting this evidence." Id. at 176, 670 S.E.2d at 364-365. Due to trial counsel's deficient performance, the jury never heard the impartial testimony of Aiken that in his expert opinion, Petitioner would adapt well to life in prison and the Department of Corrections was equipped to maintain custody and control over Petitioner. Had the jury learned of Petitioner's high likelihood of adaptability and low risk of future dangerousness from an expert and placed this evidence on the mitigating side of the scale, there is a reasonable

probability that at least one juror would have struck a different balance. See Wiggins, 539 U.S. at 537.

Failure to Investigate and Present Evidence in Mitigation

Trial counsel presented only two witnesses during the penalty phase of the trial: Petitioner's girlfriend, Lynda Byrd, and Petitioner's "stepson," James Byrd. Trial counsel called no other members of Petitioner's family to testify and presented no evidence of Petitioner's life history. Rather, the focus of the mitigation case appeared to be Petitioner's ability to be a "father" while in prison.

Mitigation Evidence Presented at PCR hearing

During PCR proceedings, Petitioner presented deposition testimony from Dorothy Hooper, Cecil J. Hooper, Harold Harrington, Arma Hadley, James A. Moore, and Maurice Moore. Pete Skidmore testified concerning his role as fact investigator, and Dr. Sandra Conradi testified regarding the meaning of the forensic evidence which as discussed above showed the decedent was actually shot only once.

Petitioner's aunt, Dorothy Hooper, who has been a lifelong resident of Michigan, became aware of Petitioner being charged with murder in 2006, five years prior to her deposition testimony. App. 1802, ll. 13-20; App. 1803, ll. 16-21; App. 1808, ll. 7-9. No lawyers or investigators ever spoke to her prior to the PCR investigation. App. 1803, ll. 22-24; App. 1807, l. 17 – 1808, l. 1; App. 1813, ll. 4-8. Dorothy would have spoken to investigators and would have testified at Petitioner's trial. App. 1803, l. 25 – 1804, l. 6. At the time of Petitioner's trial, Petitioner's mother was deceased, and no member of the defense team, or Petitioner's father or other family members asked Dorothy to testify. App. 1808, ll. 11-21; App. 1813, ll. 21-22.

Dorothy explained Petitioner was at her home on a weekly basis, including overnight visits, when he was a child. App. 1804, ll. 9-12; App. 1804, l. 21 – 1805, l. 11. She described Petitioner as a "good person" who never gave her any trouble. App. 1804, l. 9-14; App. 1805, ll. 12-19. According to Dorothy, Petitioner was respectful and did not act aggressively or violently. App. 1805, ll. 22-24. Had Dorothy addressed the jurors in Petitioner's capital trial, she would have asked them to spare his life and for mercy. App. 1805, l. 25 – 1806, l. 6. Dorothy candidly admitted she was not aware of Petitioner's prior interactions with law enforcement; however, knowing of Petitioner's legal troubles would not have affected her willingness to testify on his behalf. App. 1809, l. 21 – 1811, l. 23; App. 1813, ll. 9-15.

Cecil J. Hooper, Dorothy's husband, had known Petitioner all of Petitioner's life. App. 1819, l. 22 - 1820, l. 15. Cecil learned Petitioner had been charged with murder from Dorothy. App. 1820, l. 16-20. He was never contacted by anyone on Petitioner's behalf prior to the PCR investigation. App. 1820, l. 21 – 1821, l. 2; App. 1822, ll. 7-18. Had Cecil been contacted, he would have been willing to be interviewed and testify on Richard's behalf. App. 1821, ll. 3-9. Cecil would have told the jury that based upon his regular interactions with Petitioner, he considered Petitioner "a nice kid growing up," who was respectful to adults, and had no behavior problems. App. 1821, ll. 10-21. Cecil would have asked the jury for mercy. App. 1821, l. 25 – 1822, l. 1. Like Dorothy, Cecil admitted he was not aware of Petitioner's prior criminal record, but he would have testified on Petitioner's behalf even knowing about Petitioner's troubles with the law. App. 1822, l. 19 – 1824, l. 11; App. 1825, l. 24 – 1826, l. 1.

Harold Harrington, Petitioner's uncle and a lifelong resident of Michigan, became aware of Petitioner's murder charges shortly after Petitioner's mother's death. App. 1832, ll. 5-6; App. 1832, ll. 16-20; App. 1833, ll. 2-7. During Petitioner's teenage years and into his twenties,

Harold saw him several times a week. App. 1835, ll. 2-11. Harold never observed Petitioner acting out aggressively. App. 1836, ll. 15-18.

Harold was never contacted by anyone on Petitioner's behalf prior to the PCR investigation. App. 1833, ll. 8-12. Had he been contacted, he would have testified that Petitioner was a good person and would have asked the jury to be lenient and not recommend the death penalty. App. 1834, ll. 6-13. Harold was not aware of Petitioner's criminal record, but that would not have changed Harold's willingness to testify on Petitioner's behalf. App. 1835, l. 12 – 22; App. 1836 l. 25 – 1837, l. 2; App. 1837, ll. 12-18; App. 1838, ll. 5-15; App. 1838, l. 21 – 1839, l. 5.

Arma Hadley, Petitioner's maternal aunt, was one of nine children. All lived in the same area in Michigan. App. 1845, l. 25 – 1846, l. 3; App. 1850, l. 20 – 1851, l. 2. Her family was very close with Petitioner's father's family. App. 1851, ll. 7-17. Arma was never contacted by anyone regarding Petitioner until the PCR investigation. App. 1846, ll. 12-21; App. 1859, ll. 11-21. Arma would have been willing to speak to investigators and testify on Petitioner's behalf. App. 1846, l. 22 – 1847, l. 5.

Arma recalled Petitioner as a sweet and friendly person. App. 1847, ll. 21-25. Petitioner was respectful to her, worked hard, and played on the basketball team in high school. App. 1848, ll. 4-8. Petitioner was not a discipline problem and did not act aggressively. App. 1848, ll. 14-20. She admitted that after Petitioner graduated from high school and moved away, she did not see him as often. App. 1855, ll. 8-22.

Furthermore, Arma would have told the jury that Petitioner was a calm person, who did not show signs of aggression. App. 1848, l. 22 – 1849, l. 9. She would have asked the jury to spare his life. App. 1849, ll. 16-23. Arma was aware of Petitioner having trouble with the law

on one occasion. App. 1851, ll. 21-23. She was not aware of any other arrests or convictions. App. 1852, l. 22 – 1855, l. 5; App. 1855, l. 25 – 1856, l. 12. Arma did not learn of Petitioner's murder conviction and death sentence until several years after the fact. App. 1856, ll. 18-25.

James Moore is Petitioner's younger brother. App. 1866, ll. 6-18. James did not learn of Petitioner being charged with murder until after Petitioner was convicted. App. 1867, l. 23 – 1868, l. 2. No one ever contacted James about Petitioner. App. 1869, ll. 2-9; App. 1880, ll. 17-23; App. 1881, l. 20 – 1882, l. 11; App. 1886, ll. 8-10. James would have been willing to speak to Petitioner's defense team and would have testified on Petitioner's behalf. App. 1869, ll. 10-17. Had James testified, he would have informed the jury that Petitioner was nice, was a good man, and loved by many. App. 1869, ll. 22 – 24; App. 1870, ll. 1-3. James recalled Petitioner played sports and was popular in school. App. 1869, l. 4 – 1871, l. 2. He would have asked the jury to have mercy on Petitioner. App. 1869, ll. 24-25.

On cross-examination, James admitted he was not aware of Petitioner's prior arrests in the late 1980s and early 1990s.[4] App. 1876, ll. 21-24; App. 1877, ll. 8-11; App. 1877, ll. 15-18; App. 1878, ll. 1-7; App. 1878, l. 21 – 1879, l. 6.

Maurice Moore, Petitioner's older brother, became aware of Petitioner being charged with murder within a few months of the incident. App. 1897, ll. 11-16; App. 1897, ll. 20-25; App. 1905, ll. 4-8. No lawyers or investigators attempted to speak with him prior to Petitioner's trial. App. 1898, ll. 1-8. However, Maurice recalled receiving a phone call from a woman he believed to be Petitioner's lawyer, who informed Maurice of Petitioner's legal troubles. App.

[4] James also admitted he had been convicted of drug law violations in 1994 and 2000. App. 1884 lines 3-11; App. 1884, ll. 20-24. As a result of the 2000 conviction, James would have been in prison at the time of Petitioner's 2001 trial. App. 1885, ll.19-24.

1898, ll. 12-22; App. 1899, ll. 8-11. The woman explained she would call back, but she never did. App. 1899, ll. 10-13.

Maurice would have testified during Petitioner's trial had he been asked. App. 1900, ll. 10-14. He would have told the jury that his brother was a loving, caring person who loved sports and worked hard. App. 1900, l. 20; App. 1901, ll. 15-18. Petitioner was a good brother, a good husband, and Maurice loved him. App. 1901, ll. 21-24; App. 1903, ll. 8-12. He would have asked the jury to have mercy for Petitioner. App. 1902, ll. 1-3; App. 1903, ll. 9-10.

On cross-examination, Maurice admitted he was upset with Petitioner and did not want to talk to him soon after the incident. App. 1910, l. 1-4. However, Maurice denied ever telling Petitioner's lawyers or mitigation investigator that he was upset with Petitioner. App. 1910, ll. 5-8. Maurice was aware of some of Petitioner's past troubles with law enforcement, but was unaware of others. App. 1913, ll. 10-12; App. 1913, ll. 21-23; App. 1914, ll. 9-20; App. 1915, ll. 5-9; App. 1915, ll. 21-24. Maurice admitted he had a criminal history. App. 1918, ll. 2-7.

Pete Skidmore, a private investigator, testified that the defense team retained him to investigate facts relating to the guilt-phase of the case. App. 2046, ll. 5-6; App. 2046, ll. 12-20; App. 2047, ll. 17-25. According to Skidmore, he did not deviate from his role as fact investigator except that he was asked to locate some individuals and he provided the information to the mitigation investigator. App. 2048, ll. 1-5.

When asked if he were involved in the penalty phase investigation, Skidmore responded: "I may [have] been asked to try to find some witnesses. But the - - from my [per]spective, there wasn't much investigation going on in that area that I was aware of." App. 2048, ll. 19-24. On cross-examination by the state, Skidmore agreed that he had no role in developing the mitigation case other than trying to help locate some witnesses. App. 2057, ll. 15-20. During re-direct

examination, Skidmore testified that he did not travel to Michigan to interview available witnesses. App. 2059, l. 19 – 2060, l. 2.

Petitioner's father, five brothers, two sisters, multiple aunts, uncles, cousins, nieces and nephews lived in Michigan. App. 2257, ll. 2-7. He graduated high school in Michigan. App. 2257, ll. 8-11. His trial attorneys asked about his family in Michigan, and Petitioner provided names, addresses, and phone numbers. App. 2259, ll. 20-24; App. 2261, ll. 14-19; App. 2278, l. 24 – 2278, l. 1. Petitioner recalled his attorneys tried to call a few of the numbers he provided, but went no further in the investigation. App. 2261, ll. 20-24. Petitioner's trial attorneys failed to call any of his family members from Michigan to testify during the penalty phase of his trial. App. 2282, ll. 23-25.

On cross-examination, Petitioner denied that his family in Michigan wanted nothing to do with him when he was arrested. App. 2286, ll. 8-11. Petitioner admitted writing a letter to his trial attorney dated April 20, 2001 concerning his case. App. 2288, ll. 1-10; App. 2805. In the letter, Petitioner explained he was unable to supply all of the information requested; however, he explained that trial counsel could get the required information by calling his sister, Vanessa Moore. Petitioner provided his sister's address and telephone number. App. 2805. The letter explained that Petitioner had not informed his family of the prosecution's intention to seek the death penalty. According to the letter, Petitioner asked for his family's help when he was first arrested and was told no help would be coming. However, the letter encouraged trial counsel to contact his sister to obtain information concerning his family. App. 2805.

Petitioner was not aware of what role Drucy Glass, the mitigation investigator, played in his case. App. 2289, ll. 10-11; App. 2289, ll. 16-22. He did recall his trial attorneys retaining

someone to track down people to testify on his behalf. App. 2290, ll. 3-6. Neither Ms. Glass nor his trial attorneys indicated his family would not cooperate. App. 2290, ll. 13-21.

Trial counsel, Michael Morin, testified during the PCR hearing.[5] The defense retained Drucy Glass as a mitigation investigator. App. 2524, ll. 18-20. Morin said his relationship with Petitioner deteriorated over the course of the representation. App. 2524, l. 24 – 2526, l. 25. Morin sent a letter to the fact investigator, Pete Skidmore, in August of 2001 providing a list of names and numbers of people who may have been helpful to Petitioner during the penalty phase. App. 2535, ll. 6-15. Concerning Petitioner's family background or family history, Morin expressed the importance of Petitioner cooperating with the defense team, but he did not attempt to elicit any specific information. App. 2551, ll. 6-24.

Petitioner completed the social history packet provided by Morin. App. 2551, l. 25 – 2552, l. 12. Morin claimed that the defense team was unable to secure the cooperation of Petitioner's family in Michigan. App. 2552, ll. 12-19. Morin further maintained that Petitioner sent a letter in April of 2001 indicating he was not interested in getting the assistance of his family in Michigan. App. 2553, ll. 11-21. As explained above, in contravention of Morin's representations about the letter during PCR proceedings, the letter did not indicate Petitioner's lack of cooperation. In fact, the letter supplied trial counsel with the name, address, and phone number of Petitioner's sister, who would be able to supply trial counsel with additional information concerning the family. App. 2805.

On May 8, 2001, Morin met with Petitioner and received additional names and contact information for family members. App. 2736, l. 7 – 2737, l. 20. Morin's notes from this meeting

[5] At the time of his PCR testimony, Morin was an Assistant Solicitor in Spartanburg County after he transferred "back here" from the Cherokee County Solicitor's office. App. 2343, ll. 2-6.

indicated Morin and Petitioner spoke about Petitioner's family. Specifically, Petitioner explained to Morin that his four brothers, two sisters, and father were in Michigan and one family member was in Alabama. App. 2797-2799. Petitioner provided his father's address and phone number. App. 2798. Morin's notes indicated that he attempted to call Petitioner's father and sister, but was unsuccessful. App. 2554, ll. 14-25; App. 2798-2799.

When asked if Morin had an obligation "to at least go to [Petitioner]'s hometown and talk to his family," Morin's response reflected an improperly narrow view of admissible mitigation evidence: Morin "may have felt that way if [he] thought that or had any evidence that [Petitioner] had some sort of mental defect." App. 2576, l. 18 – 2577, l. 10. Morin posited that "a functioning defendant" should have a say in what the defense team does or does not do. App. 2577, ll. 10-12. Morin admitted "some things" are required in capital cases, "[b]ut in this particular instance, with [Petitioner], he felt like [Petitioner] could make the call about his family." App. 2577, ll. 16-18. Petitioner in fact wrote Morin suggesting he get in touch with his sister in Michigan, and that Morin could find out whatever information he needed by calling or writing. See App. 2805.

Keith Kelly was called as a witness by the state. He was responsible for the penalty phase of the trial. App. 2629, ll. 22-23. The mitigation investigator prepared a report, and Kelly prepared a history of Petitioner's prior criminal record. App. 2637, ll. 8-16; App. 2848 – App. 2868.

Although the report listed the names of some family members, the report "[was] really essentially a chronology of his [Petitioner's] criminal offenses." App. 2664, ll. 12-14.[6] According to Kelly's testimony and the report, attempts to contact Petitioner's father were by phone and letter. App. 2638, ll. 15-20. Two relatives were listed, but never contacted. App. 2639, ll. 13-16. One relative allegedly told Petitioner's wife that Petitioner "[was] dead to [them]." App. 2639, ll. 17-20. Three other relatives were in prison. App. 2639, ll. 21-24.

When questioned regarding why the mitigation investigation revealed nothing in terms of Petitioner's social history, Kelly maintained the mitigation investigator could not get in touch with anyone in Michigan. App. 2664, l. 15 – 2665, l. 11. According to Kelly, if Petitioner had given him names of family members, he would have gone to Michigan to investigate. App. 2665, ll. 21-25. Kelly claimed there was no way to reach individuals for whom the defense team had names because Petitioner did not know how to contact them. App. 2666, ll. 4-13. Although the team discussed traveling to Michigan, the decision was made not to go because there was not "much to go on." App. 2669, l. 21 – App. 2670, l. 5. Kelly testified that the mitigation investigation tried to reach some members of the family by phone and certified mail and he did not "know what else she may [have] done." App. 2670, ll. 13-15.

The defense's presentation during the penalty phase consisted of Linda Byrd, Petitioner's wife, and Petitioner's stepson, James. App. 2645, ll. 5-6. According to Kelly, the defense was

[6] The social history prepared by the mitigation investigator and introduced as Respondent's Exhibit #25 illustrated that an investigation into Petitioner's family and social history was incomplete. App. 2848-2860. Throughout the document, the investigator indicated a need for additional documentation to have a clear understanding of the very limited information already gathered. For example, the report indicated a need for arrest records, court records, and jail records for many charges listed. App. 2856; App. 2857 – 2858; App. 2859.

"begging for mercy" and wanted to show Petitioner was "life eligible because he ha[d] a family." App. 2645, ll. 13.

Regarding Petitioner's letter to Morin explaining that his family told him to get himself out of the mess, the actual contents of the letter provided the defense team with Petitioner's sister's name, address, and telephone number. The letter expressed Petitioner's desire not to contact his sister himself, but informed the defense team that if the information concerning his family was needed, then his sister would provide it. He further explained that he was "not trying to be uncooperative." App. 2668, l. 12 – 2669, l. 8; App. 2805.

Kelly admitted that if the mitigation investigation uncovered anyone who had anything positive to say, he would have had the person testify. App. 2671, l. 7 – 2672, l. 1; App. 2672, ll. 11-12; App. 2700, ll. 5-9.

Order of Dismissal

The PCR judge determined there was no merit to Petitioner's claim that trial counsel rendered ineffective assistance in failing to investigate, develop, and present mitigation evidence from family members of Petitioner. App. 2962. Having reviewed the video-taped depositions of Petitioner's family from Michigan, the PCR judge found "their testimony on the issue of their willingness to come to trial and testify to be not credible given this entire record." App. 2963. The court found the record showed trial counsel's investigation for and presentation of mitigating evidence was objectively reasonable under prevailing professional norms where "trial counsel investigated and attempted to locate mitigation witnesses ... from his family in Michigan." App. 2963. The court emphasized that Petitioner was largely uncooperative in trial counsel's endeavor and initially did not want the family to assist. App. 2963.

The judge stated that trial counsel attempted to develop mitigation witnesses in South Carolina through the fact investigator, Pete Skidmore. Without any support in the record, the judge concluded "[t]hese results were apparently unsuccessful." App. 2964.

The judge noted the mitigation investigator's report indicated her attempts to contact Petitioner's father by phone and certified letter and Petitioner's indication to her that he had been cut off by his family. App. 2964. The judge posited, without evidence in the record, that Petitioner's family cut him off due to his "life of crime." App. 2965-2966. The judge further found trial counsel's testimony credible and found Petitioner's family members did not want to assist in the case and avoided all efforts to gain their assistance. App. 2967. Finally, the PCR court found trial counsel's decision not to seek out Petitioner's brothers who were incarcerated for drugs was an objectively reasonable trial strategy. App. 2969.

Turning to the prejudice prong, the PCR court relied upon its credibility determinations concerning the witnesses presented by Petitioner. App. 2967. The judge based this finding upon testimony of James Moore, which the judge concluded "typifie[d] the credibility of [Petitioner]'s family members on this issue." App. 2967.[7] Initially, James testified he was living at home with

[7] The PCR court used its credibility determination regarding James against all of Petitioner's witnesses, but the record did not support doing so. This was error. See State v. Jenkins, 848 N.W.2d 786, 797 (Wis.2014)(holding that "[i]n assessing *the prejudice caused by defense trial counsel's performance*, i.e., the effect of the defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible")(emphasis in original); Commonwealth v. Johnson, 966 A.2d 523, 541 (Pa. 2009)(recognizing "that assessing credibility for purposes of Strickland prejudice is not necessarily the same thing as assessing credibility at a trial," finding no case from the United States Supreme Court setting "forth a standard for credibility determinations in the Strickland prejudice context" and explaining that "credibility assessments in the Strickland context are not absolutes, but must be made with an eye to the governing standard of a 'reasonable probability' that the outcome of the trial would have been different"). Predicating a mass finding on credibility of all family members based on other witnesses was wrong. In South Carolina, corruption of blood is constitutionally prohibited. See S.C. Constitution. Art I, §4.

his father and he would have testified had he been notified of the trial. However, on cross-examination, James admitted he was incarcerated during the trial. App. 2968. According to the court, "James also admitted that he was kept in the dark by [Petitioner]'s Michigan family regarding the fact that [Petitioner] had been charged with murder and was facing the death penalty." App. 2968. The judge surmised this corroborated the fact that Petitioner's family in Michigan was embarrassed and angered by Petitioner's crime and "had washed their hands of him." App. 2968.

The PCR judge next pointed to Maurice Moore's testimony that he was angry with Petitioner after his arrest. The judge asserted that Maurice "admitted that [Petitioner]'s father basically disowned him after he was charged with murder and armed robbery in South Carolina." App. 2968. The judge found Maurice's testimony not credible because of his conflicting testimony about his discussions with Petitioner regarding Maurice testifying at his capital trial. App. 2968-2969. In addition, the judge held Maurice's testimony that he was not contacted by anyone on Petitioner's behalf was contradicted by the mitigation investigation report indicating she sent a certified letter to him. App. 2969.

In addition, the PCR judge held Petitioner was not prejudiced by trial counsel's failure to call any of the witnesses presented during the PCR proceedings to testify during his capital trial because (1) trial counsel presented two witnesses during the trial, who made a plea for Petitioner's life; (2) the witnesses who testified during the PCR proceedings had little contact with Petitioner after he reached the age of eighteen and were unaware of Petitioner's legal troubles; and (3) the witnesses, while saying good things about Moore, offered no evidence Petitioner suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse or deprivation or poverty. The judge determined the witnesses' claims that they

were unaware of Petitioner's criminal record was not credible and even if credible, the witnesses would have been thoroughly impeached at trial. Thus, the court concluded, Petitioner suffered no prejudice by trial counsel's failure to call these witnesses during the penalty phase of his trial. App. 2969-2970.

Discussion

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Deficient Performance

An attorney whose representation falls below an objective standard of reasonableness provides deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. Attorneys are not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Wiggins v. Smith, 539 U.S. 510, 533 (2003). Nevertheless, courts must determine whether a decision not to investigate is reasonable in all circumstances. Id.

The United States Supreme Court explained the ABA Guidelines provide evidence of the well-defined and prevailing professional norms. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available mitigating evidence* and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Id. at 524 (citing ABA Guidelines for the Appointment and

Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)).[8] (emphasis added). The Guidelines direct counsel to "[c]ollect information relevant to the sentencing phase of trial including ... family and social history." Id. at 11.4.1(D)(2)(C). In addition, the Guidelines directed counsel to interview "witnesses familiar with aspects of the client's life history that might affect the ... possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death." Id. at 11.4.1(D)(3)(B). As expressed in the commentary and relevant to this case, "[c]ounsel's duty to investigate is not negated by the expressed desires of a client." Id. at 11.4.1 cmt. 4.

For purposes of deciding which witnesses and evidence to prepare for presentation during the penalty phase, the Guidelines instruct counsel to consider "[w]itnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client." Id. at 11.8.3(F)(1). "Counsel should present to the sentencing entity ... all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." Id. at 11.8.6(A). Additionally, counsel should consider presenting evidence of a capital defendant's family and social history. Id. at 11.8.6(B)(5).

---

[8] The 1989 ABA Guidelines are relevant for Petitioner's case as well. The 1989 ABA Guidelines provided the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (C)(1989)(emphasis added).

For the reasons explained below, based on the evidence above, counsel was wholly deficient in failing to investigate Petitioner's background in Michigan. The fact that counsel did not bother to travel to Michigan in this capital case to investigate is stunning in and of itself.

As explained by the Court, the Guidelines provided that counsel should consider presenting evidence of a defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Id.

Just a few short months ago, this Court granted sentencing relief to a death-sentenced inmate based upon "the complete lack of social history mitigation evidence in the sentencing phase." Weik v. State, ___ S.C. ___, 761 S.E.2d 757, 758 (2014). During Weik's trial, the defense presented three mental health experts to testify about Weik's mental illness – paranoid schizophrenia. Id. However, the defense "failed to present readily available evidence concerning Weik's chaotic upbringing and dysfunctional family." Id. Although the defense had uncovered a "wealth of social mitigating information," only one witness, Weik's sister, was presented during the penalty phase to address Weik's background. Id. The sister's testimony was very limited and general. Id. In fact, this Court surmised that the sister's testimony "revealed virtually nothing about Weik's abusive upbringing." Id. at 761. As explained by this Court, "[t]hough counsel introduced *psychological* testimony regarding [Weik]'s mental illness, counsel failed to present even a skeletal version of [Weik]'s *social history* even though there was abundant social history evidence available to them." Id. at 768 (emphasis in original).

In Wiggins, 539 U.S. at 523, trial counsel's mitigation investigation into Wiggins' life history consisted of two parts: (1) a written pre-sentence investigation, which included a one-page account of Wiggins' personal history, and (2) the state's social services records

documenting Wiggins' various placements in the state's foster care system. Counsel thereafter abandoned their investigation of Wiggins' background. Id. at 524. The Court held counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence, as mandated by the ABA Guidelines. Id.

In addition, the Wiggins Court held that counsel's investigation was unreasonable due to the evidence counsel actually uncovered in the social services records, which indicated Wiggins' mother was an alcoholic and Wiggins displayed emotional difficulties in foster homes and had frequent, lengthy absences from school. Id. at 525. The Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527.

The United States Supreme Court again confronted the issue of trial counsel's duties to investigate mitigation in a capital case where counsel conducted a minimal investigation with an apparently uninterested client. Rompilla v. Beard, 545 U.S. 374 (2005). In general, Rompilla's contribution was minimal as he was not interested in helping his attorneys develop a mitigation case. He told trial counsel his childhood was normal. At times, he actively obstructed counsel by sending them off on false leads. Id. at 381. Trial counsel interviewed five family members, who indicated they did not know Rompilla well because he spent many of his adult years and some of his childhood years in custody. Id. at 381-382. The three mental health witnesses who

examined Rompilla offered nothing useful either. Trial counsel made no further efforts to investigate a mitigation case. Id. at 382. However, post-conviction counsel for Rompilla uncovered multiple sources of mitigation evidence, including school records, incarceration records, and a history of alcohol dependence. Id. The Court concluded trial counsel's failure to even examine Rompilla's prior conviction file fell below the level of reasonable performance. Id. at 383. The file concerned Rompilla's prior conviction for rape and assault, which trial counsel knew would be used by the prosecution. Id.

The Court held trial counsel had a duty to make all reasonable efforts to learn what they could about the prior offense, and that reasonable efforts included obtaining the readily available file to learn what the prosecution knew, to discover any mitigating evidence, and to anticipate the details of the aggravating evidence. Id. at 385.

Recently, the United States Supreme Court examined the failings of trial counsel in a capital case involving trial counsel's failure to secure an expert witness. Hinton v. Alabama, 134 S.Ct. 1081 (2014). In early 1985, two restaurant managers were killed during similar robberies. In mid-1985, a third restaurant manager was robbed and shot, but survived. Two .38 caliber bullets were recovered from each scene. The third restaurant manager identified Hinton as the shooter after viewing a photographic line-up. Id. at 1083. When the police arrested Hinton, they recovered a .38 caliber revolver belonging to his mother, who shared the house with him. Id. The state's expert analyzed the six bullets and opinioned that all had been fired by the gun found in Hinton's home. Id. The state charged Hinton with capital murder for the first two killings and tried to link Hinton to those killings through the use of the forensic evidence and the third restaurant manager's eyewitness testimony. Id. There was no other evidence connecting Hinton to the crimes. Hinton maintained his innocence of all three crimes. Id. at 1084. As stated by the

Supreme Court, "[t]he state's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." Id.

Hinton's trial counsel filed a motion for funding to hire an expert witness. The judge granted $1000 to hire an expert. In the funding order, the judge indicated he believed he was limited to $1000 by statute, but told trial counsel to seek additional funding if necessary. Id. Unfortunately, trial counsel did not seek additional funding and the statute did not limit the funding as the judge believed. Id. Although trial counsel did not believe him qualified, he hired the only person willing to take the case for the paltry sum – Andrew Payne. Id. at 1085.

At trial, Payne testified that the toolmarks in the barrel of the Hinton revolver had been corroded away such that it was impossible to say with certainty whether a particular bullet had been fired from that gun. Payne also testified that the bullets from the three crime scenes did not match each other. On cross-examination, the prosecutor "badly discredited" Payne by forcing him to admit he had testified as an expert on firearms and toolmark identifications only twice in the preceding eight years and that one of the two cases involved a shotgun, not a handgun, by forcing him to admit he had difficulty operating the microscope at the state forensic laboratory, and finally by forcing him to admit he had only one eye. Id. at 1085-1086. As expected, in his closing argument, the prosecutor seized on Payne's lack of qualifications. Id. at 1086.

During state post-conviction relief proceedings, Hinton presented three new experts on toolmark evidence. One of the three had worked on toolmark identification at the FBI in a senior position; the other two had worked for many years for the Dallas County Crime Laboratory and had testified as experts in several hundred cases. Id. All three examined the evidence and testified "they could not conclude that any of the six bullets had been fired from the Hinton revolver." One of Hinton's experts testified that he had asked the state's expert to show him how

he determined the recovered bullets had been fired from the Hinton revolver, and the state's expert refused to do so. Id.

The Supreme Court explained the case "call[ed] for a straightforward application of our ineffective-assistance-of-counsel precedents." Id. at 1087. After recognizing that Hinton's case required consultation with experts and the introduction of expert evidence, the Court noted that trial counsel had recognized the need for an expert as well, but counsel hired an unqualified expert based upon his mistaken belief that the statute limited his funding. Further, the Court noted that trial counsel failed to request additional funding despite the court's express invitation to do so. Id. at 1088. The Court held this was deficient performance. Id. The Court explained that trial counsel "failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants." Id. at 1089.[9]

In Cauthern v. Colson, 736 F.3d 465, 483-487 (6th Cir. 2013), the Sixth Circuit Court of Appeals recently granted relief to Cauthern, who had been sentenced to death, where trial counsel failed to present testimony at the sentencing hearing from the individual's step-siblings concerning Cauthern's abusive childhood. Explaining that the "fail[ure] to investigate a defendant's nearest relatives at all is deficient performance, regardless of what the end result might have been," the Sixth Circuit found trial counsel rendered deficient performance by failing to interview and present testimony from the defendant's step-siblings regarding the abuse they suffered at the hands of their grandmother. Id. at 484-485. The court was not persuaded by trial counsel's testimony that Cauthern "did not bring anything to his attention that would have caused him to suspect that [Cauthern]'s home life might be of value to the defense" or that trial

[9] The Supreme Court remanded the case for a determination of whether Hinton suffered prejudice because no court had yet evaluated the prejudice question. Hinton, 134 S.Ct. at 1090.

counsel "wasn't too successful" when he sought family background information from Cauthern's adoptive parents. Id. at 485.[10]

The Fifth Circuit Court of Appeals recently granted a certificate of appealability to a death-sentenced inmate on his claim that trial counsel's failure to present the true nature of his disadvantaged upbringing amounted to ineffective assistance. Escamilla v. Stephens, 749 F.3d 380 (5th Cir. 2014). During the sentencing proceeding, the defense presented to testimony of Escamilla's father, sister, two former neighbors, and an old friend. Id. at 383-384. The defense presentation had portrayed Escamilla's childhood as loving and affectionate. Further, the defense emphasized the difficulty Escamilla had in dealing with the death of his mother a few years before trial. Escamilla coped with his loss by drinking alcohol. Id. In state post-conviction relief proceedings, Escamilla presented evidence of his violent and abusive upbringing and untreated substance abuse problems. Id. at 385. The post-conviction relief evidence showed Escamilla's father was physically abusive to his children and their mother, that Escamilla and his siblings were involved with a gang from an early age, and that Escamilla had abused alcohol since age nine and had used drugs as a child. Id. The Fifth Circuit granted a certificate of appealability because reasonable jurists could debate that the state post-conviction court unreasonably applied Strickland, supra, when it determined Escamilla's trial counsel was not deficient "despite the available, unpursued 'red flags'" regarding his troubled childhood. Id. at 392.[11]

---

[10] See also Mason v. Mitchell, 543 F.3d 766 (6th Cir. 2008)(finding trial counsel ineffective in failing to investigate and present social history evidence during the sentencing proceeding).

[11] Likewise, the Fifth Circuit granted the certificate of appealability to consider the prejudice prong. Escamilla v. Stephens, 749 F.3d 380, 392-394 (5th Cir. 2014).

In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable. According to this Court, counsel was deficient in failing to begin his investigation into Council's background as soon as the prosecution served its notice of intent to seek the death penalty. Id. Despite the strong case of guilt against Council, the trial attorney obtained only his juvenile justice records and state hospital records before trial. Trial counsel did not request certain background records until the day of jury selection and did not set up a meeting with the defense's retained mental health expert, who had received only limited records, until a month before trial. Id. This Court held counsel's conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing ABA Guideliens for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(2)(C)(1989)).

Additionally, this Court held the limited information obtained by trial counsel should have put him on notice that Council's background could potentially provide powerful mitigating evidence. Id. at 173, 670 S.E. 2d at 363. Not only did trial counsel unreasonably delay in investigating Council's background, trial counsel failed to conduct an adequate investigation. Id. The retained mental health expert evaluated Council for competency and criminal responsibility only, had inadequate records, and met with Council only once, shortly before trial. Id. Trial counsel did not utilize the services of a social history investigator, despite available funding. Id. Finally, this Court concluded "it was unreasonable for trial counsel not to obtain [Council's] family records." Id. at 174, 670 S.E.2d at 363. The limited records obtained by trial counsel "should have alerted him to the fact that the family was dysfunctional." Id. at 174, 670 S.E.2d at 364.

This Court went on to hold "[e]ven if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence [where the] mitigation presentation consisted solely of [Council's] mother's extremely limited testimony." Id. at 174-175, 670 S.E.2d at 364.

This Court rejected the state's argument that trial counsel made a reasonable strategic decision not to present additional evidence where the investigation was inadequate and incomplete, trial counsel was aware the jury had rejected the defense theory that Council was merely present, and it would not have been inconsistent for trial counsel to have pursued the merely present theory along with the evidence in mitigation. Id. at 175, 670 S.E.2d at 364. This Court also noted that in light of the state presenting damaging character evidence, Council's character could not have been further damaged by the presentation of additional mitigation evidence. Id.

In Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004), this Court held trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort." The mitigation case presented during the trial was that Von Dohlen was a good husband, had been married for seventeen years, was a good father to his four children, and was a dependable employee. At trial, witnesses testified he grew up in a very poor family and had been physically abused and emotionally neglected as a child. Von Dohlen's personality dramatically changed when his brother was murdered just two weeks before the murder involving Von Dohlen. He began abusing alcohol and Valium. A psychiatrist, Dr. Michael Lampkin, testified on behalf of Von Dohlen indicating he suffered from an adjustment reaction, which was easily treated, short-term, and not a chronic mental illness. Id. at 604, 602 S.E.2d at 741.

However, the same psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from '"major depressive episodes with severe symptoms of anxiety and possible prepsychotic features."' Id. at 605, 602 S.E.2d at 741. Another psychiatrist, Dr. John DeWitt, testified at the post-conviction relief hearing that Von Dohlen suffered from a major mental illness at the time of the murder and was predisposed to such based upon his family history of mental illness and alcohol or drug abuse. Id. at 606, 602 S.E.2d at 742. This Court held that although trial counsel "exerted some effort," their failure "to adequately investigate and prepare expert testimony about Von Dohlen's condition as it existed at the time of the murder" was deficient performance. Id.

The question presented in the instant case is whether trial counsel's decision not to investigate Petitioner's family history in Michigan was reasonable. Trial counsel's stated reasons for not investigating were (1) that their limited phone calls and letters to several family members in Michigan had been unsuccessful in securing the family's cooperation; and (2) that counsel was not certain of the addresses of family members. In Petitioner's case, counsel failed to conduct any investigation relating to Petitioner's family and social history in Michigan, where he was born and raised. The record indicates that the mitigation investigator made several phone calls and wrote letters; however, this level of investigation is constitutionally deficient. Neither attorney nor the mitigation investigator even bothered to go to Michigan where Petitioner had been raised. The witnesses were not impossible to locate. PCR counsel did so easily enough. The decision not to investigate further was unreasonable as it was based upon what trial counsel considered a lack of good leads.

The evidence presented during the post-conviction relief proceeding indicated Petitioner had an expansive family all residing in the same small town in Michigan. In addition, trial counsel knew the locations of at least two of Petitioner's brothers because they were in prison. Petitioner's counsel put forth much less effort than even Von Dohlen's trial counsel who had interviewed multiple family members and investigated and presented evidence of Von Dohlen's social history to the jury. Petitioner's case is similar to Council's in that Petitioner's trial attorneys called only two witnesses to beg for mercy, just as Council's trial attorneys called one witness to beg for mercy. Petitioner's trial counsel's decision not to investigate further was unreasonable in light of their limited and inadequate investigation. Wiggins, supra.

Prejudice

The Wiggins Court explained that to show prejudice, a petitioner "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). To assess prejudice, the Court reweighed the evidence in aggravation against the totality of available mitigation evidence. Id. The mitigation evidence showed Wiggins experienced "severe privation and abuse in the first six years of his life," "suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care," was homeless for a period of time, and had diminished mental capacities. Id. at 535. The Court concluded that had the jury been informed of the additional mitigating evidence that a reasonable investigation would have uncovered, there was a reasonable probability that the jury would have returned a different sentence. Id. at 536.

The Rompilla Court held trial counsel's failure to examine the file on his prior conviction was prejudicial. Rompilla, 545 U.S. at 390. The file contained "a range of mitigation leads that no other source had opened up." Id. Evidence in the file indicated Rompilla grew up in a "slum environment," his criminal activity was accompanied by alcohol abuse, mental health testing indicated possible schizophrenia, and cognitive testing placed him at a third grade level. Id. at 391. The undiscovered evidence, which the file would have prompted reasonably competent counsel to investigate, showed Rompilla's parents were extreme alcoholics who fought violently; Rompilla was physically abused by his father, Rompilla and his siblings lived in terror; Rompilla and his brother had been locked in a small wire mesh dog pen containing excrement; Rompilla had been isolated as a child; the family had no indoor plumbing; Rompilla slept in the attic with no heat; and the children were not given clothes. Id. at 391-392.

Armed with the appropriate social history, the post-conviction mental health experts found Rompilla suffered from organic brain damage, an extreme mental disturbance significantly impairing his cognitive functions. His problems were likely the result of fetal alcohol syndrome and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. Id. at 392. The Court held the mitigation case taken as a whole may have influenced the jury's appraisal of Rompilla's culpability and the likelihood of a different result if the evidence had been presented was sufficient to under confidence in the result at sentencing. Id. at 394.

In Cauthern, the Sixth Circuit relied upon the Supreme Court's explanation that trial counsel's effort to present some mitigation evidence never forecloses an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. Cauthern, 736 F.3d at 486 (citing Sears v. Upton, 130 S.Ct. 3259, 3266 (2010)). As an initial matter, the court

recognized that in death penalty cases, a defendant has wide latitude in the introduction of mitigation evidence and that evidence of abuse is significant to a jury's determination of moral culpability. Id. The Sixth Circuit rejected the state court's speculation that a jury may reject or be insulted by the suggestion that a defendant's criminal actions were attributable to a disadvantaged background because such speculation was inapposite to federal law. Id. at 487. There remained "the possibility that there was a reasonable probability that the jury would have found that it did mitigate his culpability." Id. The only evidence before the jury of the abuse Cauthern suffered was his own testimony, "which is on its face less compelling than the testimony of a less interested party." Id. Thus, the Sixth Circuit concluded Cauthern was entitled to habeas relief on this ground of effective assistance of trial counsel. Id.

The Supreme Court confronted a state court's failure to apply the proper prejudice inquiry in Sears v. Upton, 130 S.Ct. 3259 (2010). After finding trial counsel performed deficiently in his mitigation investigation, the state post-conviction court found no prejudice because trial counsel "did present some mitigation evidence" making it impossible to compare the case with those where little or no mitigation evidence was presented. Id. at 3264. The state court concluded that because trial counsel put forth a reasonable theory with support evidence, Sears had failed to meet his burden of proving there was a reasonable likelihood that the outcome of the trial would have been different if a different mitigation theory had been advanced. Id. at 3264-3265. The Supreme Court held this analysis was error for two reasons. The first was the state court "curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory." Id. at 3265. Trial counsel's constitutionally deficient mitigation investigation called into question the reasonableness of the theory employed at trial. Id. Second, the state court limited the prejudice inquiry to cases where

little or no mitigation evidence was presented, which the Supreme Court had never done. Id. at 3265-3266. Rather, the prejudice inquiry requires a probing and fact-specific analysis no matter the quality or quantity of evidence presented by trial counsel. Id. at 3266.[12]

In Council, this Court held Petitioner was prejudiced despite the prosecution's production of overwhelming evidence of guilt and the jury finding six aggravating factors in light of the very strong mitigating evidence that was adduced at PCR. Council, at 176, 670 S.E.2d at 365. The mitigating evidence which trial counsel failed to uncover and present included medical evidence concerning Council's and family members' mental health issues, Council's extremely violent alcoholic father, Council growing up in poverty, Council's significant drop in IQ and learning disabilities, Council's use of drugs and alcohol at a very young age, and Council's frontal lobe brain dysfunction and diagnosis of schizophrenia. Id. at 177, 670 S.E.2d at 365.

In Von Dohlen, 360 S.C. at 608, 602 S.E.2d at 743, this Court held Von Dohlen had shown prejudice based upon trial counsel's insufficient investigation concerning his mental health because "[t]here [was] a reasonable probability the outcome of the trial might have been different had the jury heard the available information about [Von Dohlen]'s mental condition as it existed at the time of the murder."

Concerning prejudice, this Court held the presentation at Weik's PCR hearing "revealed graphic and detailed accounts of [Weik]'s abusive and dysfunctional childhood, saturated with violence and military fantasies, which was not apparent from the scant testimony presented at trial." Weik, 761 S.E.2d at 769. This testimony "would have demonstrated [Weik]'s genetic predisposition to schizophrenia and helped explain his auditory and visual hallucinations at the

[12] The Court remanded the case for further proceedings consistent with its opinion. Sears v. Upton, 130 S.Ct. 3259, 3267 (2010).

time of the shooting." Id. After reviewing the evidence presented by both sides during the sentencing phase and the evidence presented during the PCR hearing, this Court concluded there was "a reasonable probability that the missing details regarding the degree of physical and emotional abuse [Weik] suffered and the full extent of [his father]'s mental illness and its impact on the Weik household might well have influenced the jury's determination." Id. at 770. Thus, Weik was prejudiced by counsel's deficient performance. Id.

Similarly, Petitioner suffered prejudice as a result of trial counsel's failure to adequately investigate his family history and uncover witnesses who would have testified as to Petitioner's positive character as a youth and to the love his family felt for him. As demonstrated during the post-conviction relief proceeding, these additional family members would have asked the jury to spare Petitioner's life.

The judge's use of his credibility determinations as the basis for his prejudice analysis as to these witnesses was erroneous. The PCR judge provided no reason for his credibility determination and the record discloses none. "[W]itnesses are presumed to tell the truth." State v. George, 113 S.C. 154, 102 S.E. 284 (1920). In fact, when judges instruct juries concerning determinations of credibility of witnesses, the traditional charge has explained that the jurors may "reject any part of the testimony if they found good reason for so doing." State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972). While Jones had been in prison and Maurice had an unspecified "criminal record," nothing in the record supports an adverse credibility determination as to four family witnesses: Dorothy, her husband Cecil, Uncle Harold, Aunt Arma. This mass adverse credibility determination is inexplicable and unwarranted.

The family witnesses, among other things, would have asked the jury for mercy for your Petitioner. A jury may recommend a life sentence as an act of mercy and it is proper to so instruct the jury. Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009).

Only one juror is needed to prevent a death penalty sentence. This Court explained why it is difficult to find harmless error from a penalty stage error on direct appeal in State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). "A capital jury can recommend a life sentence for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Petitioner has shown prejudice since Petitioner's family members from Michigan asking the jury for mercy, and informing the jury of Petitioner's good traits, and that they still cared for Petitioner despite his recent troubles with the law would have had an effect on the jury.

One of the guiding principles of death penalty jurisprudence is "death is different." See Harmelin v. Michigan, 501 U.S. 957 (1991); Turner v. Murray, 476 U.S. 28, 36-37 (1986); Gregg v. Georgia, 428 U.S. 153, 181-188 (1976). The United States Supreme Court "has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-999 (1983); see also McCleskey v. Kemp, 481 U.S. 279, 335 (1987); Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982)(O'Connor, J., concurring); Beck v. Alabama, 447 U.S. 625, 637-638 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-358 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett, 438 U.S. at 604. The Court's denial of certiorari to review the post-conviction relief proceedings below does not consider the qualitative

difference between death and all other penalties and fails to ensure the greater degree of reliability required by the United States Constitution.

For the foregoing reasons, Petitioner respectfully requests this Court rehear this matter.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

Susan B. Hackett
Appellate Defender

ATTORNEYS FOR PETITIONER

This 26th day of September, 2014.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of September, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of September, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.