IN THE SUPREME COURT OF MISSISSIPPI

JEFFREY KELLER DAVIS, *Appellant*

versus **NO. 2010-CA-01770-SCT**

STATE OF MISSISSIPPI, *Appellee*

BRIEF FOR APPELLEE

Appeal from the Circuit Court of Greene County, Mississippi
No. 2002-12-091(1)

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TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

Statutes *page*

Other Authorities *page*

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BRIEF FOR APPELLEE

COMES NOW the Appellee, State of Mississippi, by and through counsel and files this Brief for Appellee with this Court in the above styled and numbered cause. This case is an appeal from the denial of post-conviction relief by the circuit court after remand for an evidentiary hearing by this Court.

I. STATEMENT OF THE CASE

Defendant Jeffrey K. Davis was indicted by the Grand Jury of Greene County, Mississippi, during the September 1991 term of said court for the crime of capital murder of Linda Hillman while engaged in the commission of the crime of robbery. The indictment was returned pursuant to MISS. CODE ANN. § 97-3-19(2)(e) (1972, as amended). CP 6.[1] The Defendant entered a plea of not guilty and was tried by a jury of his peers. CP 34. Davis was found guilty of capital murder on May 22, 1992, in the Circuit Court of Greene County. The jury then entered the sentencing phase of the trial and heard evidence in aggravation and

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[1]References to the record are designated as follows: "CP" - court papers, Volume 1; "Tr."- trial transcript, Volumes 2 through 5; and "Supp." - supplemental volume of instructions submitted after this Court granted Davis' Motion to Supplement the Record.

mitigation of sentence. After due deliberations the jury returned a sentence of death in the proper form. The jury's specific findings of capital murder are as follows:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. That the Defendant actually killed Linda Hillman;
>
> 2. That the Defendant attempted to kill Linda Hillman;
>
> 3. That the Defendant intended the killing of Linda Hillman to take place; or
>
> 4. That the Defendant contemplated that lethal force would be employed.
>
> Next, we, the jury, unanimously find that the aggravating circumstances of:
>
> 1. Whether the capital offense was committed for pecuniary gain.
>
> 2. Whether the capital offense was especially heinous, atrocious, or cruel.
>
> is/are sufficient to impose the death penalty and that there are sufficient mitigating circumstance to outweigh the aggravating circumstances, and we further find that the defendant should suffer death.
>
> CP 40.

Based on the facts of the case and the aggravating circumstances, Davis was sentenced to death. Davis' Motion for a New Trial was overruled by the trial court on July 28, 1992. CP 53. Davis pursued his automatic direct appeal to this Court. He raised the following claims:

I. The State's Voluntary Intoxication Instruction Improperly Shifted the Burden of Proof on the Issue of Intent.

II. The Prosecutor Committed Reversible Error in Repeatedly Eliciting

Evidence Concerning Davis' Lack of Remorse as Well as in Using this So-called Lack of Remorse to Comment on Davis' Failure to Testify.

III. The Many Instances of Prosecutorial Misconduct Violated Jeffrey Davis' Right to a Fair Trial.

IV. The Nonconformity Between the Capital Murder Instruction and That Defining Armed Robbery Was Error.

V. The Trial Court Erred in Denying Defendant's Instruction on the Lesser Included Offense of Murder.

VI. The Use of Davis' Statements Was Error in That the State Failed to Prove They Were Voluntary.

VII. The Trial Court Erred in Failing to Sustain Davis' Motion to Quash the Jury Venire.

VIII. The Trial Court Erred in Limiting Examination of Witness Clayton Evans with Regard to His Knowledge of the Victim.

IX. The Trial Court Erred in Prohibiting Evidence Concerning the Victim's Prior Conviction for Marijuana.

X. The Jury Was Given an Unconstitutional Definition of Heinous, Atrocious or Cruel, an Aggravating Circumstance That Was Unsupported by the Evidence in this Case.

XI. The Aggravating Circumstance of Murder Committed for Pecuniary Gain Is Invalid in That it Fails to Narrow the Class of Persons Eligible for the Death Penalty.

XII. Sentencing Instruction S-3 Was Erroneous in That it Contained a Signature Line Only under the Option of Death.

XIII. The Sentencing Instructions Were Erroneous in That They Failed to Inform the Jury That They Need Not Be Unanimous in Finding Mitigating Circumstances.

XIV. The Trial Court Erred in Failing to Have the Court Reporter Take down the Actual Jury Selection Process.

XV. The Trial Court Erred in Allowing the District Attorney to Ask Prospective Jurors about Their Ability to Return a Death Sentence Given Specific Facts.

XVI. The Trial Court Erred in Admitting a Photograph of Davis' Right Arm.

XVII. The Death Sentence Should Be Vacated as it Is Disproportionate Given the Circumstances of the Crime and the Background of the Defendant.

XVIII. The Cumulation of Error in this Case Demands Reversal.

Davis v. State, 684 So.2d 643 (Miss. 1996).

On June 27, 1996, this Court affirmed the conviction of capital murder and sentence of death

in a written opinion. *Davis v. State*, 684 So.2d 643 (Miss. 1996). A petition for rehearing was filed and later denied on September 9, 1996.

From this affirmance Davis sought relief by filing a petition for writ of certiorari with the United States Supreme Court. In this petition Davis raised the following questions:

> 1. Whether it is time for this Court to resolve, once and for all, the disagreements across the board as to the constitutional limits of the "heinous, atrocious or cruel" aggravating circumstance?"
>
> 2. Whether this Court should resolve the confusion in the lower courts as to whether this Court's decisions in *Mills v. Maryland* and *McKoy v. North Carolina* apply to cases where the instructions imply that mitigation must be found unanimously but do not say so explicitly?
>
> Petition for Writ of Certiorari at I.

On April 14, 1997, the United States Supreme Court denied certiorari. *Davis v. Mississippi*, 520 U.S. 1170 (1997). No petition for rehearing was filed.

After denial of certiorari, the State moved the Court to reset a date for the execution of sentence in this case. On June 19, 1997, the Court set July 23, 1997, as the date for the execution of the sentence of death.

Davis then filed a motion for appointment of counsel and stay of execution in the United States District Court for the Southern District of Mississippi on June 27, 1997. This district court granted a stay of execution of the state court judgment on July 9, 1997, under the authority of *McFarland v. Scott*, 512 U.S. 849 (1994). On August 21, 1997, the Court appointed counsel for petitioner and appointed additional counsel on October 1, 1997, in order to prepare petitioner's petition for writ of habeas corpus. On March 17, 1998, the

Court denied petitioner's Motion to Toll the Running of the Statute of Limitations Pursuant to 28 U.S.C. § 2244(d) and ordered that the habeas petition be filed on or before April 14, 1998. On April 1, 1998, petitioner filed an Application for Leave to File Motion to Vacate Judgment and/or Sentence of Death with the Mississippi Supreme Court. Thereafter, Davis filed a motion to hold the habeas action in abeyance and maintain the stay of execution until such time as this Court ruled on the application for post-conviction relief. The district court denied the motion to hold in abeyance, vacated the stay of execution and vacated the appointment of counsel on April 30, 1998.

On April 1, 1998, Davis filed his Application for Leave to File Motion to Vacate Judgment and/or Sentence of Death with this Court. On July 10, 1999, this Court granted in part and denied in part petitioner's motion for leave to file a motion to vacate the judgment in the trial court. The Court granted Davis an evidentiary hearing on the following claims of ineffective assistance of counsel: 1) the failure to investigate for and prepare character witnesses to testify in the sentence phase of the trial; 2) whether there was improper contact between the State and prospective jurors; 3) whether trial counsel failed to convey or explain a plea agreement; and 4) whether trial counsel failed to request a special jury venire.

Pursuant to the mandate of this Court the Circuit Court of Greene County held an evidentiary hearing in this case of February 25 and 26, 2010. On July 2, 2010, the Circuit Court entered an Order denying post-conviction relief. CP. 224-28. The Circuit Court found that neither of the ineffective assistance of counsel claims had been sustained and noted that petitioner had conceded that the proof adduced at the hearing would not sustain the improper

contact claim or the special venire claim. CP. 225. Petitioner filed a motion to alter or amend the judgment on July 9, 2010. On October 14, 2010, the Circuit Court denied the motion to alter or amend judgment. CP. 241. Petitioner filed a timely notice of appeal on October 25, 2010. CP. 242.

Davis has now filed his brief for appellant and the following is the response of the State of Mississippi.

II. STATEMENT OF THE FACTS

The facts of this case leading to Davis' conviction and sentence of death are outlined by this Court in *Davis v. State*, 684 So.2d at 648-49. However, due to the serious nature of the issues addressed in Davis' Motion, Appellee will restate the salient facts for the Court.

This story of greed and murder is one not unfamiliar to the Court – a man robs and murders a friend to get money to buy drugs. This story is told by the man himself, Jeffrey K. Davis.

Davis borrowed money from Linda Hillman, a friend, on Monday to buy drugs. When she made the loan, Davis saw that she had more money in her purse. Early on Thursday morning, July 11, 1991, Davis decided he had to have more drugs and returned to Linda Hillman's trailer. He drove past the trailer and an adjacent corn field and parked his truck. He walked back through the corn field to the trailer and knocked on the door.

Hillman let Davis in, but refused to give him any more money. Davis shot Hillman twice. Hillman began screaming and Davis got scared so he took his knife and stabbed her three times. Taking her money, he left the trailer and walked back through the corn field.

Davis returned home briefly and then left for Jackson County where he bought more drugs.

That Friday Davis "came to his senses" and called the sheriff to report the robbery/murder. At Davis' home, the sheriff met Davis where he was waiting with two bags of clothes. Davis started to tell his story when the sheriff interrupted to advise him of his *Miranda* rights. Davis said he understood these rights and began telling his story. When Davis was taken to the courthouse, he was again advised of his rights. He signed a waiver of rights form and then repeated the same story.

The sheriff subsequently recovered, at Davis' direction, the overalls and shoes worn the morning of the murder. One boot was found in one creek, the second in another creek, and the overalls in yet a third. Receiving Davis' consent to search, a rifle was also recovered from Davis' home.[2]

III. SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate deficient performance and actual prejudice to support a claim of ineffective assistance of counsel related to the failure to relate a plea offer to petitioner. The trial court found that no valid plea was offered and therefore counsel did not perform deficiently in relating it to petitioner. Further, petitioner clearly stated that the plea offer that was conveyed to him was rejected by him based on information that he obtained after his trial was over and only on post-conviction review.

Petitioner's claim of ineffective assistance of counsel related to the failure to call

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[2]The part of the Statement of Facts is taken from the testimony of Tommy Miller, former Green County Sheriff. Tr. 146-147.

additional character witnesses at trial similarly was not shown. The witnesses called all testified that he was a nice, non-violent person who they did not know used drugs. This testimony was basically the same that was presented at trial. The trial court held that the repetitive testimony of these witnesses did not show deficient performance and resulting prejudice. Further, the trial court held that even if trial counsel's performance was deficient that petitioner failed to demonstrate prejudice as there was no reasonable probability that the result of the sentence phase would have been different.

Finally, the trial court did not err in disallowing the testimony of Dr. James Kramer, M.D., an addictionologist at the post-conviction evidentiary hearing. The trial court ruled that no witness had testified that Davis was addicted to drugs and therefore the testimony that petitioner sought to present was irrelevant to the issues before the court. In addition, Dr. Kramer could not have been available to testify at the sentencing phase of this case as he was in private practice in Pacific Beach, California, at the time of the trial of this case. He did not move to Mississippi until after the case was over. Thus, petitioner's attempt to show that an expert could have been called to testify to support a claim of ineffective assistance would not have been supported by Dr. Kramer's testimony. The trial court did not abuse its discretion in holding that Dr. Kramer could not testify.

V. ARGUMENT

A. STANDARD OF REVIEW

In *Doss v. State*, 19 So.3d 690 (Miss. 2009), this Court reiterated the standard of review to be used in assessing an appeal from the denial of a post-conviction relief petition.

The Court held:

> ¶ 5. The standard of review after an evidentiary hearing in post-conviction-relief (PCR) cases is well settled. This Court has said:
>
> > "When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous." *Brown v. State*, 731 So.2d 595, 598 (Miss.1999) (citing *Bank of Mississippi v. Southern Mem'l Park, Inc.*, 677 So.2d 186, 191 (Miss.1996)) (emphasis added). In making that determination, "[t]his Court must examine the entire record and accept 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact. . . .'" *Mullins v. Ratcliff*, 515 So.2d 1183, 1189 (Miss.1987) (quoting *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss.1983)). That includes deference to the circuit judge as the "sole authority for determining credibility of the witnesses." *Mullins*, 515 So.2d at 1189 (citing *Hall v. State ex rel. Waller*, 247 Miss. 896, 903, 157 So.2d 781, 784 (1963)).
>
> *Loden v. State*, 971 So.2d 548, 572-573 (Miss.2007). However, "where questions of law are raised the applicable standard of review is de novo." *Brown v. State*, 731 So.2d 595, 598 (Miss.1999) (citing *Bank of Mississippi v. Southern Mem'l Park, Inc.*, 677 So.2d 186, 191 (Miss.1996)). The burden of proof at an evidentiary hearing on a PCR case is on the petitioner to show "by a preponderance of the evidence" that he is entitled to relief. MISS. CODE ANN. § 99-39-23(7) (Rev.2007).
>
> 19 So.3d at 694.

The State would assert that the findings of the trial court are not clearly erroneous and the application of the law is not in error in this case.

The claims presented in this appeal all revolve around claims of ineffective assistance of counsel. As with all claims of ineffective assistance of counsel, the precedent that must be followed was that set forth by the United States Supreme Court in *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and first adopted by this Court in *Stringer v. State*, 454 So.2d 468 (Miss. 1984). In *Strickland* the Court held, "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." 466 U.S. at 686. The steps for assessing an ineffective assistance of counsel claim are also presented in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First*, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.*
>
> 466 U.S. at 687. [Emphasis added.]

The standard to be used for assessing the first prong is an "objective standard of reasonableness" to be measured under "prevailing professional norms." *Id.*

> *Judicial scrutiny of counsel's performance must be highly deferential.* It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made *to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.* Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption that counsel's conduct*

> *falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra*, 350 U.S., at 101, 76 S.Ct., at 164. There are 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. *See* Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).
>
> 466 U.S. at 689-90. [Emphasis added.]

The standard to be used for the determination of prejudice is whether there "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. A reasonable probability has been defined as, "a probability sufficient to undermine confidence in the outcome." *Id.* Also, in determining prejudice:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> 466 U.S. at 695.

More recently the United States Supreme Court has further explained *Strickland* and its application in *Cullin v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388 (2011). In reversing the Ninth Circuit Court of Appeal, the Supreme Court explained how the federal appeals court had misapplied *Strickland* in finding trial counsel ineffective. There the high court held:

> There is no dispute that the clearly established federal law here is *Strickland v. Washington*. In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he 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." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.
>
> Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.*, the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *id.*, at 690, 104 S.Ct. 2052 . To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.*, at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690, 104 S.Ct. 2052.
>
> The Court also required that defendants prove prejudice. *Id.*, at 691–692, 104 S.Ct. 2052. "The 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." *Id.*, at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid. That requires a "substantial," not just "conceivable," likelihood of a different result. Richter*, 562 U.S., at ——, 131 S.Ct., at 791.
>
> 131 S.Ct. at 1403. [Emphasis the Court's and emphasis added.]

The Court continued its discussion, finding that the court of appeals had misapplied *Strickland's* holding in determining that Pinholster's counsel had rendered deficient performance:

The Court of Appeals misapplied *Strickland* and overlooked "the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." 466 U.S., at 689, 104 S.Ct. 2052. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.*, at 688, 104 S.Ct. 2052. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions . . . ." *Id.*, at 688–689, 104 S.Ct. 2052. *Strickland* itself rejected the notion that the same investigation will be required in every case. *Id.*, at 691, 104 S.Ct. 2052 ("[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" (emphasis added)). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Richter*, 562 U.S., at ——, 131 S.Ct., at 779. The Court of Appeals erred in attributing strict rules to this Court's recent case law.[17]

Nor did the Court of Appeals properly apply the strong presumption of competence that *Strickland* mandates. The court dismissed the dissent's application of the presumption as "fabricat[ing] an excuse that the attorneys themselves could not conjure up." 590 F.3d, at 673. But *Strickland* specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment." 466 U.S., at 689–690, 104 S.Ct. 2052. *The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F.3d, at 673, but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did,"* *id.*, at 692 (Kozinski, C.J., dissenting). *See also Richter, supra*, at 1427, 131 S.Ct., at 791 ("*Strickland . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind*").

131 S.Ct. at 1406 -07. [Emphasis the Court's and emphasis added.]

The Court continued:

Justice SOTOMAYOR's approach is flatly inconsistent with *Strickland*'s recognition that "[t]here are countless ways to provide effective assistance in any given case." 466 U.S., at 689, 104 S.Ct. 2052. There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus "mak[ing] particular investigations unnecessary." *Id.*, at 691, 104 S.Ct. 2052; *cf.* 590 F.3d, at 692 (Kozinski, C.J., dissenting) ("*The current infatuation with 'humanizing' the defendant as the be-all and end-all of*

mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it"). Those decisions are due "a heavy measure of deference." *Strickland, supra*, at 691, 104 S.Ct. 2052 The California Supreme Court could have reasonably concluded that Pinholster's counsel made such a reasoned decision in this case.

We have recently reiterated that " '[s]urmounting *Strickland's* high bar is never an easy task.'" *Richter, supra*, at ——, 131 S.Ct., at 788 (quoting *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1484, 176 L.Ed.2d 284, (2010)). The *Strickland* standard must be applied with "scrupulous care." *Richter, supra*, at ——, 131 S.Ct., at 788. The Court of Appeals did not do so here.

131 S.Ct. at 1407-08. [Emphasis added.]

Turning to the question of prejudice the Supreme Court also found that the court of appeals had erred in its application of *Strickland.* The Court held:

Even if his trial counsel had performed deficiently, Pinholster also has failed to show that the California Supreme Court must have unreasonably concluded that Pinholster was not prejudiced. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland, supra*, at 695, 104 S.Ct. 2052 We therefore "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins, supra*, at 534, 123 S.Ct. 2527.

131 S.Ct. at 1408.

The Court pointed out that:

To the extent the state habeas record includes new factual allegations or evidence, much of it is of questionable mitigating value. If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert. *See, e.g., Wong v. Belmontes*, 558 U.S. ——, ——, 130 S.Ct. 383, 389–90, 175 L.Ed.2d 328 (2009) (per curiam) (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence). The new evidence relating to Pinholster's family —their more serious substance abuse,

> mental illness, and criminal problems, *see post*, at 1424—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation. *Cf. Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness).
>
> 131 S.Ct. at 1410.

See Harrington v. Richter, 562 U.S. ____, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Thus, the reviewing court is required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible "reasons [Davis'] counsel may have had for proceeding as they did," 131 S.Ct. at 1407. Further, the idea that "humanizing" the defendant during the sentence phase as the "be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it." 131 S.Ct. at 1408.

The Supreme Court stated that it had "recently reiterated that "'*[s]urmounting Strickland's high bar is never an easy task.*'" *Richter, supra*, at ——, 131 S.Ct., at 788 (quoting *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1484, 176 L.Ed.2d 284, (2010)). The *Strickland* standard must be applied with "scrupulous care." *Richter, supra*, at ——, 131 S.Ct., at 788." 131 S.Ct. at 1388. [Emphasis added.]

Petitioner must overcome the high bar set by *Strickland* in order to obtain relief and he failed to do so in this case.

B. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE IN COMMUNICATING THE PLEA OFFER THAT WAS MADE BY THE DISTRICT ATTORNEY.

Davis contends that his trial counsel was ineffective when he failed to properly convey

a plea offer to him that was made by the district attorney. The trial court held:

> In support of the ineffective assistance of counsel claim regarding the plea offer the plaintiff offered his testimony, his defense attorney's (George Shaddock) testimony and the testimony of Judge Dale Harkey who was the District Attorney who prosecuted the case. The plaintiff testified that he recalled an offer being relayed by Shaddock from him to plead and receive a sentence of twenty years day for day on each count to run consecutively; it was not an offer he was willing to accept. Shaddock remembers receiving an offer of what he thinks may have been twenty and twenty. Harkey testified that he does not recall specifically, but he thinks he may have made an overture to Shaddock about the possibility of a plea. Harkey's testimony made it clear that there was no true plea offer on the table. There was basically discussion about the possibility of talking about a plea offer. He does recall there being a discussion along the lines of if there was going to be a plea offer it may be in the realm of life plus twenty years.
>
> In order for the plaintiff to show ineffective assistance of counsel in this type of claim, he must show a plea offer that was not made known to him by his attorney.
>
> In this case the proof shows that there may have been some preliminary discussion about starting up plea negotiations. The evidence before the Court does not show there was as plea offer to discuss with the plaintiff or that he was prejudiced by the actions of his attorney. This issue is without merit.
>
> CP. 224-25.

This finding and holding is not contrary to the evidence or the law.

At the evidentiary hearing the evidence demonstrates that the district attorney at the time made an "overture" to defense counsel as to whether petitioner would plead to life on the murder and ten or twenty years for armed robbery to be served consecutively. Judge Harkey testified the offer was "[n]othing definite, nothing firm, but an overture." Tr. 158. This tentative offer was never reduced to writing. The offer was tentative because the district attorney had not done any review or investigation of the case and had not spoken with the

family regarding a plea offer. Tr. 157-58. Judge Harkey, when asked about a 20 year plus 20 year sentence to be served consecutively, stated that he did not recall making any such offer, but did say that it may have been Mr. Shaddock's response to his offer. Tr. 160-61.

Mr. Shaddock testified that once his recollection was refreshed he did remember the plea offer and that it was life plus 20 years, or at least life. Tr. 131. He stated that he told petitioner of the offer and he declined the offer. Tr. 131-33. On cross-examination Mr. Shaddock stated that petitioner's response to the offer of life plus 20 was "Hell, no." Tr. 148-49. Petitioner continues to maintain that Mr. Shaddock told him the offer was 20 years plus 20 years which he refused to take it because he would be 71 when he got out of prison. Tr. 177-78. He maintains that he would have accepted a life plus 20 year sentence because he would only have to serve 10 years on the life sentence before he was eligible for parole. Tr. 185-86. When asked how he knew about the parole law, he testified:

> A. I've learned that since then, from my – during my PCR on that.
>
> Q. But you didn't know that at the time, did you?
>
> A. No, sir, I didn't.

Tr. 186.

If he did not know the parole implications of the plea offer that was made to him until his case was on post-conviction review, how did he know that was the sentence that he wanted. Evidentially, realizing that he had just blown a hole in his case he then attempted to back track and state that Mr. Shaddock told him that a life sentence would be with parole. Tr. 186. Then agreed that he was offered life plus 20 years. Tr. 186. It is clear that petitioner was

less than truthful with regards to his testimony regarding the plea agreement. What it appears to be is that the district attorney made Shaddock an offer of life plus 20 years, and Shaddock countered with 20 plus 20, which was not accepted. Shaddock conveyed these discussions to petitioner who now asserts that the offer was 20 plus 20. Petitioner's testimony on this point is hardly credible.

The State would assert that the testimony from the evidentiary hearing does not show that the district attorney made a valid plea offer. The discussions between counsel and the district attorney were merely preliminary discussions with no firm offer being made. Any discussions that petitioner and his counsel had regarding a plea bargain were simply discussions of what petitioner would accept if one was offered. It is also clear that petitioner would refused to take any plea offer that was conveyed to him. The State would submit that petitioner has failed to demonstrate deficient performance and resulting prejudice to make out a claim of ineffective assistance of counsel under *Strickland, supra.*

The trial court's finding is not manifestly against the evidence adduced at the evidentiary hearing and that decision should be affirmed.

C. COUNSEL WAS NOT INEFFECTIVE IN THE INVESTIGATION FOR AND PRESENTATION OF MITIGATION EVIDENCE IN THE SENTENCE PHASE OF PETITIONER'S TRIAL.

Petitioner next contends that the trial court erred in denying relief on his claim of ineffective assistance of counsel based on the failure to call additional character witnesses during the sentence phase of the trial. In denying relief, the trial court held:

> The remaining witnesses called on behalf of the plaintiff were ones that the plaintiff was using regarding the mitigation evidence in the penalty phase of the trial. There was a litany of witnesses brought forward by the plaintiff to testify regarding his childhood, work history reputation for nonviolence and general reputation in the community.
>
> Without replaying the testimony of each witness, the general essence of their testimony was that the plaintiff was generally a non confrontational person who was willing to lend a hand to anyone who needed help. They had never seen him in a fight and were not aware that he used drugs. The witnesses who were called that were former employers all said that the petitioner was a good worker and never gave them any trouble. They, likewise were not aware that the petitioner ever used drugs. Several of the witnesses had not been in contact with the plaintiff for several years before the crime occurred. For the most part, many of the witnesses were repetitive and offered the same opinion of the plaintiff that was presented during the penalty phase of the trial.
>
> The plaintiff also had his mother and sister testify on his behalf at the hearing. They gave evidence regarding plaintiff's upbringing, his military service, work life and general personality. It should be remembered that these two witnesses were called and did testify during the penalty phase of the trial in this matter. While there was evidence regarding a bad temper the petitioner's father would display when he was drinking, the evidence was that the petitioner may have to intervene when his father was abusive toward his mother. The evidence did not demonstrate a physically abusive relationship between the petitioner and his father.
>
> CP. 225-26.

After conducting analysis of the law related to ineffective assistance claims the trial court continued:

> Here the Court cannot say that counsel's performance was deficient. The majority of the evidence presented through testimony at the hearing was repetitive. Some of the evidence may have had an adverse effect on the case since none of the witnesses could testify that they ever knew the plaintiff to use drugs. The Court finds that the evidence fails to overcome the presumption that counsel at trial was competent.

> Even if the Court were to find that the performance of counsel was deficient, there is then the second prong of the test. "To determine the second prong of prejudice to the defense, the standard is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Mohr v. State*, 584 So.2d 426, 430 (Miss. 1991) This means a probability sufficient to undermine the confidence in the outcome. *Id.*"
>
> Taking into consideration the testimony presented by the plaintiff at the hearing the Court does not find that it was the type of evidence that would make a difference in the jury's original verdict. In other words, the evidence was not so overwhelming or different than the jury heard at the trial of this matter. Of course there was more evidence, but not so unusual that the Court thinks it would be outcome determinative. Without more the Court finds that there has been no undermining of the confidence in the outcome in this case when all circumstances are taken into account.
>
> CP. 27-28.

Clearly, the trial court found that after a review of the testimony presented during the evidentiary hearing, the additional testimony adduced basically boils down to evidence that is cumulative of that introduced during the sentence phase of the trial. The State would assert that the evidence presented by petitioner during the evidentiary hearing did not create a reasonable probability that the result of the sentence phase of this trial would be different. *See Strickland v. Washington, supra.*

We would first note that this Court was impressed in its post-conviction opinion that Sheriff Howell filed an affidavit that he would have testified on his behalf during the sentence phase of the trial. *See* 743 So.2d at 339. However, Sheriff Howell was not called and did not testify during the evidentiary hearing by petitioner and no valid explanation was offered for the failure to present his testimony. The State is aware that petitioner attempted

to fill this void with the testimony of Linda Davis. However, her testimony regarding Sheriff Howell does not show that he was unavailable to testify. The transcript reads:

> Q. And do you know what Mr. Howell's health is these days?
>
> A. I understand he's in pretty bad health. He had a stroke here a while back. He gets around, but I think he's pretty well –
>
> Q. Thank you.
>
> Tr. 8.

This not a showing that he was unavailable; and, therefore, no weight can be placed on the fact that he filed an affidavit that he would testify. Thus one of the concerns voiced by the Supreme Court was not answered by petitioner. Whether he did not testify for health reasons or had a change of heart about testifying, we will never know, as petitioner did not call him or explain his absence in any way.

Instead petitioner tried to furnish the testimony that he contended the sheriff would have given through Linda Davis, who was an office deputy with the George County Sheriff's Office while petitioner was incarcerated there. Tr. 6-15. She testified that petitioner was made a trustee by the sheriff. However, she could not tell the Court anything about the circumstances or the thinking of the sheriff that brought this about. Tr. 10-11. It would have been interesting to hear the sheriff's explanation why a person charged with capital murder was allowed the freedom to walk around outside of the jail in civilian clothes and drive official vehicles. Was it some friendship with petitioner's family that brought about this decision? Petitioner felt that the special privileges he received was because of the sheriff's

friendship with his grandfather. Tr. 188-89. The State would assert that a Greene County jury may not have viewed such evidence as favorable to petitioner, but would have seen it as the sheriff of another county giving one charged with a serious crime special privileges because of his family or political connections.

In any event, Mrs. Davis' testimony was that petitioner washed patrol cars and ran errands for the sheriff's office. Basically Mrs. Davis' testimony was that petitioner did what he was told and did not run away. While it may be mitigating evidence, it is unlikely that it would have created a reasonable probability that the result of the sentence phase would have been different.

Petitioner next called Cynthia Mizell, petitioner's sister, to testify. Mrs. Mizell was well rehearsed in her testimony.[3] *See* Tr. 15-34. What did we learn from Mrs. Mizell that we did not learn at trial? It boils down to her testimony that her "father was an alcoholic, abusive to my mother, abusive to the children at home, and it was a turmoil childhood." Tr. Vol. 16. She testified that "as [Davis] got to be a teenager, he began to like try to protect Mother and I from the situations that would happen." Tr. 17. Mrs. Mizell offered only one specific instance when there was an altercation between her father and mother in which petitioner intervened. Her transcript reads:

> Q. I'm sorry to interrupt, but let me ask you, was there ever a specific time when he physically pulled your father off of your mother?
>
> A. There was. He came home and was in one of his rages, and he was

[3]Mrs. Mizell testified at trial as Cynthia Lambert. Her testimony appears in the transcript of the trial Vol. 5 at 568-571.

beginning to abuse our mother, and had pushed her down on the floor, and was going to get on top of her and choke her, and so Jeff being the person he was, wanted to protect our mother, because we're all very close, and so he like jumped on him to get him off of him, and then he kind of like pushed him off. And then he went to the neighbor's house and called the law to come, which we called the law a lot of times, but they never came. And he called, so when he got back to the house, my father wouldn't let him come inside. He told him that he was going to have to sleep outside, or that he was going to kill him; so he made him be outside underneath a tree. He had to stay out there. And we waited until he went to sleep so that we could bring him back inside. On numerous occasions he would try to intervene in those situations.

Q. Was this type of occurrence unusual in your house?

A. No. It happened regularly, at least every weekend.

Tr. 17.

There was no evidence that his father beat him; there was no evidence that his father abused him, other than coming home drunk. What did his father do when he intervened in the altercation with his mother – "tell" him he was going to have to stay outside, only to be allowed to into the house when his father went to sleep.

Other than this recitation about her alcoholic father, the testimony from Mrs. Mizell was basically that petitioner had a mild temper and was not violent. Tr. 16, 18, 19, 28. She testified that she had never known him to use drugs, but when pressed she said that on occasion he smoked marijuana when he was about sixteen and admitted to smoking it herself. Tr. 28. She also repeated the fact that petitioner was allowed to wander around outside the jail in street clothes by the sheriff of George County.

Mrs. Mizell then told how petitioner was a good worker and would help people in the trailer park where they lived. Tr. 19. She also told how petitioner was allowed to be outside

the jail in street clothes by the sheriff. Tr. 20-21. She also related as to how petitioner and another person built her some furniture while he was incarcerated in George County. Tr. 21. One can only wonder if this was at county expense.

She stated that she met with Mr. Shaddock on the day of trial, but could not remember what they talked about. She stated that he did not tell her what kind of information he would be asking for during her time on the stand, nor did he ask her about any other witnesses that could testify in petitioner's behalf. Tr. 22-23. She stated that there was nothing that would make her think that her brother was on drugs. Tr. 24.

Other than recounting the fact about her father being an alcoholic and the incident between her father and her mother in which petitioner intervened, her testimony does not give us much more than her testimony at trial. In other words, he was a good worker, was not violent, and she had never seen him in a fight. When considered against the totality of the evidence in this case, the State would assert that there is no reasonable probability that the result of the sentencing phase would have been different. *See Strickland, supra.*

Petitioner next called his mother, Christine Davis, to testify.[4] The sum total of her testimony regarding her former husband was that he had an "unpredictable" temperament. Tr. 34. She did not testify that her husband beat or choked her or that he was abusive to her or the children. She related the fact that petitioner did not have the same temperament as his father. Tr. 34. She stated that petitioner was a good student, but that he dropped out of

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[4]Mrs. Davis testified at the sentencing phase of petitioner's trial. Her testimony is found in Vol. 5 at 573-75.

school in the eleventh grade. Tr. 34. She identified a letter from the Army stating that petitioner had obtained his GED while in the service. Tr. 35. She told us how he got out of the Army with an honorable discharge based on hardship because he was having family problems. Tr. 37. The problem being that his wife had gotten pregnant by another man. Tr. 37. Mrs. Davis then told us what a low-key person petitioner was, that he was never violent, always helping people and working steadily. Tr. 39.

Mrs. Davis stated that she first met Mr. Shaddock about a week before trial at her house for about an hour to an hour and a half. Tr. 41. She said that the conversation was mainly about petitioner's relationship with the victim in this case and "basically not a lot of nothing". Tr. 41.

Mrs. Davis then was asked about her testimony regarding petitioner's drug use. She testified during the sentence phase that she had no knowledge of his using drugs. It must be remembered that she furnished an affidavit to this Court on post-conviction review stating that he had struggled with drugs and addiction for several years. Tr. 46. During the hearing she attempted to explaine that she did not know anything about his using drugs until the end of the trial during summations and that the affidavit furnished on post-conviction review was not at odds with her trial testimony.[5] Tr. 43. Petitioner faults counsel for not better preparing Mrs. Davis to testify. The question is how would she have testified about his drug use if she had been "better prepared"? Anything she would have said would have been rank hearsay

[5]This brings up the all to frequent problem found in the affidavits furnished on post-conviction review that contain information that witnesses had no knowledge of until after the trial or that is furnished to them by post-conviction counsel.

as she steadfastly denied on both direct and cross that she knew anything about his drug use. Tr. 43; 45-46. This part of the ineffective assistance claim is a non-starter. Mrs. Davis simply could not have testified to something that was not in her personal knowledge. To fault defense counsel for not allowing a witness to perjure herself is hardly ineffective assistance of counsel. Other than this point, Mrs. Davis did not testify to anything at the post-conviction hearing that raises a reasonable probability that the outcome of the sentence phase would have been different. Her testimony was basically a repeat of what she gave at trial.

Further, Mrs. Davis could only identify two additional witnesses that may have testified. These were two neighbor ladies, Mrs. Graham and Mrs. Rouse, but she could not give us anything factual to which they may have testified. Tr. 49. The only thing new we got from Mrs. Davis was that petitioner got a GED while in the military. Neither Mrs. Graham or Mrs. Rouse were called to testify at the post-conviction hearing.[6]

Petitioner next called Betty Cochran, a friend of petitioner's mother. She testified that she had known petitioner since he was a small child, as she worked as a nurse for the Davis family doctor. Tr. 52-53. She testified that later she lived in the same trailer park as petitioner and his mother after their respective divorces. Tr. 53; 58. The two families would go camping, fishing, and swimming together. Tr. 53. She related as to how petitioner would look after her place when she was working out of town. Tr. 54. She stated that he was always helping people by running errands, but would not take any money for doing these

[6]To be fair, Mrs. Graham had died since the time of the trial.

things. Tr. 54-55. She stated that she had never seen him display a temper or to be violent. Tr. 55; 59. She also testified that she saw petitioner every weekend prior to the murder but she never thought he was using drugs. Tr. 58-59.

Petitioner next called Mark Pitts, a former employer and friend. He testified that he had known petitioner since elementary school, but became good friends when he was a sophomore in high school. Tr. 62. He testified about hunting and fishing together and spending days at a time together. Tr. 62-63. Later they worked with Brown & Root at the same time and even rode to work together for a time. Tr. 64-65. He told us that petitioner did not have a temper and was not violent. Tr. 65. He then told of petitioner's involvement with the Pineview Missionary Baptist Church and how petitioner made a profession of faith while attending there. He told us how petitioner became involved in evangelical programs at the church and sang in the choir. Tr. Vol. 1 at 65-68.

On cross-examination, Pitts stated that he and petitioner had "drank" together, but that they never used drugs together nor did he ever know of petitioner using drugs. Tr. 69-70. He also stated that after he got married, petitioner began to drift away from the church and finally stopped attending. Tr. 71-72.

Petitioner then called Wayne Christian, a former supervisor from George County. Mr. Christian's knowledge of petitioner came from his involvement in the Pineview Baptist Church. Tr. 75. He testified that petitioner was very involved in the church for a while and that he "seemed like a good person, a really good person, wanted to do what was right". Tr. 75-76. He also stated that he petitioner was involved with the church for about three or four

years and then got away from the church. Tr. 77. He stated that he did not know if petitioner used drugs or not. Tr. Vol. 1 at 77.

Petitioner next called Darryl Cooley to testify. Mr. Cooley worked with petitioner at Ingalls Shipyard in Pascagoula for a time and lived part time in the same rural part of Greene County as petitioner. He stated that they stayed in the same rooming house for a while in Pascagoula. Tr. 80. He said the petitioner helped out around his place in Green County. Tr. 80. Cooley stated that he had a painting business and that petitioner worked with him some. Tr. 81. He stated that he did not know petitioner to be a violent person or to have a temper. Tr. 81. Mr. Cooley stated that he did not know petitioner to use drugs or to drink. Tr. 85. However, Cooley did not know any of the facts of the crime and had never been told of the facts. Tr. 85-86. He stated that knowing about the facts of the crime could "possibly" change his opinion about petitioner's violent nature. Tr. 86.

Petitioner next called Donny Parnell. Petitioner worked for Parnell tearing down and relocating mobile homes. Other than saying that petitioner was a good worker and that he did not have a temper or a tendency to violence, we find very little in this testimony. Tr. 86-93.

Next Mrs. Enda Fryfogle testified that petitioner worked for her and her husband's water well business for a while and that he was a "perfect" worker. Tr. 95. However, on cross-examination she stated that she never saw him while he was working. Tr. 97-98.

The next witness was Mike Fryfogle. He testified that petitioner worked for his parents water well business. However, he did not often work directly with petitioner. Tr.

100. We also found from Mike that the Fryfogle's are related to petitioner. Tr. 100. He stated the he and petitioner would party together outside work and go hunting together. Tr. 101; 103. He testified that petitioner was not violent and did not have a temper. Tr. 103-104. He stated that he had never used drugs and had never known petitioner to use drugs. Tr. 103.

Finally, petitioner called James Lambert, his former brother-in-law. He stated that when he was married to his sister he would see him often and he would help them fix things occasionally. Tr. 105-06. He stated that he had not seen petitioner for about six months before the murder because petitioner had quit his job at In galls. Tr. 107. He stated that he never observed petitioner to have more of a temper than anyone else and did not know him to be violent. Tr. 107-108. Like the rest of the witnesses Mr. Lambert did not know of petitioner to use drugs. Tr. 111.

The picture that we get from all of these witnesses is that petitioner was a good worker on the many jobs, and was "perfect" on one of the jobs that he had over the years. They all said that he did not have a bad temper. They all said that he was not a violent person. They all said that they never saw or knew him to use drugs. They all said that if contacted they would have testified. And they all said that knowing the facts of the case would not change their opinion of petitioner. This is basically the same picture presented at petitioner's sentencing trial by his mother, sister and Clayton Evans.[7] Petitioner presented no dramatic new evidence that had not been presented in mitigation of mental deficiency, extreme abuse, or abject poverty. Other than the new evidence relating to the one incident with his father,

[7]Evans testimony appears in Vol. 5 at 561-65.

there is simply nothing new.

The witnesses who recounted his involvement with the church in all likelihood would not have been beneficial to petitioner. They both stated that he left the church. There was no showing that he moved on to a different church, just that he quit going to church.

While it can be argued that Shaddock exhibited deficient performance in failing to call at least some of these witnesses, that is not the whole test. Petitioner must also demonstrate prejudice. To show prejudice petitioner must demonstrate that the deficient performance was such that there is a reasonable probability that the results of the sentencing phase would have been different. The State would assert that considering the nature of the crime in this case and the totality of all of the evidence the witnesses presented at the hearing, petitioner has not demonstrated there is a reasonable probability that the results of the sentencing phase would have been different. In order to make out a case of ineffective assistance of counsel under *Strickland*, a petitioner must show both prongs of the test. The State would assert that petitioner has failed in this as he has not demonstrated prejudice.

The State respectfully submits that the trial court did not err in denying post-conviction relief on this claim of ineffective assistance of counsel.

D. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DR. KRAMER'S IRRELEVANT TESTIMONY DURING THE EVIDENTIARY HEARING IN THIS CASE.

Davis contends that the trial court erred in refusing to allow him to call James J. Kramer, M.D., to testify during the post-conviction hearing. He contends that Dr. Kramer would have testified that just because one is addicted to drugs does not make them a bad

person. The purpose of Dr. Kramer's testimony was presumably to support his claim of ineffective assistance of counsel by showing that trial counsel should have located and called Dr. Kramer as a witness during the sentence phase of his trial as a mitigating witness.

Davis' stated purpose for presenting Dr. Kramer's testimony was to show that drug "addiction is a disease and has nothing to do with good character or bad character." Tr. 165; 166. The trial court asked if Dr. Kramer had examined Davis, to which counsel replied no. But he asserted that Dr. Kramer would base his testimony solely on Davis' testimony before the court. Tr. 166-67. The State objected again as to the relevance of Dr. Kramer's testimony as he had not examined him and was purporting to make a diagnosis while sitting in the courtroom from Davis' testimony.

The trial court took a recess to review Dr. Kramer's curriculum vitae, what his proposed testimony would be, and the remand order of this Court. The trial court then ruled:

> THE COURT: The Court has reviewed the Curriculum Vitae of James J. Kramer, M.D., and reviewed the notes that I took of the witnesses from yesterday. No witness on Cross-examination said he or she would change their mind with respect to the Cross-examination questions, not only as to supposed addiction, drug use, but none of them would say they would change their mind, even after being told the facts of the case. Therefore, I'm not going to allow Mr. Kramer to testify. I don't find it relevant under the rulings of the Supreme Court for those four issues.
>
> . . .
>
> THE COURT: Let me also add there's no testimony that I've been able to find –
>
> . . .
>
> Also, I want to add, there was no testimony that this Defendant was ever addicted to drugs.

Tr. 167-68.

Therefore, the fact of whether a person who becomes addicted to drugs is of good character or bad character was not relevant because no one ever testified that he was addicted to drugs. In fact, every witness, except his sister, testified that they had never know him to take drugs and had no idea that he used drugs.[8]

The proffer made by petitioner did not state that Dr. Kramer was going to testify that Davis was addicted to drugs. Davis has been in prison since 1992, and presumably has not had any access to illicit drugs in the eighteen years of incarceration. Yet, petitioner purported that Dr. Kramer would make some sort of diagnosis sitting in the courtroom and listening to Davis alone testify. He also wanted Dr. Kramer to testify that drug addiction is classified as a disease by the American Medical Association.[9] He further wanted Dr. Kramer to testify that since drug addiction is a disease becoming addicted did not mean that your character was bad or good.

It appears that the reason petitioner wished to call Dr. Kramer was to support his claim of ineffective assistance of counsel. This was to show that trial counsel should have located and called Dr. Kramer to testify during the sentence phase of the trial. The presumed reasoning was that had Dr. Kramer been called to testify during the sentencing phase of the trial, he would have given an expert opinion regarding petitioner's character not being bad because he was addicted to drugs. However, as stated above, not one of the character witnesses called at the post-conviction hearing testified that Davis was addicted to drugs.

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[8]His sister admitted smoking marijuana with him as a teenager.

[9]This is not something new as the AMA listed drug addiction as a disease in 1956.

Taking into account the proffer given by petitioner during the hearing, the law regarding uncalled witnesses does not support petitioner's assertion that he should have been allowed to testify. Davis cannot show that Dr. Kramer would have been available to testify during the sentence phase of this trial. In *Day v. Quarterman*, 566 F.3d 527 (5th Cir. 2009), the Fifth Circuit held:

> Thus, to prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must name the witness, *demonstrate that the witness was available to testify and would have done so*, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense. *Id.* (citing *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985)). We have required this showing for claims regarding uncalled lay and expert witnesses alike. *See, e.g., Evans v. Cockrell*, 285 F.3d 370, 377-78 (5th Cir.2002) (rejecting uncalled expert witness claim where petitioner failed to present evidence of what a scientific expert would have stated); *United States v. Doublin*, 54 Fed.Appx. 410 (5th Cir.2002).
>
> 566 F.3d at 538. [Emphasis added.]

In *Woodfox v. Cain,* 609 F.3d 774 (5th Cir. 2010), the Fifth Circuit further held:

> At bottom, Woodfox's claim is one of uncalled witnesses. Claims that counsel failed to call witnesses are not favored on federal habeas review because the presentation of witnesses is generally a matter of trial strategy and speculation about what witnesses would have said on the stand is too uncertain. *See Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). For this reason, we require petitioners making claims of ineffective assistance based on counsel's failure to call a witness to demonstrate prejudice by "nam[ing] the witness, *demonstrat[ing] that the witness was available to testify and would have done so*, set[ting] out the content of the witness's proposed testimony, and show[ing] that the testimony would have been favorable to a particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir.2009). This requirement applies to both uncalled lay and expert witnesses. *Id.*
>
> Woodfox presented the declarations from the expert witnesses to cast doubt on the State Police Crime Lab's 1973 findings by criticizing the

> benzidine and precipitin tests and explaining how advanced testing procedures, such as DNA testing, should have been performed in 1998. Although the experts declared as part of the state habeas proceeding that if called to testify they could testify competently to the matters contained within the declarations, *they did not state that the experts were available to testify at trial in 1998 and would have done so*, or that they would have testified to the same extent as their opinions presented in the declarations. *See id. This is not a matter of formalism.* In *Day*, we addressed very similar circumstances. The petitioner there presented an expert affidavit in post-conviction proceedings rebutting the opinions of the State's experts, but *he failed to show the expert was available to testify at trial and would have done so.* We stressed that the petitioner's claim of uncalled expert witnesses was therefore subject to "the exact problem of speculation that the Fifth Circuit seeks to avoid by requiring the prejudice showing set forth [above]." *Id.* In other words, *we have no evidence beyond speculation that in 1998 defense counsel could have found and presented an expert witness who would have testified as he claimed in his post-conviction applications. See id.*
>
> 609 F.3d at 808. [Emphasis added.]

See Turner v. Epps, 412 Fed.Appx. 696, 706, 2011 WL 567452, 8 (5th Cir. 2011) (Claim of ineffective assistance of counsel based on uncalled witnesses failed "as neither expert's declaration contains a statement that the expert was willing and available to testify at trial."); *Gray v. Epps*, 616 F.3d 436, 443 (5th Cir. 2010).

While petitioner clearly named the witness, Dr. Kramer, and set forth the contents of his proposed testimony, he did not demonstrate that the witness was available to testify and would have done so or show that the testimony would have been favorable to his defense.

Davis was required to show that Dr. Kramer was available to testify and would have testified at original trial in 1992. Davis' trial took place on May 19-22, 1992. *See* 684 So.2d at 647. The State would assert that Dr. Kramer cannot meet the requirement of being available to testify at the original trial. According to his curriculum vitae, which was

introduced as Exhibit 5 for Identification Only at the hearing, he was not a resident of Mississippi until June, 1992, when he became a clinical assistant at the COPAC Extended Treatment Center in Jackson, Mississippi.[10] Prior to that time he was in private practice with the Pacific Coast Medical Group in Pacific Beach, California. The State would assert that defense counsel could not have found Dr. Kramer prior to the trial of this case because he lived two thousand miles away. Therefore, it is only speculation that defense counsel could have located Dr. Kramer prior to trial and had him at trial to testify. It is also speculation that he could have found anyone else to testify as he asserts because he did not furnish the name of any other witness who could have been found who would have testified. Davis has not shown that Dr. Kramer was available to testify.

Further, he has failed to show that the testimony would have been favorable to his case. If trial counsel had put on a witness that testified that Davis was addicted to illegal drugs, when no other witness even hinted at any problem with drugs, we would be here on a claim of ineffective assistance of counsel for introducing such evidence. While an expert may well have testified that drug addiction was a disease and did not mean that someone had a good or bad character, the jury was not bound to accept such testimony or the conclusion offered by the doctor in its deliberations.[11] The thinking being that using an illegal drug,

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[10]In fact, looking to his CV, it appears that the jobs he held until January, 1995, clinical assistance and counselor, did not require a medical license. We presume that until that time, he was obtaining his license to practice medicine in Mississippi.

[11]Davis asserts that one of the witnesses at the hearing stated that he would change his mind when confronted with evidence of petitioner's drug use and therefore Dr. Kramer should have been allowed to testify. However, as the record clearly demonstrates Darryl

even one time, showed bad character. The State would assert that Davis failed to show that the evidence that Dr. Kramer purportedly would have given would have been favorable to his defense.

A petitioner must present evidence on these points as part of the burden of proving that trial counsel could have found and presented a favorable expert. *Woodfox*, 609 F.3d at 808.

Because petitioner failed show both deficient performance and resulting prejudice, he has failed to make out a claim of ineffective assistance of counsel under *Strickland.* Likewise, petitioner has failed to demonstrate that the trial court abused its discretion in not allowing Dr. Kramer to testify. Petitioner is entitled to no relief on this assignment of error.

CONCLUSION

For the above and foregoing reasons, the State respectfully submits that the decision of the Circuit Court of Greene County denying post-conviction relief should be affirmed.

Cooley stated that after knowing the facts of the murder, not the drug use, that he would "possibly" change his opinion as to whether petitioner was violent, not that his character was bad. Tr. 86. A totally different subject.

Respectfully submitted,

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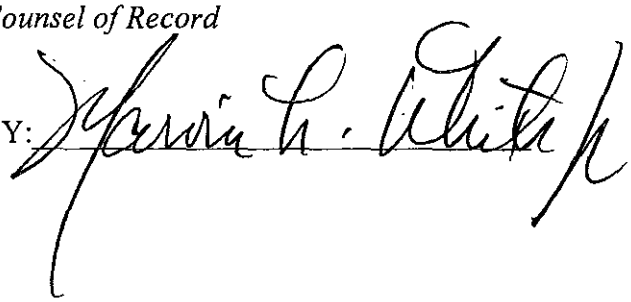
BY: 

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