IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 14A774

RICHARD BERNARD MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

*ROBERT M. DUDEK

Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense

SUSAN B. HACKETT
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense

Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEYS FOR PETITIONER

*Counsel of Record

QUESTIONS PRESENTED

1.

Whether 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 Petitioner shot the decedent with premeditation while behind the store counter since how the decedent came to be shot was critical to the extent of Petitioner's culpability?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to call James Aiken to present his expert mitigating evidence that Petitioner could adapt to life in prison pursuant to Skipper v. South Carolina, 476 U.S. 1 (1986), since defense counsel's reason for failing present this evidence in mitigation was based on a fictitious constraint?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to perform a reasonable investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding?

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Counsel for Richard Bernard Moore petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction for murder, and his death sentence.

CITATION TO OPINION BELOW

The Spartanburg Court of Common Pleas denied Petitioner's application for post-conviction relief on August 1, 2011. The order is reproduced in the Appendix at pages A4-104. The South Carolina Supreme Court denied certiorari on September 11, 2014. That order is reproduced in the Appendix at page A3. The Court denied the petition for rehearing on October 24, 2014. That order is reproduced in the Appendix at page A1. The Chief Justice extended the time for filing this certiorari petition until March 23, 2015.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Petitioner is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

This case also involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, "Excessive bails shall not be required . . . nor cruel and unusual punishments inflicted."

In addition, this case involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Procedural history

Petitioner was tried before Judge Gary Clary and a jury trial in Spartanburg County, South Carolina from October 15-22, 2001 for the offense of murder, assault with intent to kill, armed robbery and possession of a weapon during a violent crime. The state sought the death penalty.

Howard "Trey" Gowdy, III, Barry Barnette and James Willingham, II, were the prosecutors. Keith Kelly, Michael Morin, and Jennifer Johnson represented Petitioner. App. 1. The jury found Petitioner guilty on all counts. App. 1601, ll. 5-14. After a sentencing phase trial, the jury returned a verdict of death, which sentence Judge Clary imposed. App. 1758; app. 1761-1762.

WHY CERTIORARI SHOULD BE GRANTED

The procedural posture of this case presents this Court with an opportunity to analyze the Sixth Amendment's protections without the constraints of review imposed by the Anti-Terrorism and Death Penalty Act.

1.

The state theorized that petitioner, who was unarmed, attempted to rob a convenience store, but was thwarted by the armed clerk. The state further theorized that after petitioner got the gun from the clerk, petitioner got behind the counter and shot the clerk. The Sixth Amendment's guarantee of effective assistance of counsel was violated where trial counsel failed to investigate and present critical evidence to rebut the state's primary evidence that petitioner was behind the store counter because there was available evidence petitioner shot only after the clerk fired at him, which was critical evidence concerning culpability and aggravation.

The trial

Everyone knew the third shift clerk at Nikki's convenience store, James Mahoney, carried a .44 Magnum bulldog revolver in his waistband. In addition to Mahoney's .44 Magnum, a .45 and a .32 caliber Magnum were kept under the counter. App. 1347, l. 23 – 1348, l. 20. On September 16, 1999, Petitioner entered the store, gathered several items for purchase, and approached the register. App. 1196, l. 25 – 1197, l. 3; App. 1204, l. 15 – 1205, l. 1; App. 2264, ll. 3-23. Shortly thereafter, Mahoney pointed a gun at petitioner. App. 1212, ll. 7-12; App. 1347, l. 12 – 1348, l. 20; App. 2269, ll. 5-12. A struggle ensued and petitioner got the gun from Mahoney. App. 2269, ll. 14-16. However, Mahoney pulled another gun on petitioner, and the two began shooting at each other – both suffered gunshot wounds. App. 1209, ll. 4-5; App. 1377, ll. 19 – 25; App. 1382, ll. 3-13; App. 2270, ll. 16-24. Mahoney ultimately died. Petitioner managed to leave the store, but was caught by police within hours only a few miles from the store. App. 1238, l. 2 – 1239, l. 10; App. 1241, ll.

14-17; App. 2274, ll. 13-15.

Hadden told the jurors that while he was playing the video poker machine at Nikki's, he saw petitioner walk into the store at about three o'clock that morning. He claimed he heard Mahoney say: "What the hell do you think you are doing?" Hadden said he turned around and 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 waistband. App. 1212, ll. 7-13.

In light of the security camera not working and petitioner not testifying, it was critical to discredit Hadden's version of what occurred, as Morin repeatedly acknowledged. App. 1331, l. 15 – 1333, l. 23; App. 2384, ll. 12-23; App. 2398, l. 13 – 2401, l. 15; App. 2549, l. 16 – 2550, l. 13. However, 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 written statement to the police did he tell them that petitioner had held Mahoney's hands down. App. 1224, ll. 8-10.

HOW THE FEDERAL ISSUE WAS RAISED

In his amended application for post-conviction relief, petitioner alleged his constitutional right to the effective assistance of counsel was violated by trial counsel's failure to investigate and prepare to confront and rebut the state's alleged physical evidence. App. 1790-1791.

PCR hearing

Petitioner consistently told his trial counsel, Michael Morin,[1] that he placed items on the

[1] At the time of his PCR testimony, Morin was a prosecutor in the prosecutor's office which had prosecuted petitioner in 1999. App. 2343, ll. 2-6.

counter for purchase, but he did not have enough money so he asked the clerk to "let him slide because he was in there all the time." "[T]he clerk made some offensive remarks," and told petitioner to leave. When petitioner refused to leave, "the clerk pulled out a gun and [petitioner] 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 [petitioner] returned fire." App. 2511, ll. 11-25.

Petitioner described what happened largely the same way as Morin. He asked Mahoney to allow him to take some small change – eleven or twelve cents – out of the little container on the counter, but Mahoney refused. 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 petitioner refused, 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 pulled out a second gun and shot petitioner. Although shot, Petitioner fired three or four shots at Mahoney. Petitioner denied pointing the gun at Terry Hadden, who was playing the video poker machine, but admitted he grabbed the bag of money and left. App. 2268, l. 3 – 2274, l. 13. However, petitioner's story was never presented to the jury. Instead, the jurors heard only from Hadden.

According to Morin, 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 thought there were "holes in [the state's] story." App. 2362, l. 18 – 2363, l. 10. Morin claimed he tried to present evidence to obtain a voluntary manslaughter instruction: "Without [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. However, Morin claimed petitioner was not interested in testifying, even though this 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.

Concerning the defense theory during the guilt phase, Morin said: "[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." Morin thought a jury would find petitioner's reaction of returning fire to be reasonable. Thus, Morin "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 not armed, now they're both armed, now they're both shot." The defense wanted to determine "how many times the .45 got shot" to show the jury that "once the gun's pointed at you, you, you kind of -- he's kind of reacting." App. 2549, l. 16 – 2550, l. 8.

In preparation for trial, Morin spoke to Dr. Carol McMahon, the forensic pathologist who performed the autopsy and potential witness, "only one time." He met with the defense pathologist and his crime scene expert at the same time to discuss their findings. Morin never spoke to the state's crime scene investigator, Paul Dorman, before trial. App. 2371, l. 15 – 2372, l. 2; App. 2898. Strangely, as the PCR judge acknowledged in the order of dismissal, "*Morin did not tell his experts what [petitioner] said had occurred.*" App. 2898 (emphasis added).

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

> 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 - -

App. 1327, ll. 4-11 (emphasis added). This ineffective cross left the jury with the 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*). 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. 2206, l. 24 – 2208, l. 6.

From his single conversation with McMahon and a crime scene reconstruction expert, Donald Girndt, Morin recalled they both believed petitioner had fired shots from behind the counter. App. 2358, l. 8 – 2363, l. 2. Morin believed the defense needed more than petitioner's consistent version of events: "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. 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 to testify following the negative opinions of McMahon and Girndt. App. 2363, ll. 8-10; App. 2373, ll. 7-16.

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, the state's pathologist at trial. Dr. Wren, in contrast to Dr. Conradi, testified Mahoney was shot twice. Concerning the second gunshot wound, Dr. Wren stated it may have been a re-entry wound and the gun was only "12 to 15 inches away" at the time of the shooting. App. 1492, l. 15 – 1502, l. 9. Further, Dr. Wren testified Mahoney "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 state court judge relied upon the one and only meeting between trial counsel and the experts to determine that trial counsel's investigation and presentation was not ineffective assistance. App. A20-A31; App. 2897 – 2898. The court was not persuaded that petitioner shot the clerk in self-defense because petitioner was "just a few short blocks to Spartanburg Regional Hospital," but petitioner instead "drove approximately six miles in the opposite direction. [Petitioner] did not drive to the hospital or even his own home, but directly to George Gibson's house." App. A25; App. 2900.

The court wrote that Dr. McMahon's testimony would have been harmful to petitioner and 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. A26-A27; App. 2901 – 2902. The court concluded Conradi's testimony would have hurt Petitioner because she also opined that the decedent was shot at close range. App. A28-29; 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 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. A30; 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. A.31; App. 2906. Additionally, 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 despite the undisputed evidence that the victim was standing behind the counter, armed with multiple handguns, and firing at petitioner. The court found it was impossible to tell how the shell casings ended up behind the counter, and the court found petitioner's version of the shooting implausible. The court also stated there was overwhelming evidence of petitioner's "guilt of these crimes." App. A32; App. 2907.

Discussion

Long ago, this Court established the test for determining whether counsel's performance satisfied the Constitution. 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). The South Carolina court's decision to deny petitioner relief in the face of clear evidence of ineffective assistance of trial counsel conflicts with this Court's unambiguous holdings on this point.

Recently, this Court examined the impact trial counsel's failure to secure an expert witness in a capital case. 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 opined 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. "The 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 trial judge granted $1000 for Hinton's trial counsel to hire an expert, which the judge erroneously believed was statutory maximum; however, the judge told trial counsel to seek additional funding if necessary, but counsel never did. 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.

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. 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. The prosecutor's closing argument seized on

Payne's lack of qualifications. Id. at 1086.

During state post-conviction relief proceedings, Hinton presented three new and exceptionally qualified experts on toolmark evidence who 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 case called for "a straightforward application" of this Court's "ineffective-assistance-of-counsel precedents." Id. at 1087. Although trial counsel recognized the case required expert consultations and testimony, counsel hired an unqualified expert based upon his mistaken belief that the statute limited his funding and failed to request additional funding despite the court's express invitation to do so. Id. at 1088. Trial counsel "failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants." Id. at 1089.[2] This was deficient performance. Id. at 1088.

Petitioner's case presents striking parallels to Hinton and the South Carolina court's decision in Petitioner's case conflicts with this Court's "ineffective-assistance-of-counsel precedents" just as the Alabama court's decision did in Hinton. 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* came from *behind* the counter toward petitioner. This was critical evidence, yet the jury was left with the impression at trial that the shot came from the "outside in," meaning,

[2] The case was remanded for a determination of whether Hinton suffered prejudice. Hinton v. Alabama, 134 S.Ct. 1081, 1090 (2014).

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 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, using racially-charged language, 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 because self-defense and voluntary manslaughter would have been verdict options had petitioner testified. The worst case scenario was that Petitioner intended to commit a larceny or common-law robbery – it was undisputed that he was unarmed. A jury could have reasonably found that the death of Mahoney was not the natural or probable consequence of the intended larceny or robbery, and Petitioner would have been entitled to an acquittal on the murder charge. Cf. State v. Peterson, 335 S.E.2d 800, 801 (1985), overruled on other grounds by State v. Torrence, 406 S.E.2d 315 (1991). It is highly implausible that petitioner anticipated that the decedent would point a firearm at him, 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 jury hear the expert opinions of Dorman and Conradi regarding the direction of the gunshots and the number of gunshot wounds suffered by Mahoney.

Morin's ineffectual cross-examination of Dorman failed to elicit critical testimony that the gunshot going through the bag originated on the clerk's side of the counter. Evidence that the unarmed 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 did not even bother to interview Dorman prior to the trial even though his forensic testimony was very important. Morin's failure to interview Dorman, and his inept cross-examination of him constituted deficient performance. Further, Morin 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 to counter the state's pathologist on the number of shots.

Morin'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 version of events, 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). Morin's deficient performance allowed the state to argue petitioner entered the store with the intent to rob it – though it was undisputed he was not armed– 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: petitioner had no intent to rob the store and only returned fire in self-defense after the decedent pointed a gun at him.

2.

The defense had compelling available mitigating evidence that Petitioner could adapt to prison, be managed in prison, and not present a threat to others in defense expert witness, James Aiken. The failure of the defense to offer this mitigating evidence was inexcusable, and any attempt to justify the failure to offer this mitigating evidence based on an effort to prevent further state's evidence in aggravation was a fictitious constraint.

The sentencing trial

The penalty stage of a capital trial is about the circumstances of the crime, and the character of the defendant. The prosecution therefore had the right to present evidence of Petitioner's prior convictions and bad acts as relevant evidence of his character. This capital case case was not any different, and 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 not do anything 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. Nixon's 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 a 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 in aggravation. 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. A 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.

Michelle Crowder 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. 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 worked at Rack Room Shoes on September 13, 1991 in Spartanburg, South Carolina. 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, as a result of the incident at Rack Room Shoes. App. 1667, ll. 3-17. 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 anticipated and 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. 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.

No evidence was offered by the defense that Petitioner could adapt to prison, and not be a

risk to the public, prison guards, or other inmates. The jury sentenced Petitioner to death, and his conviction and death sentence were affirmed on direct appeal. State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004).

HOW THE FEDERAL ISSUE WAS RAISED

In his amended application for post-conviction relief, Petitioner alleged, inter alia, that his attorneys were ineffective for failing to call James Aiken, a nationally recognized expert in the field of penal institutional safety and management to testify that Petitioner "could be safely housed for the duration of his life." PCR counsel noted the unreasonable decision not to call Aiken as a witness opened the door to the "state's damning closing argument" that Petitioner's life was one of "'escalating violence,' thereby injecting the fear of Applicant's future dangerousness into the minds of the jurors." "The prejudice of Applicant stemming from counsel's inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. [internal citations deleted]." App. 1793.

PCR hearing

James Aiken was called to testify during Petitioner's 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 was prepared and present for Petitioner's trial, but was not called to testify as a witness. App. 2097, l. 24 – 2098, l. 3. He would have testified the same during Petitioner's 2001 capital trial 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 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 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. 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. As will be seen infra, both of Petitioner's trial attorneys advanced the fictitious constraint that presenting mitigating evidence that Petitioner could adapt to prison and be safely housed without a risk of violence to others pursuant to Skipper v. South Carolina, 476 U.S. 1 (1986) would "open the door" to other evidence of Petitioner's misbehavior in prison, or outside of prison.

Keith Kelly, who also served as trial counsel, consulted with Aiken prior to Petitioner's trial. His recalled 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 suffered from the same fictitious constraint as co-counsel Morin. He 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 believed if Aiken testified that evidence relating to Petitioner's discipline while incarcerated would have been admitted. App. 2650, l. 23 – 2651, l. 14.

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 community." A. 96. The court found Aiken was present at the trial and prepared to testify favorably on Petitioner's behalf. A. 97. 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. A. 97.

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." A. 99. The PCR court seemed 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. A. 99. 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. A. 99. 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.*" A. 100. (emphasis added).

Discussion

The Attorneys General of South Carolina for years has mischaracterized this Court's holding in Skipper v. South Carolina, 476 U.S. 1 (1986), as a Due Process case i.e. that adaptability evidence could be introduced in fair response to State's evidence that the defendant would be dangerous if he were not executed. Rather, its true holding that any mitigating evidence the defendant proffers as a basis for a sentence of less than death, here adaptability to prison evidence, is admissible under Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) and Lockett v. Ohio, 438 U.S. 586, 604 (1978) irrespective of the evidence the state chooses to offer. It is evidence of the defendant's positive character.

By contrast, Kelly v. South Carolina, 534 U.S. 246 (2002), Shafer v. South Carolina, 532 U.S. 36, 39 (2001), and Simmons v. South Carolina, 512 U.S. 154 (1994), are due process cases in which a capital defendant's right to a jury instruction that life imprisonment means "life without the possibility of parole," is triggered by evidence of future dangerousness.

The attorneys in this case, accepted the erroneous proposition that adaptability evidence would open the door. This was fallacious. The State had the right to present evidence of Petitioner's record in its case-in-chief. And it presented evidence from Michigan authorities in its case-in-chief. Defense counsel's fear that someone from Michigan could testify to petitioner's record *only if* he presented adaptability evidence was inaccurate. And similar analysis applies to the Petitioner's South Carolina record.

"Opening the door" in South Carolina evidence law simply means that a defendant by introducing evidence may open to the door to *what otherwise is improper evidence*, e.g. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct.App. 2008). Since the State's evidence of Petitioner's record was proper, not improper, counsel's fear of "opening the door" was well

beside the legal mark. Moreover, the "additional evidence" from Michigan was never established on the record. Also, fear of impeachment with a prison cell phone violation was hardly grounds to entirely forego a strong witness in mitigation. A reasonable juror might well discount this, as Aiken did, as true evidence of future dangerousness when making a life/death decision.

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. This 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). In Skipper v. South Carolina, 476 U.S. 1, 4 (1986), this Court held that evidence of good behavior of a previously-incarcerated defendant is relevant evidence

in mitigation of punishment. 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. This 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.

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. If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Here, Petitioner's trial counsel testified that he did not present testimony of Aiken because he erroneously thought 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.

Prejudice is apparent in this case in light of the pathetically minimal case presented by trial counsel during the penalty phase and the weak case for death offered by the prosecution. This is amply demonstrated in issue III below. Counsel for Petitioner had plenty of evidence to present in mitigation and failed to do so for no good or constitutionally adequate reason. 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. 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 criminal record, the majority of his convictions were for traffic offenses. The prosecution used this 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 already 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. 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, and Petitioner would have received a life rather than a death sentence. See Wiggins, 539 U.S. at 537.

The procedural posture of this case presents this Court with an opportunity to analyze the Sixth Amendment's protections without the constraints of review imposed by the Anti-Terrorism

and Death Penalty Act.

3.

The Sixth Amendment's guarantee of effective assistance of counsel was violated where trial counsel failed to perform even a most basic investigation concerning Petitioner's background and family life and present evidence of the investigation during the sentencing proceeding in this capital case.

Sentencing phase presentation

Juxtaposing the mitigation presentation at trial with the mitigation presentation at the PCR hearing highlights the perfunctory and constitutionally inadequate nature of trial counsel's investigation and presentation. Covering only twenty-five pages of the transcript, trial counsel presented only two witnesses during the penalty phase of the trial: Petitioner's girlfriend, Lynda Byrd, and Petitioner's "stepson," James Byrd. Counsel called no members of Petitioner's family and presented no social history. Rather, the focus of the mitigation case was on Petitioner's ability to be a "father" to the "stepson" from prison. App. 1688, l. 13 – App. 1703, l. 23. In stark contrast, during PCR proceedings, deposition testimony from petitioner's aunts, uncles, and brothers – Dorothy Hooper, Cecil J. Hooper, Harold Harrington, Arma Hadley, James A. Moore, and Maurice Moore – presented Petitioner's social history in mitigation of a death sentence and would have given the jury a reason to be merciful.

The refrain among the family members was that (1) no one contacted them to investigate petitioner's social history, (2) they would have cooperated with the investigation, (3) they would have testified at the trial, and (4) they would have asked the jury for mercy. The testimony of trial counsel revealed no one from the defense team ever traveled to Michigan, where petitioner was born and raised and where his family remained, to investigate and marshal evidence for trial.

HOW THE FEDERAL ISSUE WAS RAISED

In his amended application for post-conviction relief, petitioner alleged his trial counsel rendered prejudicial deficient performance by failing to perform a reasonable investigation into his background and family life, including a complete failure to conduct any investigation in the state of Michigan, where petitioner was born and raised. App. 1789.

PCR hearing

The mitigation case at the PCR hearing showed a family supportive of petitioner, whom they viewed as a loving nephew and brother. Petitioner's family members were lifelong residents of Michigan who were willing to testify at Petitioner's trial; however, no one ever contacted them. App. 1802, l. 13 – 1803, l. 24; App. 1807, l. 17 – 1808, l. 21; App. 1813, ll. 4-22; App. 1819, l. 22 - 1822, l. 18; App. 1832, l. 5 – 1835, l. 11; App. 1845, l. 25 – 1846, l. 21; App. 1850, l. 20 – 1851, l. 17; App. 1859, ll. 11-21; App. 1866, l. 6 – 1869, l. 9; App. 1880, l. 17 – 1882, l. 11; App. 1886, ll. 8-10. Further, the family was willing to tell the jury about petitioner's calm and respectful demeanor from the time he was a small boy. App. 1804, l. 9 - 1806, l. 6; App. 1821, ll. 10-21; App. 1836, ll. 15-18; App. 1847, l. 21 – 1848, l. 20; App. 1869, l. 4 – 1871, l. 2. All would have asked the jury for mercy. App. 1821, l. 25 – 1822, l. 1; App. 1834, ll. 6-13; App. 1849, ll. 16-23; App. 1869, ll. 24-25.

Maurice Moore, Petitioner's older brother, recalled receiving a phone call from a woman he thought was Petitioner's lawyer, regarding petitioner's legal troubles. The woman said she would call back, but never did. App. 1897, l. 11 – 1899, l. 13; App. 1905, ll. 4-8. Maurice would have told the jury that his brother was a loving, caring person who loved sports and worked hard. App. 1900, l. 20 – 1901, l. 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, l. 1 – 1903, l. 10.

Petitioner grew up in Michigan, where his father, five brothers, two sisters, multiple aunts, uncles, cousins, nieces and nephews still lived. App. 2257, ll. 2-11. Petitioner provided his trial counsel with names, addresses, and phone numbers for family members in Michigan. App. 2259, ll. 20-24; App. 2261, ll. 14-24; App. 2278, l. 24 – 2279, l. 1. Petitioner denied the state's contention that his family in Michigan wanted nothing to do with him when he was arrested. App. 2286, ll. 8-11. On April 20, 2001, just a few months before trial, Petitioner wrote a letter explaining his inability to supply all of the information requested; however, he gave trial counsel the address and telephone number for his sister who could provide the required information. According to the letter, petitioner asked for his family's help when he was first arrested and was told no help would be coming, but he had not informed his family of the death notice in his case. App. 2288, ll. 1-10; App. 2805.

Although Petitioner completed the social history packet, Morin claimed that the defense team was lacked the necessary contact information to secure the cooperation of petitioner's family in Michigan. App. 2551, l. 25 –2552, l. 19. Further, Morin's contention that petitioner was uncooperative was belied by his admission that although he told petitioner his cooperation was important, Morin did not attempt to elicit any specific information about his background. App. 2551, ll. 6-24. Morin maintained petitioner's April letter indicated he was not interested in getting the assistance of his Michigan family. App. 2553, ll. 11-21. In contravention of Morin's representations, the letter did not indicate petitioner's lack of cooperation. In fact, the letter supplied trial counsel with contact information for petitioner's sister, a source for additional familial information. App. 2805. Furthermore, on May 8, 2001, Morin met with petitioner and received additional contact information for family members, clearly evidencing petitioner's

cooperation. App. 2736, l. 7 – 2737, l. 20; App. 2554, ll. 14-25; App. 2797-2799. In August of 2001, just two months before the trial, Morin sent a letter to the fact investigator, Pete Skidmore, about people for the penalty phase, notwithstanding the fact that a mitigation investigator had been retained. App. 2524, ll. 18-20; App. 2535, ll. 6-15.[3]

When asked if he 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. Yet, the record revealed petitioner cooperated with his counsel's request for information about his family.

According to defense counsel Keith Kelly, the strategy was "begging for mercy" and showing petitioner was "ha[d] a family." App. 2629, ll. 22-23; App. 2645, ll. 13. 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 some family members, the report "[was] really essentially a chronology of his [Petitioner's] criminal offenses." App. 2664, ll. 12-14.[4] According to Kelly's testimony and the report, attempts to contact Petitioner's

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[3] When asked about 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.

[4] The report illustrated the investigation into Petitioner's family and social history was incomplete. App. 2856-2860.

father were by phone and letter. App. 2638, ll. 15-20. Two relatives were listed, but never contacted. App. 2639, ll. 13-16. Three other relatives were in prison, but never contacted. App. 2639, ll. 21-24.

Kelly claimed 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, they decided not to go because there was not "much to go on." App. 2669, l. 21 – App. 2670, l. 5. Kelly testified that the mitigation investigator tried to reach some family members by phone and certified mail and he did not "know what else she may [have] done." App. 2670, ll. 13-15.

Order of Dismissal

Having reviewed the video-taped depositions of petitioner's Michigan family, 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." The court found counsel's investigation for and presentation of mitigating evidence was objectively reasonable where "trial counsel investigated and attempted to locate mitigation witnesses ... from his family in Michigan." The court believed that petitioner was largely uncooperative in trial counsel's endeavor and initially did not want the family to assist. App. A88; App. 2963. The judge posited, without evidence in the record, that petitioner's family cut him off due to his "life of crime." App. A89-A90; App. 2965-2966. The judge further found counsel's testimony credible that petitioner's family members did not want to assist despite counsel's failure to seek out even petitioner's brothers who were incarcerated.

App. A91-A93; App. 2967-2969.

Turning to the prejudice prong, the 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. A92; App. 2967. Initially, James testified he was living at home with his father and he would have testified had he been notified of the trial. However, on cross-examination, James recalled he was incarcerated at the time of the trial. 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." The judge surmised this corroborated the fact that petitioner's family was embarrassed and angered by petitioner's crime and "had washed their hands of him." App. A93; App. 2968.

In addition, the 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) two witnesses made a plea for petitioner's life at trial; (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 petitioner, offered no evidence petitioner suffered from any mental illness, mental retardation, personality disorder, physical or sexual abuse or deprivation or poverty. 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. A94-A95; App. 2969-2970.

Discussion

The state court's decision to deny petitioner relief where the undisputed evidence demonstrated a complete failure by trial counsel to investigate and present evidence in mitigation

conflicts with a long line of cases from this Court regarding the duties of trial counsel to investigate and present evidence in mitigation of a death sentence. 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).

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 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))(emphasis added).[5] The Guidelines directed counsel to "[c]ollect information relevant to the sentencing phase of trial including ... family and social history." ABA Guidelines, 11.4.1(D)(2)(C). Collecting this information requires interviewing "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).

[5] 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).

"Counsel's duty to investigate is not negated by the expressed desires of a client." Id. at 11.4.1 cmt. 4.

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" for presentation during the penalty phase. 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) & 11.8.6(B)(5).

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 the investigation of Wiggins' background. Id. at 524. This Court held counsel's decision not to extend the 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, this 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. "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. "In 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.

This 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.

This 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. This 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.

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

The question presented in the instant case is whether counsel's decision not to investigate Petitioner's family history in Michigan was reasonable. 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 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's decision not to investigate further was unreasonable in light of their limited and inadequate investigation.

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.'" Wiggins, 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). To assess prejudice, this 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. This 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.

In Rompilla, this Court held trial counsel's failure to examine the file on his prior conviction was prejudicial. 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.

This Court confronted a state court's failure to apply the proper prejudice inquiry in Sears v. Upton, 561 U.S. 945 (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 952. 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. This 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 953. 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 954. 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 955.[6]

In Cauthern, the Sixth Circuit relied upon this 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.

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

[6] The case was remanded for further proceedings. Sears v. Upton, 561 U.S. 945, 956 (2010).

post-conviction relief proceeding, these additional family members would have asked the jury to spare Petitioner's life. The judge instructed the jury could sentence petitioner to life "for any reason you can think of or for no reason at all." App. 1743, ll. 19-21. Later, he told the jury "you may choose to recommend life imprisonment as an act of mercy." App. 1746, ll. 9-10. He explained "[t]his is what has been traditionally referred to as a recommendation of mercy." App. 1746, ll. 2-3.

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. 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," 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"). The PCR court's mass adverse credibility determination is inexplicable and unwarranted.

The family witnesses, among other things, would have asked the jury for mercy for petitioner. A jury may recommend a life sentence as an act of mercy and it is proper to so instruct the jury. See Caldwell v. Mississippi, 472 U.S. 320, 331 (1985); Eddings v. Oklahoma,

455 U.S. 104, 110-111 (1982); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009). Petitioner has shown prejudice since Petitioner's family asking the jury for mercy, informing the jury of Petitioner's good traits, and testify they still cared for Petitioner would have had an effect on the jury.

CONCLUSION

By reason of the foregoing arguments this Court should grant a writ of certiorari.

Respectfully submitted,

ROBERT M. DUDEK
Counsel of Record
Chief Appellate Defender

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

March 23, 2015

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 14A774

RICHARD BERNARD MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, William Edgar Salter, III, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 23rd day of March, 2015. Counsel is also today, March 23, 2015 sending a copy of the petition for writ of certiorari and appendix to opposing counsel by electronic delivery to: agesalter@scag.gov .

ROBERT M. DUDEK
Counsel of Record

SWORN TO BEFORE me this 23rd
day of March, 2015.

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