STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2019-000446

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DERRELL GREEN, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

## RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly dismissed Petitioner's application where counsel submitted a substantive sentencing memorandum including numerous evaluation reports from mental health professionals, filed a motion to reconsider including Petitioner's diagnoses, and was unaware of Petitioner's head injuries or undiagnosed depression?

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## STATEMENT OF THE CASE

On December 6, 2010, Petitioner was indicted by a Charleston County grand jury for murder. App. 1413-1414. Previously he had been charged with unlawful possession of a firearm and possession of a weapon during the commission of a violent crime but those charges were withdrawn. App. 13 ll. 17-25. He appeared before the Honorable Judy L. McMahon in the Family Court, Ninth Judicial Circuit on March 4, 2010. Megan Ehrlich represented Petitioner, and Ann Seymour appeared on behalf of the State. A pre-waiver evaluation was requested and granted. App. 3 l. 6-App. 8 l. 4.

A waiver hearing, again before the Honorable Judy L. McMahon, was then held on August 25 and August 26, 2010. App. 10. The family court judge took the matter under advisement after hearing the testimony from witnesses. App. 351 ll. 20-21. Another hearing was held on September 1, 2010 before Judge Judy McMahon wherein the family court granted the waiver. App. 355 l. 1-App. 359 l. 1. Counsel for Petitioner moved to reconsider the transfer of jurisdiction, and an additional hearing was held on October 21, 2010 before the Honorable Judy L. McMahon with the same counsel present. App. 361.

That motion was denied, and Petitioner proceeded to trial before the Honorable J.C. Nicholson and a jury on August 22, 2011. App. 375. Megan Ehrlich and Lorelle Proctor represented Petitioner, and Douglas Durant and Jennifer Shealy appeared on behalf of the state. After a four day trial, the jury found Petitioner guilty of murder. App. 1173 ll. 19-25.

On September 1, 2011, Petitioner appeared before Judge Nicholson for sentencing. App. 1177. He was sentenced to forty years imprisonment. App. 1202 ll. 16-19. Trial counsel filed a motion to reconsider the sentence on or about September 9, 2011. App. 1204-1205. A hearing

was held on Petitioner's motion before Judge Nicholson on October 7, 2011. App. 1206. The motion was denied. App. 1218 ll. 21-23.

Petitioner's conviction was affirmed on appeal. *State v. Green*, 2014-UP-345 (filed October 1, 2014). Petitioner filed an application for post-conviction relief on January 16, 2015. App. 1222. The State made its Return on or about July 30, 2015. App. 1233. Counsel for Petitioner filed an amendment to the post-conviction relief application on or about February 24, 2018. App. 1235.

An evidentiary hearing was held before the Honorable G. Thomas Cooper on December 3, 2018. App. 1244. James Falk appeared on behalf of Petitioner and Kelly Oppenheimer represented the State. Dr. Donna Schwartz Maddox, trial counsel, and the solicitor testified at the hearing. Dr. Maddox was qualified as an expert in the field of forensic psychiatry. App. 1252 l. 7-App. 1253 l.6. At the conclusion of the hearing, the PCR court denied relief. App. 1310 l. 3-App. 1312 l. 15. The Order of Dismissal was filed on February 22, 2019. App. 1392.

## RELEVANT FACTS

On February 5, 2010, Petitioner shot the victim, Larry Maybank twice, killing him. One of the gunshot wounds was to the hip, and the other was not life threatening. Trial Tr. 718. The fatal shot went into the victim's body through his right back near the armpit area. Trial Tr. 718. The bullet went through his body, going through a rib in the back on the right, through the right lung and through a number of great vessels, further through the heart and trachea, continuing between the collar bone and first rib. Trial Tr. 718. The bullet stopped in the pectoralis muscle in the front of the chest. Trial Tr. 718. The victim died from that gunshot wound because he bled out. Trial Tr. 728.

When the victim was shot, Jacquintas Washington indicated he saw Petitioner following them. Trial Tr. 377-78. He noted the three other guys were further back and were closer to the school. Trial Tr. 378-79. Jaquintas testified he knew Petitioner was the one who shot the victim because when he turned around, he saw Petitioner shooting at the victim. Trial Tr. 379-80, 402. He was not sure how many times Petitioner shot the gun; he knew it was definitely more than once and it may have been three times. Trial Tr. 380.

Rashawn testified he saw Daqone pass Petitioner something, but he was not able to identify what was passed between the two. Trial Tr. 431. Rashawn asked Daqone what he brought, and Daqone said nothing. Trial Tr. 431. Rashawn stopped, and Daqone told Rashawn and Antonio to back up. Trial Tr. 432-33. The two backed up and headed back in the direction of the school. Trial Tr. 433. Rashawn testified he saw Petitioner pull out the gun. Trial Tr. 433. Petitioner shot once, and then Rashawn ran. Trial Tr. 433. Rashawn noted Petitioner had fired the shot at the victim. Trial Tr. 433. He heard other shots. Trial Tr. 433.

Antonio noted Petitioner and Daqone pulled away from the other two, and Antonio believed they were going to fight with the victim and his friend. Trial Tr. 467-69. Antonio testified while they were standing there, he heard gunshots. He saw Petitioner pull out the gun and start shooting. Trial Tr. 469. Specifically, Petitioner was shooting at the victim, who at that time was near the laundromat. Trial Tr. 470. In his statement to police, Antonio had indicated that Daqone gave Petitioner the gun. Trial Tr. 471.

Petitioner gave two statements to law enforcement. In his first statement, which began around 3:55 p.m., Petitioner denied any involvement in the shooting. Trial Tr. 596-600. He stated he did not have a gun that day, nor did he fire a gun that day. Trial Tr. 599. In his second statement, which began around 7:45 p.m., Petitioner admitted his first statement was not truthful. Trial Tr. 608. In the statement, Petitioner indicated he had been jumped by the victim and some others a few weeks prior to the shooting. Trial Tr. 608. Petitioner saw the victim after school. Trial Tr. 609. He noted the victim had been mean mugging him. Trial Tr. 609. Petitioner stated he went and got a gun, which he had hidden in an abandoned house near the school. Trial Tr. 610. He described the gun as being a .38 revolver. Trial Tr. 610, 611. Petitioner told Detective Kramitz he walked up behind the victim and started shooting. Trial Tr. 610. He indicated he did not know how many times he fired the gun, but he thought it may have been four or five times. Trial Tr. 610. After the shooting, Petitioner ran home. Trial Tr. 610. Petitioner stated he threw the gun into a vacant lot as he ran. Trial Tr. 611.

First, Petitioner presented the testimony of Dr. Maddox, who was qualified as an expert in forensic psychiatry without objection. Dr. Maddox testified she met with Petitioner for a few hours and reviewed the trial transcript, the application for post-conviction relief, the discovery, the evaluations of Petitioner from the Department of Juvenile Justice (DJJ), Petitioner's records from

the Medical University of South Carolina, Petitioner's school records, Petitioner's waiver evaluation, Dr. Halavonich's report, and Petitioner's mental health records in preparation for this hearing. She explained in reviewing these materials, she looked for anything that was not considered at the time of Petitioner's trial and also focused on issues prevalent in younger defendants. She also testified Petitioner underwent extensive evaluations prior to his trial.

Dr. Maddox further testified at the time of this crime, Petitioner lived with his mother and stepfather and his five siblings. She explained it was possible Petitioner shared a room in that household with his three brothers, which would have been stressful. She further explained the family had not been referred to the Department of Social Services (DSS), as Petitioner's home was a stable environment; but certain stressors present were sharing a bathroom and school. She also testified Petitioner had some relationship with his biological father, who had been previously incarcerated. She explained when his father was out of prison, Petitioner developed a relationship with him, but his father was sent back to prison shortly thereafter.

She also testified Petitioner was in special education classes at the time of this crime and also has a low average IQ. She further testified Petitioner had previously been ordered to participate in the STAR program through DJJ due to prior disturbing school charges. She testified Petitioner was kicked out of the STAR program because he was not motivated. She explained at the time although Petitioner was described medication, his mother did not believe he was taking his medication.

Dr. Maddox diagnosed Petitioner with attention deficit disorder (ADD), substance abuse disorder, behavioral disorder, and depression. She explained although there were clear indications of depression in Petitioner's history, he had never been diagnosed with depression. She further explained after his evaluation at the Department of Mental Health (DMH), Petitioner was

diagnosed with ADD, a behavior problem—either opposition defiant disorder (ODD) or conduct disorder, and substance abuse disorder. She testified when she met with Petitioner, he was not on medication for depression, and he did not show a lot of emotion. She further explained Petitioner was prescribed medication for ADD, but that prescription caused side effects, so Petitioner stopped taking the medication and began deteriorating. She testified, however, once Petitioner was on the appropriate medication for ADD, he stabilized.

She testified ADD is manageable with medication and typically stimulants which slow motor behavior down are prescribed. Dr. Maddox testified Petitioner's ADD is more treatable than others with the disease, and he was prescribed Concerta at the time of this crime. She further testified some people grow out of ADD and ODD. She explained about twenty percent of people diagnosed with ADHD exhibit symptoms of ADHD into adulthood. She also testified people with ADHD get into a lot more trouble with school; and if there is no diagnosis of ADHD, teachers usually believe the student is merely being oppositional. She testified someone diagnosed with ODD does not like rules and regulations and typically acts out verbally. She further explained, however, conduct disorder is more serious than ODD, as an individual with conduct disorder can be aggressive and the diagnosis can progress into anti-social personality disorder in adulthood. She testified Petitioner has not been diagnosed with anti-social personality disorder.

Dr. Maddox further testified at the age of fourteen, which was Petitioner's age at the time of the crime, there is a lack of brain development. She explained fourteen-year-old males are in the second phase of brain development, and at that time adolescent brains are beginning to process things, which usually begins around the age of twelve or thirteen. She further explained the emotional parts of the brain develop first, so young adolescents are typically aggressive and hotheads. Dr. Maddox also testified the judgment portions of the brain are usually finished

developing around the age of seventeen. She testified typical fourteen-year-old do not like their parents, want to hang out with their friends, and do no appreciate the consequences of their actions. Dr. Maddox also testified a fourteen-year-old knows that murder is wrong, but does not understand the full consequences. She further testified Petitioner was not a typical functioning fourteen-year-old, however, because he brain was less developed due to his learning disability, depression, and ADD. She further explained the combination of these diagnoses and the lack of brain development made Petitioner more impulsive and easily irritable.

She also testified Petitioner's head injury was not explored at the time of his trial, and the defense expert at trial was unaware of the head injury. She testified Petitioner has a scar on his head from when he was hit in the head with a board while working for his grandfather, and he was also hit by a car when he was on his bicycle. Dr. Maddox further testified she did not perform any neuropsychological testing, so it is difficult to tell what effects these injuries had on Petitioner; but Petitioner does report headaches. She explained Petitioner's brain injury needs to be considered.

She also testified Petitioner appeared more passive and appeared to be a follower. She explained Petitioner was easily suggestible and subject to bullying by his peers. She testified the victim had "ganged" Petitioner and stolen his necklace prior to this shooting. She explained waiting a month to do something to the victim could have been part of Petitioner's depression.

Dr. Maddox testified at sentencing, the court had all of the information concerning Petitioner's learning disability, but did not have any information regarding depression. She explained the court had all of Petitioner's prior evaluations and diagnoses at the time of sentencing, but did not have any information regarding Petitioner's head injury nor his depression. She testified juveniles with depression typically get angry, are impulsive, and have an impaired capacity, all of which should have been presented as mitigating factors at sentencing. She

explained Petitioner's depression existed before he was sentenced, which constricted his affect. She further explained Petitioner would not have shown a lot of emotion and his speech would have been flat. She further testified, however, depression does not cause someone to commit murder. She testified people with depression are more likely to harm themselves and commit suicide than they are to commit homicide. She testified there was nothing impulsive about Petitioner following the victim down the street, nor shooting the victim twice. She explained these actions exhibited poor judgment.

She further testified the life expectancy for someone who is incarcerated is 21.8 years less than someone who is not incarcerated. She testified the average life expectancy of an individual in prison is fifty-five years.

Following Dr. Maddox's testimony, Petitioner presented the testimony of Counsel. Counsel testified Petitioner was fourteen at the time of the crime, so he was initially in family court. She testified the State then wanted to waive Petitioner up to General Sessions, so Petitioner went through the evaluation process. She explained Petitioner was initially evaluated by DJJ, but he had difficulty understanding the form, so DJJ was not comfortable moving forward. She further explained Petitioner then underwent competency evaluations by DMH and the Department of Disabilities and Social Needs (DDSN), and he was found competent in both of those evaluations. She testified Petitioner then underwent evaluations through DJJ and Counsel's defense experts, whom she hired, Dr. Halavonich and Dr. Holmstrom, who evaluated Petitioner's IQ. She further testified Petitioner had a low IQ, but the tests Dr. Holmstrom was using were outdated, which caused the scores to be lower, so she disregarded Dr. Holmstrom's tests. She further testified Dr. Halavonich testified in family court. Counsel testified after this process, Petitioner was waived up to General Sessions.

Counsel testified none of Petitioner's co-defendants were waived up to General Sessions. She explained Daqone, who provided the gun to Petitioner, was charged as an accessory after the fact and not waived up. She further explained Rashawn, who was charged with accessory after the fact, was also not waived up. She further testified none of Petitioner's co-defendants were adults, and Petitioner was the only one with "adult charges."

She also testified at the time of trial, there was a lot of focus on Petitioner's ADHD and anxiety issues. She testified there were signs of depression indicated, but no one ever diagnosed Petitioner with depression at the time. She further testified she provided the court with a sentencing memorandum[1], arguing Petitioner was, indeed, a child. She explained she attempted to bring to the court's attention brain development in juveniles and also attempted to reiterate to the court Petitioner was sixteen years old at the time of the trial but only fourteen years old at the time of the shooting. She further explained the sentencing memorandum included Petitioner's background, his limited treatment, Dr. Halavonich's evaluation, the waiver evaluation, the fact adolescents are different than normal adults, and letters from Petitioner's language arts teacher and guidance counselor. Counsel testified she submitted all of the information she had at the time to the court. She stated, however, she did not have any information regarding Petitioner's depression and head injury. She testified in her motion to reconsider the sentence[2], she presented some additional information to the court. Counsel further testified Petitioner's case was before *Aiken v. Byars*[3] and also before the life expectancy studies for inmates, which Dr. Maddox cited. She testified, however, Petitioner was not subject to a mandatory life without the possibility of parole (LWOP) sentence, and Petitioner was only sentenced to forty years.

[1] A copy of the sentencing memorandum was introduced at the hearing as Respondent's Exhibit #1.
[2] A copy of the motion to reconsider the sentence was introduced at the hearing as Respondent's Exhibit #2.
[3] 410 S.C. 534, 765 S.E.2d 572 (2014).

She further testified she would have wanted Dr. Maddox to testify at sentencing. She explained there was a lot of focus on Petitioner's anxiety issues, and he was afraid to testify. She explained Dr. Maddox's testimony at sentencing would have helped Petitioner, particularly in light of the depression and head injury Dr. Maddox noted. She further testified in light of the head injury, she would have wanted to have had additional testing done on Petitioner.

Counsel also testified Petitioner went to the same school as Rashawn, and Petitioner, Rashawn, Daqone, and Antonio all met up in front of the school on the day of the shooting. She further testified Rashawn initially told law enforcement he did not see the shooting but later gave a statement, which he did not sign, implicating Petitioner. She explained the first statement was taken on February 12, 2010, and Rashawn indicated he did not see the shooting but heard the shots and ran away. She further explained Rashawn's second statement was given later that same day, and he stated he saw Daqone pass Petitioner something and then saw Petitioner shoot. She testified at trial, Rashawn testified Daqone told him to back off, and then he saw Petitioner shoot the victim. She explained Rashawn's testimony was harmful to Petitioner at trial. Counsel testified her investigator met with Rashawn, and he did not recant seeing Petitioner shoot the gun at that time.

She also testified there were two other witnesses to the shooting, and each of them gave an initial statement but changed their stories later, indicating they saw the shooting. She explained both Antonio and Jacquintas identified Petitioner and gave varying accounts of what they saw to law enforcement. She further explained a school administrator identified Petitioner and indicated Petitioner was wearing a camouflage jacket. Counsel also testified one witness gave a different description of the shooter, stating the shooter had dreadlocks, but also stated the shooter was wearing a camouflage jacket. She further testified she was able to bring out every witness's inconsistencies in their statements at trial.

Counsel also testified Petitioner had a difficult time opening up to her, and she believed he was holding things back. She explained she did not know if Petitioner's demeanor was due to fear, as his family was receiving threats at the time. She further explained Petitioner was not difficult with her. She testified Petitioner was both polite and soft spoken.

Petitioner then rested his case, and Respondent presented the testimony of Chief Deputy Solicitor DuRant. Chief Deputy Solicitor DuRant testified he has been practicing law since 1981 and has been employed with the Ninth Circuit Solicitor's Office for twenty-seven years. He testified he primarily handles homicide cases.

He testified his theory of this case was it was a revenge killing. He explained the victim had robbed Petitioner at some point prior to the shooting, and Petitioner had shot the victim in order to get back at him. Chief Deputy Solicitor DuRant testified he had a good video, which showed the events leading up to the shooting. He further testified there were three eyewitnesses to the shooting: (1) Jacquintas, who was friends with the victim; (2) Rashawn, who was friends with Petitioner; and (3) Antonio, who was also friends with Petitioner. He testified everyone knew Petitioner's friends were not being truthful in their initial statements because of the video. He explained the video showed Petitioner and his friends walking behind the victim and also showed Rashawn and Antonio watching the shooting. He also testified two other witnesses identified Petitioner by his clothing, and a school administrator indicated Petitioner was wearing a camouflage jacket. Chief Deputy Solicitor DuRant testified another witness gave a statement she had seen Petitioner the morning of the shooting with a gun. He also testified this was not a mandatory LWOP case.

## ARGUMENT

**The post-conviction relief court properly dismissed Petitioner's application where counsel submitted a substantive sentencing memorandum including numerous evaluation reports from mental health professionals, filed a motion to reconsider including Petitioner's diagnoses, and was unaware of Petitioner's head injuries or undiagnosed depression**

Petitioner contends counsel was deficient for failing to present evidence of Petitioner's depression and multiple head injuries at various stages of his case, including the waive hearing in family court where such diagnoses would be relevant to a transfer of jurisdiction to the court of general sessions and the sentencing hearing. However, the post-conviction relief court properly dismissed Petitioner's application where counsel submitted a substantive sentencing memorandum including numerous evaluation reports from mental health professionals, filed a motion to reconsider sentence including Petitioner's diagnoses, and was unaware of Petitioner's head injuries or undiagnosed depression.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*. 466 U.S. 668, 686. To prove ineffective assistance of counsel, "the Applicant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the Applicant." "When a convicted defendant complains of the ineffectiveness of counsel's defense, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case". Rather, "[t]he defendant 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." *Id.* at 694, 104 S.Ct. at 2068.

First, defense counsel is 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). Even so, counsel had Petitioner evaluated by numerous mental health professionals prior to trial and presented their findings to the court in her sentencing memorandum. Counsel's sentencing memorandum included all of the reports from the mental health evaluations as well as character statements from people who knew Petitioner. Further, counsel submitted additional information to the court concerning Petitioner's mental health in her motion to reconsider the sentence. This motion to reconsider the sentence contained information pertaining to Petitioner's diagnoses of ADHD and ODD. Significantly, the evaluations conducted by the mental health professionals did not indicate a history of any head injuries or a diagnosis of depression.

Trial counsel testified at the evidentiary hearing that the focus was mainly on Petitioner's ADHD and anxiety issues. Counsel testified that there were indications of Petitioner's depression, but that none of the evaluations yielded a depression diagnoses. Counsel testified that she presented all of the mitigating evidence she had to the court and that she did not have any information concerning Petitioner's head injuries or depression. Counsel testified that she would have wanted to present Dr. Maddox's testimony to the court and that her testimony would have been helpful. Counsel testified that the depression diagnosis and the head injury information would have been helpful, relevant, and mitigating. Significantly, counsel's testimony at the evidentiary hearing highlights the fact that she had Petitioner evaluated numerous times and presented all of the mitigating evidence made available to her at the time.

Petitioner relies heavily on the testimony and findings of Dr. Maddox in his argument. Petitioner argues counsel was deficient for failing to discover and present his head injuries and depression in mitigation based on the findings Dr. Maddox testified to at the evidentiary hearing. However, counsel thoroughly investigated Petitioner's mental health and had him evaluated by mental health experts.

Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. *Ibid.* It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it. *Harrington v. Richter*, 131 S. Ct. 770, 788-89, 178 L. Ed. 2d 624 (2011). Here, unlike in *Richter*, counsel consulted numerous mental health experts in an effort to develop a defense and mitigating evidence. Counsel had Rikki Lynn Halavonich, a forensic psychiatrist, evaluate Petitioner and provide reports as to his findings. Specifically, as it relates to investigating mitigation evidence, the United States Supreme Court has said the following:

> We emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland,* 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional

> judgments support the limitations on investigation." *Id.,* at 690-691, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.,* at 691, 104 S.Ct. 2052. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 2541, 156 L. Ed. 2d 471 (2003).

Again, Petitioner's case is distinguishable from *Wiggins* in that counsel made significant efforts to investigate any mitigating evidence relating to Petitioner's mental health. Here, counsel reasonably relied on the evaluations and findings of experts for the mitigation evidence used in Petitioner's case. Counsel conducted a thorough investigation in Petitioner's case and to find otherwise would require this Court to find that trial counsel was not reasonable for failing to procure Dr. Maddox specifically or the opinions of additional experts. Trial counsel's representation was professionally reasonable and Petitioner has failed to show any deficiency, therefore, the post-conviction relief court properly dismissed this allegation.

Second, Petitioner has failed to show any resulting prejudice from the alleged deficiency of trial counsel. Petitioner argues, rather conclusively, that had the family court judge known of Petitioner's head injuries and depression the waiver request would have denied. Petitioner also argues that had the sentencing judge known of Petitioner's depression it may have resulted in a shorter sentence. Further, Petitioner contends that had the head injuries and depression been discovered it would have been explained to the family court and sentencing court that these factors resulted in Petitioner's inability to control his actions and thus would have provided grounds to deny the waiver request or reduce his sentence. However, it is highly unlikely that Petitioner's explanation would have been heard by either court given that it directly contradicts testimony from his own witness, Dr. Maddox. At the evidentiary Dr. Maddox did testify that juveniles with depression are typically angry and more impulsive, but that there was nothing impulsive about following the victim down the street and shooting him twice.

Petitioner cites the eight factors the family court must consider in making its waiver determination and argues had the court known of Petitioner's head injuries and depression the result would have been different. The family court must consider eight factors enumerated in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) in making its determination. The factors are as follows:

1. The seriousness of the alleged offense.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint.
5. The desirability of trial and disposition of the entire offense in one court.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services, and facilities currently available.

*Id.* The family court must provide a sufficient statement of the reasons for the transfer in its order. *State v. Avery*, 333 S.C. 284, 293, 509 S.E.2d 476, 481 (1998). "The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court." *Id.* The family court demonstrated its ruling that a thorough investigation had been conducted and that it had carefully considered each factor in making its decision. Notably, the family court mentions Petitioner's mild depression when enumerating its considerations of Petitioner's emotional

attitude. Petitioner has failed to show how further elaboration of his head injuries or depression would have changed the ruling of the family court, especially considering the court ultimately considered depression in making its decision.

Finally, Petitioner has failed to show his sentence would have been different had the sentencing court been apprised of his head injuries and depression. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976); *Clark v. State*, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no discretion to correct a sentence given within statutory limits. To be entitled to relief, the applicant must prove the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. *Clark,* 259 S.C. 378, 192 S.E.2d 209; *State v. Cogdell*, 273 S.C. 563, 257 S.E.2d 748 (1979). The sentencing court considered Petitioner's age, mental health diagnoses, sentencing memorandum, and victim impact letters. The sentencing court was particularly concerned that Petitioner was removed from the STAR program for threatening other participants then committing this murder shortly thereafter. The sentencing court did not abuse its discretion in sentencing Petitioner and Petitioner has failed to show how presenting the head injuries and depression would have changed the result, especially considering Dr. Maddox's testimony that his actions were not impulsive and were a result of poor judgement.

Ultimately, Petitioner has failed to meet his burden of proof in showing prejudice resulting from the alleged deficiency of counsel. The PCR court properly denied relief because Petitioner failed to prove any prejudice. This Court should therefore deny Certiorari.

## CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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February 26, 2020

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY
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DERELL GREEN,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the of the Return to Petition for Writ of Certiorari has been served upon the applicant by placing two copies in Interagency Mail addressed to:

**Taylor D. Gilliam, Esquire**
**S.C. Commission on Indigent Defense**
**1330 Lady Street, Suite 401**
**Columbia, SC 29201**

This the 26th day of February, 2020.

Jennifer Jennison
Administrative Coordinator for Respondent

ALAN WILSON
ATTORNEY GENERAL

February 26, 2020

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Derell Green v. State of South Carolina**
**Appellate Case No.: 2016-000446**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jaj
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division