IN THE SUPREME COURT OF MISSISSIPPI

Mississippi Supreme Court No. 2010-CA-01770-SCT

Jeffery Keller Davis, *Appellant*

v.

State of Mississippi, *Appellee*

Appeal from the Circuit Court of Greene County, Mississippi

Reply Brief of Appellant

Oral Argument Requested

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Introduction

The facts of Jeffrey Davis' case demonstrate that he was rendered ineffective assistance of counsel by his trial attorney and that he is entitled to relief. The facts of this case are so clear and undisputed that the facts recited in the State's brief support relief. As the State's brief suggests, Mr. Davis has been upfront and honest throughout his case.[1] Mr. Davis' counsel presented evidence at the evidentiary hearing that was within the confines and rules set by this Court and, in fairness, Mr. Davis conceded two issues post-hearing which he felt had no merit. He did, however, prove the issues in the instant proceedings with overwhelmingly compelling evidence. In an attempt to undercut and sidestep these compelling facts, the trial court and the State both surgically maneuver around them, ignoring evidence that this Court specifically requested in its remand. In spite of this, it is crystal clear that Mr. Davis' trial counsel, George Shaddock, was woefully ineffective, that the trial court's findings otherwise are clearly erroneous, and that Mr. Davis is entitled to relief.

Argument

I. Shaddock's Failure to Properly Convey and Explain the Plea Offer Made on the Morning of Trial Constitutes Ineffective Assistance of Counsel.

Shaddock's actions constitute ineffective assistance of counsel. Under a myriad of case law, where a plea agreement is offered and the defense attorney fails to convey that offer or does not adequately explain that offer, that attorney's actions have satisfied the deficient performance prong of the *Strickland v. Washington*[2] test.[3] At a minimum, prejudice can be shown by

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[1] State's Brief at 6-7.

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

[3] *See, e.g., United States v. Rodriguez*, 929 F.2d 747, 752-53 (1st Cir. 1991); *United States ex rel Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Cottle v. State*, 733 So.2d 963, 964-65 (Fla. 1999); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *People v. Whitfield*, 239 N.E.2d 850, 852 (Ill. 1968); *Lyles v. State*, 382 N.E.2d 991, 993-94

demonstrating that the plea offer was not conveyed, and at the most by showing that the defendant would have accepted the offer and that he would have received a lesser sentence.[4] Where evidence demonstrates that the defendant would have taken the plea deal not conveyed or inadequately explained to him, and was thereafter sentenced to a harsher sentence (here, death) the prejudice prong is satisfied.[5] Moreover, multiple courts have found prejudice where, but for counsel's deficient performance, the defendant would have accepted the plea offer and chosen not to go to trial.[6] The evidence presented at the evidentiary hearing satisfies both prongs of *Strickland*, and Mr. Davis is entitled to relief.

A plea offer was made. The plea offer from then-District Attorney Harkey was not an "overture" as the trial court found and the State would have this Court believe. Then-District Attorney Harkey clearly states in his affidavit that a plea deal was offered. At the evidentiary hearing, now-Judge Harkey changed his testimony, after reviewing the Court's remand opinion in this case, and said that he merely made an overture regarding a plea deal. Despite this change in his testimony, Judge Harkey had the opportunity to change the language of an affidavit that states that a plea deal was offered, and he declined to do so. Not only is Judge Harkey's account of the plea offer internally inconsistent, but it conflicts with the accounts of Mr. Davis and

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(Ind. 1978); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992); *People v. Alexander*, 518 N.Y.S.2d 872, 879 (N.Y. 1987); *Jiminez v. State*, 144 P.3d 903, 906 (Okla. Crim. App. 2006); *Commonwealth v. Copeland*, 554 A.2d 54, 60-61 (Pa. Super. Ct. 1988) *appeal denied by* 523 Pa. 640 (1989); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); *State v. James*, 739 P.2d 1161, 1166-67 (Wash. Ct. App.) *reconsideration denied by* 48 Wash. App. 353 (1987); *Becton v. Hun*, 516 S.E.2d 762, 766-67 (W. Va. 1999); *State v. Ludwig*, 369 N.W.2d 722, 726-27 (Wis. 1985).

[4] *See Davie v. State*, 381 S.C. 601, 611-612 (2009) (analyzing the prejudice requirements of different jurisdictions) (citations omitted).

[5] *See, e.g., Boyd v. Waymart*, 579 F.3d 330, 356-57 (3d Cir. 2009); *see also Davie*, 381 at 601(finding prejudice where the initial plea offer of 15 years was not communicated to the defendant and he ultimately received a 27-year sentence).

[6] *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988), *vacated on other grounds* 492 U.S. 902, *reinstated* 726 F.Supp. 1113 (M.D. Tenn. 198) *aff'd* 940 F.2d 1000 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Griffin*, 330 F.3d at 733; *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) n. 3, *cert. denied*, 130 S. Ct. 3385 (2010).

Shaddock who – unlike Judge Harkey – *both* recall that a plea offer was made on the morning of trial. Judge Harkey's testimony in no way disputes this. To say that the proof in this case "only shows that there may have been some preliminary discussion" is to ignore Judge Harkey's affidavit, Shaddock's testimony, and Mr. Davis' testimony. In addition, the State's assertion that the discussions between Shaddock and Mr. Davis concerned what Mr. Davis would accept if an offer was made[7] is contradicted both by Shaddock's testimony that an offer was made and Mr. Davis' testimony that Shaddock conveyed an offer to him (albeit the wrong one).

The terms of the plea offer were life plus ten or twenty years. The State conceded this when it "refreshed" Shaddock's recollection and told him that the plea offer was life plus ten or twenty years.[8] In fact, Shaddock himself disputes that "twenty plus twenty" was the plea offer. The trial court made an erroneous finding of fact when it stated that Shaddock remembered receiving an offer that may have been "twenty plus twenty." There was no testimony to that effect.

Mr. Davis did not know that life plus ten or twenty had been offered. All documents, affidavits, and testimony in this case demonstrate that Mr. Davis' account of the plea conveyed to him by Shaddock has been consistent. There is no evidence that Mr. Davis has been untruthful as the State would have this Court believe.[9]

The record is clear that Mr. Davis would have accepted life plus ten or twenty years had it been presented to him. The State in its brief misconstrues Mr. Davis' testimony concerning what plea offers he would or would not have taken.[10] The relevant inquiry is what Mr. Davis

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[7] State's Brief at 18.
[8] Evidentiary Hearing Tr. at 131-32; 149.
[9] Mr. Davis' propensity for truthfulness is supported by the recitation of the facts of this case in the State's brief on pp. 6-7. Mr. Davis has always been forthright with the authorities concerning his crime.
[10] State's Brief at 17-18.

would have done had he known the ramifications of the sentence offered at the time. Mr. Davis asked Shaddock to pursue life.[11] Had Mr. Davis known what the offer was, he would have taken it.[12] The State contends that Mr. Davis would not have taken life plus 20 because he did not know that he would have been eligible for parole on the life sentence after ten years.[13] The State makes much of the fact that Mr. Davis did not know the particular parole implications of life plus 20 until his post-conviction lawyer told him.[14] This is exactly what supports a finding of ineffective assistance of counsel: not only did Shaddock not convey the correct plea offer, but he inaccurately explained the parole implications.[15]

The State also asserts that the evidence from the evidentiary hearing shows that Judge Harkey made Shaddock an offer of life plus twenty years and Shaddock countered with "twenty plus twenty," which Mr. Davis did not accept.[16] Even if the State's version of events was supported by the evidence (which it is not), Shaddock's actions would still constitute ineffective assistance of counsel under *Strickland.* Under this version of the State's account of events, Shaddock did not convey the District Attorney Harkey's offer. The United States Supreme Court has "long-recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[17] Even if Shaddock did not convey the original offer to Mr. Davis because he did not think it was a good

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[11] Evidentiary Hearing Tr. at 177:1-2.
[12] Evidentiary Hearing Tr. at 186.
[13] State's Brief at 17.
[14] Id.
[15] Mr. Davis testified at the evidentiary hearing that Shaddock told him that under the "twenty plus twenty" deal, he would not be eligible for parole and would have to serve every day of the forty years making his release age 71. Evidentiary Hearing Tr. at 177-78.
[16] State's Brief at 18. Notably, this argument is inconsistent with the State's other argument in support of the trial court's finding that no offer was made is supported by the evidence.
[17] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) citing *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970); *see also Burger v. Kemp*, 483 U.S. 776, 803-04 (1987).

offer, he still had a constitutional duty to tell Mr. Davis about it.[18] It is well-established that failure to inform the defendant of a plea offer satisfies the deficient performance prong of *Strickland.*[19] Where a defendant is denied an opportunity to accept a plea bargain that he would have taken, he is prejudiced under *Strickland.*[20] Shaddock's constitutional violation is not ameliorated because he took the counteroffer to Mr. Davis; the Sixth Amendment requires that he also convey the original offer. As a result of this analysis, the State's version of events do not change that Shaddock's performance was deficient and that Mr. Davis was prejudiced because of it. The trial court's findings to the contrary are clearly erroneous, and Mr. Davis is entitled to relief on this issue.

II. Shaddock's Failure to Investigate and Present the Mitigation Evidence Presented at the Evidentiary Hearing Constitutes Ineffective Assistance of Counsel.

In an attempt to sidestep and undercut the wealth of compelling mitigation evidence that was presented at the evidentiary hearing, and which it was unable to disprove and recites as true in its brief, the State argues that the evidence is cumulative and then makes irrelevant arguments concerning the credibility of certain witnesses. The State's arguments are not persuasive in either respect.

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[18] *See, e.g., Zelinsky*, 689 F.2d at 438 (failure to communicate plea offer denies Sixth Amendment rights).
[19] *See, e.g., Ex Parte Lemke*, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000) citing *Blaylock*, 20 F.3d at 1466.
[20] *See, e.g., Lemke*, 13 S.W.2d at 796-97 quoting *Zelinsky*, 689 F.2d at 438 and *State v. Simmons*, 309 S.E.2d 493, 498 (N.C. App. 1983).

A. The Evidence Presented Is Not Cumulative; It Is Character Evidence Required by Clearly Established Law.

As an initial matter, evidence is cumulative when it supports a fact already established by existing evidence[21] in a way that "adds very little to the probative value of the case"[22] and is "merely repetition of previous testimony."[23] Moreover:

> [R]epetition of the same evidence on a disputed point by several witnesses is often persuasive in establishing the truth of that evidence. Evidence should only be excluded...as cumulative if the evidence on the point "is already so full that more witnesses to the same point could not be reasonably expected to be additionally persuasive."[24]

Second, the mitigation evidence presented at the evidentiary hearing is not cumulative because it is precisely what this Court asked for in its remand opinion.[25] Third, each piece of evidence is built on another in an effort to give a full picture of the defendant that the jury never heard -- in other words, character evidence -- is precisely the type of individualized mitigation evidence called for by the United States Supreme Court,[26] the Fifth Circuit,[27] this Court,[28] and the

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[21] *See, e.g., Stewart v. Wolfenberger*, 468 F.3d 338, 358 (6th Cir. 2006); *see also Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) citing Black's Law Dictionary at 577 (7th ed. 1999).

[22] *Clark v. Mitchell*, 425 F.3d 270, 294 (6th Cir. 2005).

[23] *United States v. Castle*, 83 Fed. Appx. 977 (9th Cir. 2003).

[24] *Wasserman v. Bartholomew*, 987 P.2d 748, 753 (Alaska 1999).

[25] *Davis v. State*, 743 So.2d 326, 338-340 (Miss. 1999) (remanding for evidentiary hearing based on ineffective assistance of trial counsel for failure to investigate and present character evidence during sentencing).

[26] *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986) quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (defining mitigation evidence as "any aspect of the defendant's character or record"); *Perry v. Lynaugh*, 492 U.S. 302, 328 (1989) quoting *California v. Brown*, 479 U.S. 438, 545 (1987) (O'Connor, J., concurring) ("full consideration of evidence that mitigates against the death penalty is essential"); *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) quoting *Eddings* at 445 U.S. at 114 (virtually no limits on the mitigation evidence that can be presented); *Wiggins v. Smith*, 123 S. Ct. 2526 (2003) (finding ineffective assistance of counsel for failure to investigate and present social history); *Eddings*, 445 U.S. at 115 ("[e]vidence of family history" is typically introduced in mitigation).

[27] *Walbey v. Quarterman*, 309 Fed. Appx. 795, 2009 WL 113778 at *4 (5th Cir. 2009) (citations omitted) holds that during mitigation, counsel should consider presenting the defendant's educational history, employment history, family and social history, and religious influences. Further, the Court stated that "'generally accepted standards of competence require that counsel conduct an investigation regarding the accused's background and character.'" *Id.* at *4 quoting *Miniel v. Cockrell*, 339 F.3d 331, 344 (5th Cir. 2003), *cert. denied Miniel v. Dretke*, 540 U.S. 1179 (2004).

American Bar Association Guidelines.[29] This type of evidence is precisely what was presented at the evidentiary hearing, but was not presented at trial because of Shaddock's ineffectiveness. The State, quoting the trial court in its brief, sums up this evidence best: a "litany" of witnesses testified at the evidentiary hearing concerning Mr. Davis' childhood, his work history, his reputation for non-violence, and his reputation within his community.[30] This evidence is what Shaddock should have investigated before trial and presented at sentencing.

The facts surrounding the issue of mitigation evidence are clear. At trial, Shaddock presented four witnesses during the penalty phase: (1) Clayton Evans, a man that owned the trailer park where Mr. Davis grew up but had not had contact with Mr. Davis for five years;[31] (2) Cynthia Lambert, Mr. Davis' sister; (3) Christine Davis, Mr. Davis' mother; and (4) Kevin Fortenberry, an investigator for the Mississippi Highway Patrol that testified for the prosecution during the guilt phase simply in order to show that Mr. Davis had no prior felony convictions.[32] The combined testimony of all four, including objections by counsel, comprises less than fifteen pages of the entire transcript.[33] Each was asked brief, minimal questions by Shaddock, and each

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[28] This Court recently held that mitigation evidence is admissible if it "relates to the character and background" of the defendant. *Fulgham v. State*, 46 So.3d 315, 336 (Miss. 2010) (citations omitted). Further, a sentencer *may not* be precluded from considering any aspect of the defendant's character or record in order to provide the defendant with the "individualized consideration" he is entitled to. *Wilcher v. State*, 697 So.2d 1123, 1133 (Miss. 1997) *cert. denied Wilcher v. Mississippi*, 522 U.S. 1053 (1998) (citations omitted) (emphasis added). The jury must be permitted to consider *all* mitigating evidence to ensure that the "erroneous imposition" of the death penalty does not occur. *Fulgham* at 336 (citations omitted); *see also Wilcher* at 1133 quoting *Mills v. Maryland*, 486 U.S. 367, 375 (1998) and *Eddings*, 445 U.S. at 117. Further, this Court has firmly stated that that a defendant is allowed to present any relevant and reliable evidence concerning the defendant's background and character and cautioned prosecutors and trial judges about the danger of limiting mitigation evidence when it is presented fairly and is relevant to the defendant's character. *Fulgham* at 336.

[29] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989) Guidelines 11.4.(3)(B), (7)(C) and (D); 11.8.3; 11.8.6 (penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history, including family and social history, educational history, military service, and employment history) (citation omitted).

[30] State's Brief at 19.

[31] Trial Tr. Vol. 5 at 562; 567:1-8.

[32] Trial Tr. Vol. 5 at 572.

[33] Trial Tr. Vol. 5 at 562-76.

gave short responses that lacked even a modicum of detail. The only information elicited was that Evans thought Mr. Davis was "real nice,"[34] not violent,[35] and had a vague notion that Mr. Davis had been in the military.[36] Ms. Lambert was only asked about her parents' divorce (the question and answer exchange comprises a total of three lines of the transcript),[37] when Mr. Davis left school (three lines),[38] his discharge from the military (six lines),[39] Mr. Davis' divorce from his wife (three lines),[40] whether Mr. Davis had children (three lines),[41] and whether Mr. Davis was violent (four lines).[42] Mr. Davis' mother's testimony is less than four pages.[43] The only facts that Shaddock elicited were that she divorced Mr. Davis' father, that they had lived in a trailer park, that Mr. Davis had lived with his grandmother, that Mr. Davis was 33 years old, that she did not know Mr. Davis used drugs, that he was not violent, and that he had not been convicted of a felony.[44] Following Shaddock's sole instruction to her, she also begged for mercy for her son's life.[45]

The mitigation witnesses and testimony presented at the evidentiary hearing, however, were much more detailed and were presented in a way that built a complete picture of Mr. Davis's character and background. Each witness knew Mr. Davis in a different capacity and at a different time in his life than another:

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[34] Trial Tr. Vol. 5 at 563.
[35] Id.
[36] Trial Tr. Vol. 5 at 564:26-565:2.
[37] Trial Tr. Vol. 5 at 569.
[38] Trial Tr. Vol. 5 at 569:25-27.
[39] Trial Tr. Vol. 5 at 570:3-8.
[40] Trial Tr. Vol. 5 at 570:12-14.
[41] Trial Tr. Vol. 5 at 570:15-18.
[42] Trial Tr. Vol. 5 at 570:26-571:5.
[43] Trial Tr. Vol. 5 at 573:21-576:8.
[44] Id.
[45] Trial Tr. Vol. 5 at 576:7.

- Linda Davis was a former office deputy at the George County Sheriff Department.[46] She saw and supervised Mr. Davis every day while he was housed there awaiting his trial.[47]
- Cynthia Lambert Mizell is Mr. Davis's sister – the only person with the unique experience of growing up in a family with Mr. Davis. She has known him all of his life.
- Christine Davis is Mr. Davis' mother.
- Betty Cochran has known Mr. Davis since he was seven or eight years old; she was first a nurse for his family doctor and then a close family friend and neighbor.[48] Her children played with Mr. Davis and they all went camping, swimming, and fishing together.[49] They had a very close relationship and she saw him every day that she was able to.[50]
- Mark Pitts, the deacon of the church Mr. Davis was active in as an adult, has known Mr. Davis since they were in elementary school together.[51] They became close friends in high school, spending 24-hour periods together, hunting and fishing, helping out on Mr. Davis' grandfathers' farm, sleeping over at one another's homes, and attending church together.[52]
- Wayne Christian, a former twelve-year member of the George County Board of Supervisors, attended church with Mr. Davis during the 1980s.[53]
- Darryl Cooley was a family friend, roommate, co-worker, and employer of Mr. Davis.[54]
- Donny Parnell was a family friend and employed Mr. Davis in the mid-1980s.[55]

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[46] Evidentiary Hearing Tr. at 7:17-21.
[47] Evidentiary Hearing Tr. at 8:9.
[48] Evidentiary Hearing Tr. at 52:29-53:5.
[49] Evidentiary Hearing Tr. at 53:10-14.
[50] Evidentiary Hearing Tr. at 54:2-7.
[51] Evidentiary Hearing Tr. at 62:14-16.
[52] Evidentiary Hearing Tr. at 62:18-20, 62:26-63:12, 64:26-65:7, 66:7-11.
[53] Evidentiary Hearing Tr. at 74:28-75:27.
[54] Evidentiary Hearing Tr. at 79:23-25; 80:10-15; 80:28-29; 81:6-13.

- Edda Mae Fryfogle's children grew up with Mr. Davis and she and her husband employed Mr. Davis for a year or two.[56]
- Mike Fryfogle is kin to Mr. Davis and they grew up together.[57] Fryfogle and his father both employed Mr. Davis as well.[58]
- James Lambert was Mr. Davis' brother-in-law for 20 years.[59] They were as close as brothers and even lived together for a time.[60]

Each of these witnesses has a separate and distinct relationship with Mr. Davis and their individual perspectives, together, show the complete Jeffrey Davis. The testimony of one without the other does not show the full picture of who Mr. Davis is.

Further, each witness gave details about Mr. Davis not elicited at trial and not testified to by other witnesses at the evidentiary hearing. None of this evidence was contested or disproved by the State, and is recounted in its brief.[61]

- Linda Davis testified that Mr. Davis, while awaiting trial for capital murder, was a trustee at the jail. During the day – every day – Mr. Davis ran errands for the jail.[62] He took out the trash, washed cars (that possibly had weapons in them), and helped to repair vehicles.[63] According to Ms. Davis, a twenty-year member of the Sheriff's Department: "[h]e did anything that was asked of him to do" and "[h]e would go wherever I needed him to go…[a]nd we had offices across the street, and if I needed him to carry boxes or

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[55] Evidentiary Hearing Tr. at 87:11-15.
[56] Evidentiary Hearing Tr. at 94:22-28.
[57] Evidentiary Hearing Tr. at 100:8-9; 101:19-20; 101:26.
[58] Evidentiary Hearing Tr. at 100:11-12; 102:29-103:1.
[59] Evidentiary Hearing Tr. at 105:18-19.
[60] Evidentiary Hearing Tr. at 107:20-24; 105:28-106:4.
[61] State's Brief at 21-22 (L. Davis), 22-24 (Mizell), 24-26 (C. Davis), 26-27 (Cochran), 27 (Pitts), 27-28 (Christian), 28 (Cooley), 28 (Parnell), 28 (E. Fryfogle), 28-29 (M. Fryfogle), 29 (Lambert).
[62] Evidentiary Hearing Tr. at 8:9-12.
[63] Evidentiary Hearing Tr. at 8:26-28; 9:4-6.

anything for me, he did."[64] He was allowed outside of the confines of the jail unescorted: "[h]e was outside the jail, but he did not go off anywhere, you know."[65] Mr. Davis was permitted to be outside the jail unsupervised while wearing civilian clothes and without identification that he was a prisoner at the jail.[66] Despite knowing that Mr. Davis was charged with capital murder, she found him to be nice and polite.[67] She never had any trouble from him despite providing him with privileges that she could not recall any other person charged with capital murder having.[68]

- Cynthia (Lambert) Mizell testified in much more detail at the evidentiary hearing than she was permitted to at trial. At the evidentiary hearing, evidence was elicited for the first time that she and Mr. Davis grew up with an alcoholic father that was both physically and emotionally abusive.[69]

> There were a lot of times a lot of things went on in our household that people don't understand, that haven't [sic] raised in a household like that, we had a lot of situations to where we would be at home and my father was bad to not home at times. We were very poor, which we didn't have to be, but we were and we would sit home and we would wait, and we would calculate the time that he may come home, and you never knew at the time when he came in, what kind of mood he was going to be in. So we all tried to tip toe around, and just be as quiet as we could.[70]

Mr. Davis was her and their mother's protector from their father.[71] Mrs. Mizell recounted an average night in their household that she remembered: their father came home in one of his rages and began to abuse their mother. He had thrown her on the

[64] Id.; Evidentiary Hearing Tr. at 9:14-17.
[65] Evidentiary Hearing Tr. at 8:29-9:3; 11:4-6.
[66] Evidentiary Hearing Tr. at 9:29-10:1; 11:16-19.
[67] Evidentiary Hearing Tr. at 9:21-23.
[68] Evidentiary Hearing Tr. at 9:18-20; 10:26-28; 11:7-9. This statement in and of itself proves that it was "overwhelming," "different," and "unusual." C.P. at 228.
[69] Evidentiary Hearing Tr. at 16:1-3.
[70] Evidentiary Hearing Tr. at 16:18-28.
[71] Evidentiary Hearing Tr. at 16:12-13; 17:1-3; 17:11.

floor and was about to choke her when Mr. Davis stepped in and pushed his father off of his mother. Mr. Davis then went to a neighbor to call the police. When he returned, his father would not let him in, threatened to kill him, and forced him to sleep outside. Mrs. Mizell and their mother let Mr. Davis back in the house after their father had passed out.[72] This type of series of events was common in the Davis home -- taking place at least every weekend.[73] "A time after" that particular event, Mr. Davis went to live with his grandparents.[74] Mrs. Mizell has known Mr. Davis all of her life and described him as "mild," "mild mannered," "very easy going," "very caring," "very easy to get along with," "a good father," and "just a wonderful person."[75] Moreover, she described why he was well-liked by everybody: because he was mild-tempered and often helped people.[76] After they left their father, they lived in a trailer park where Mr. Davis helped his neighbors.[77] Mrs. Mizell remembers Mr. Davis helping an elderly resident of the trailer park, a woman with no one to look after her, so Mr. Davis would take her things and do her shopping for her.[78] Mr. Davis helped other residents, including Evans, but never asked for anything in return.[79] Mrs. Mizell also spoke about how Mr. Davis cared for their grandmother as her health deteriorated.[80] She told the court how when Mr. Davis left the military, he returned to find his wife pregnant by another man. He

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[72] Evidentiary Hearing Tr. at 17:7-22. This testimony demonstrates that the trial court's finding that no abuse had occurred is clearly erroneous. C.P. at 226.
[73] Evidentiary Hearing Tr. at 17:15-16; 17:22-27.
[74] Evidentiary Hearing Tr. at 18:4-8.
[75] Evidentiary Hearing Tr. at 16:6-7; 18:1-3; 18:13-16.
[76] Id.
[77] Evidentiary Hearing Tr. at 19:7-13.
[78] Evidentiary Hearing Tr. at 19:17-21.
[79] Evidentiary Hearing Tr. at 19:21-27.
[80] Evidentiary Hearing Tr. at 26:20-22.

always treated that child like his own and even gave her his last name.[81] In Mrs. Mizell's own words: "[t]hat in itself is a character statement right there."[82] Mrs. Mizell and Mr. Davis attended church together growing up.[83] In her entire life, she never saw her brother have a propensity for violence.[84]

- Mr. Davis' mother, Christine Davis, testified that she had a close relationship with her son.[85] Mr. Davis made good grades in school and did not have attendance problems.[86] In fact, Mrs. Davis received a letter in 1978 from Mr. Davis' commanding officer in the military congratulating her on Mr. Davis' completion of his GED.[87] The commanding officer told her that Mr. Davis is a son she should be proud of.[88] Mrs. Davis told the court that Mr. Davis left the military via honorable discharge because he was having trouble with his wife.[89] In her experience, Mr. Davis had never been violent. He was "always low-key," was never in any fights, and did not have a temper.[90] Mrs. Davis recalled one instance where Mr. Davis went to his estranged wife's home to deliver presents to his children. Mr. Davis' estranged wife's live-in boyfriend came out on to the porch and knocked Mr. Davis down. Mr. Davis did not retaliate.[91] Mr. Davis was always helping others and asking for nothing in return.[92] Mrs. Davis also testified that when Mr. Davis was being held in the George County jail on capital murder charges,

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[81] Evidentiary Hearing Tr. at 24:11-17.
[82] Id.
[83] Evidentiary Hearing Tr. at 20:1-9.
[84] Evidentiary Hearing Tr. at 18:13-16.
[85] Evidentiary Hearing Tr. at 33:17-19.
[86] Evidentiary Hearing Tr. at 34:9-13.
[87] Evidentiary Hearing Tr. at 35:14-26.
[88] Id.
[89] Evidentiary Hearing Tr. at 37:11-14.
[90] Evidentiary Hearing Tr. at 39:4-9.
[91] Evidentiary Hearing Tr. at 38:13-39:1.
[92] Evidentiary Hearing Tr. at 39:10-12.

their family was allowed to take a photo at the courthouse in front of the Christmas tree.[93]

- Betty Cochran, a long-time family friend, testified that Mr. Davis helped everyone in the trailer park and would be insulted if he was offered money in return.[94] She testified that Mr. Davis had a key to her trailer and would take care of her by going in and making sure she had turned off her electrical appliances.[95] Mr. Davis never abused the privilege of having her spare key.[96] In addition to looking after Ms. Cochran, Mr. Davis helped an elderly woman in her eighties: "he really took care of her."[97] In Ms. Cochran's words:

> [S]he was sort of crippled, and she couldn't drive, couldn't go anywhere, and he ran all her errands. She would call and he would go to the store and get a loaf of bread, and when he got back, she might say, oh, I need milk, too, and he would run back to the store and get her milk.[98]

This was not surprising to Ms. Cochran, however, because "he done us all like that."[99] Ms. Cochran also recalled Mr. Davis attending church every day during that time and that he worked every day.[100] She never saw Mr. Davis have a temper and never saw him be violent.[101]

- Mark Pitts, a high school friend, testified that he never knew Mr. Davis to have a temper, to exchange "cross words" with anyone or be violent.[102] He also knew Mr. Davis to be employed during the time that they were friends.[103] Mr. Davis also attended church with

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[93] Evidentiary Hearing Tr. at 40:15-20.
[94] Evidentiary Hearing Tr. at 54:18-20; 54:29-55:5.
[95] Evidentiary Hearing Tr. at 54:10-13.
[96] Evidentiary Hearing Tr. at 54:14-16.
[97] Evidentiary Hearing Tr. at 54:19-28.
[98] Id.
[99] Id.
[100] Evidentiary Hearing Tr. at 55:6-13; Evidentiary Hearing Tr. at 55:17-18; 59:28-29.
[101] Evidentiary Hearing Tr. at 55:19-23; 59:12-13.
[102] Evidentiary Hearing Tr. at 59:18-20; 65:13-21.
[103] Evidentiary Hearing Tr. at 63:15-17; 64:11-21.

Mr. Pitts and his then-girlfriend. Mr. Davis became active in their church, participated in the choir, and helped to organize an annual youth event.[104] Mr. Pitts testified that Mr. Davis had a positive effect on others at their church.[105]

- Wayne Christian, a fellow congregant in a church Mr. Davis attended in the mid-1980s, testified that Mr. Davis was an active member.[106] Mr. Davis sang in the church choir.[107] Mr. Christian remembers Mr. Davis as a "very good person" who "wanted to do what was right."[108] He was also testified about Jeffrey's profession of faith.[109]
- Darryl Cooley, a family friend, co-worker, and former employer, testified that Mr. Davis helped him considerably by working on his home and taking care of his home while Mr. Cooley was out of town.[110] Mr. Davis used a set of hidden keys to enter Mr. Cooley's home when he was out-of-town and Mr. Davis never abused that privilege.[111] Sometimes Mr. Cooley paid Mr. Davis for his help, but sometimes Mr. Davis volunteered: "[he] just stopped by and said, I'll help you do that."[112] They worked together at a shipyard, and later Mr. Davis worked for Mr. Cooley's painting business.[113] Mr. Cooley remembers him as a good worker.[114] In all the different roles Mr. Cooley had in Mr. Davis' life – friend, roommate, co-worker, employer – he did not know Mr. Davis to be violent and did not know Mr. Davis to have a temper.[115]

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[104] Evidentiary Hearing Tr. at 66:7-11; 67:26-27; 68:1-3.
[105] Evidentiary Hearing Tr. at 68:4-6.
[106] Evidentiary Hearing Tr. at 75:8-10; 75:18-20, 22-26.
[107] Evidentiary Hearing Tr. at 75:27-28.
[108] Evidentiary Hearing Tr. at 76:2-4.
[109] Evidentiary Hearing Tr. at 75:16-17.
[110] Evidentiary Hearing Tr. at 79:25-80:2; 81:6-7; 82:1-10.
[111] Evidentiary Hearing Tr. at 82:11-20.
[112] Evidentiary Hearing Tr. at 80:24-26.
[113] Evidentiary Hearing Tr. at 80:28-29; 80:6-13.
[114] Evidentiary Hearing Tr. at 81:3-5.
[115] Evidentiary Hearing Tr. at 81:22; 86:7-9; 81:25.

- Donny Parnell, a family friend and former employer, testified that Mr. Davis worked for him twice in the mid-1980s.[116] Mr. Parnell spent a lot of time traveling with Mr. Davis.[117] He knew Mr. Davis to be a "great" worker.[118] He never saw Mr. Davis exhibit a temper and testified that Mr. Davis was always the one calming him down.[119] Mr. Parnell testified that Mr. Davis was never violent and never got mad about anything.[120] Mr. Parnell thinks Mr. Davis is a "very good person."[121]
- Edda Mae Fryfogle, the mother of Mr. Davis' childhood friends and a former employer, spent "quite a bit of time" with Mr. Davis while he was employed by her family in the late 1980s.[122] Mr. Davis was a "perfect" and dependable worker and never exhibited a temper.[123] Mr. Davis also did several things for her around her house: "Anything I needed to do or mention something, he did it."[124] Mr. Davis did not ask for anything in exchange.[125]
- Mike Fryfogle, Mr. Davis' kin, childhood friend, and former employer, testified that he spent a lot of time with Mr. Davis as they were growing up and outside of work while he employed Mr. Davis.[126] They went to the river together to work on boats, they hunted together, and they attended social events together.[127] Mr. Fryfogle remembers Mr. Davis as a good worker, particularly because Mr. Davis would arrive early to ensure everything

[116] Evidentiary Hearing Tr. at 87:11-15.
[117] Evidentiary Hearing Tr. at 88:1-8.
[118] Evidentiary Hearing Tr. at 88:13-14.
[119] Evidentiary Hearing Tr. at 88:15-21.
[120] Evidentiary Hearing Tr. at 88:22-25.
[121] Evidentiary Hearing Tr. at 89:20-28; 91:21-27; 92:21-26.
[122] Evidentiary Hearing Tr. at 95:2-4; 96:28-29.
[123] Evidentiary Hearing Tr. at 95:5-9; 95:18-19.
[124] Evidentiary Hearing Tr. at 95:10-15.
[125] Evidentiary Hearing Tr. at 95:16-17.
[126] Evidentiary Hearing Tr. at 101:15-17; 101:19-20; 101:26.
[127] Evidentiary Hearing Tr. at 100:25; 101:2; 101:29-102:2.

was working for the other employees.[128] In all of the different roles Mr. Fryfogle had in Mr. Davis' life, he has never seen Mr. Davis be violent, have a temper, or engage in a fight:[129] "[W]e'd be at like parties or something, he would bump into somebody and somebody would – you know how people is when they drink. They want to start something. But Jeff would try to say, man, I'm sorry, I didn't mean it."[130]

- James Lambert, Mr. Davis' brother-in-law, knew Mr. Davis in multiple capacities. They were family, they lived together at one time, they were friends who fished, camped, and went to church together, and they were co-workers.[131] Mr. Lambert recalls that when they were living beside Mr. Davis' grandfather, Mr. Davis helped his grandfather all of the time. Mr. Davis helped Mr. Lambert's family as well.[132] They were close up until Mr. Davis' trial, and Mr. Lambert never saw Mr. Davis exhibit violence or a temper.[133]

Each of these witnesses provided an additional layer of Mr. Davis's character and background not testified to by another. They did not just state that Mr. Davis was a "good worker" and did not have a bad temper as the State contends:[134] they went much further, giving details as to why they think so highly of Mr. Davis. Moreover, each of these witnesses knew Mr. Davis in different social contexts, aspects of his life, and at different times in his life. They are not simply "former employers,"[135] but they are also former roommates, co-workers, friends, and family. The only truly cumulative statements made by the witnesses are, crucially, that they were not contacted by Shaddock, they would have testified at Mr. Davis' trial if asked, and that they did

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[128] Evidentiary Hearing Tr. at 101:10-14.
[129] Evidentiary Hearing Tr. at 101:21-24; 104:7-11.
[130] Evidentiary Hearing Tr. at 103:21-28.
[131] Evidentiary Hearing Tr. at 105:28-29; 106:15-19; 107:5-12.
[132] Evidentiary Hearing Tr. at 106:7-12.
[133] Evidentiary Hearing Tr. at 107:25-27; 108:4-5; 109:24-27.
[134] State's Brief at 29.
[135] Id.

not know about Mr. Davis' drug use.[136] To say these witnesses and their testimony are cumulative is a gross misstatement. Furthermore, the trial court's findings that discounted this compelling testimony as cumulative were clearly erroneous and should be reversed.

B. The State's Attempts to Undercut the Mitigation Evidence Fail.

Next, the State attempts to undercut the witness' testimony by making irrelevant arguments concerning their relevance and credibility. As established above, the witnesses did not merely establish "basically the same picture presented at petitioner's sentencing trial by his mother, sister, and Clayton Evans."[137] Further, Christine Davis' and Cynthia Mizell's evidentiary hearing testimony shows that their short trial testimony was not the result of an attempt to hide anything bad, but was the direct result of Shaddock's ineffectiveness.[138] This was testimony elicited in direct compliance with this Court's opinion granting the evidentiary hearing.[139] While

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[136] *See, e.g.*, Evidentiary Hearing Tr. at 10:8-13, 10:14-17 (L. Davis); Evidentiary Hearing Tr. at 24:8-10, 22-23 (Mizell); Evidentiary Hearing Tr. at 42:18-20, 45:18-20 (C. Davis); Evidentiary Hearing Tr. at 57:13-15 (Cochran); Evidentiary Hearing Tr. at 68:7-15 (Pitts); Evidentiary Hearing Tr. at 76:5-15 (Christian); Evidentiary Hearing Tr. at 83:21-26, 84:2-4, 85:22-24 (Cooley); Evidentiary Hearing Tr. at 90:3-13 (Parnell); Evidentiary Hearing Tr. at 96:10-19 (E. Fryfogle); Evidentiary Hearing Tr. at 102:12-22 (M. Fryfogle); Evidentiary Hearing Tr. at 108:11-19 (Lambert). Testimony regarding the lack of knowledge of Mr. Davis' drug use would have been beneficial to him at sentencing, and this is addressed at pp. 21-22, *infra*. While the trial court states, and the State argues, that that this evidence would have had an adverse effect on the case, it is irrelevant. Shaddock could not have made an informed strategic decision regarding whether to call them, because he did not know what they would say.

[137] State's Brief at 29.

[138] Evidentiary Hearing Tr. at 21:9-23:21 (Shaddock met her in a room at the courthouse on the morning of the penalty phase for ten minutes and told her only that she would be asked a few questions about their childhood and what Mr. Davis was like), 24:2-8 ("Had I had the knowledge of what we needed to say, as far as character is concerned...yes,...I would have...There are a lot of things that people maybe should need to know"); Evidentiary Hearing Tr. at 40:21-49:18 (Mr. Davis' mother was prepared for sentencing on the morning of by Shaddock telling her to "get up there and beg for her son's life" without any other instruction or preparation).

[139] This Court held:

> Jeffrey's mother and sister may have testified about his life history in a cursory and non-productive manner because of lack of preparation, or because more detail would have been harmful to Jeffrey...This issue offers a close question, and little can be known about Shaddock's preparation time and efforts in this case because of its procedural posture. We find that Davis should be granted leave to proceed on this issue in the circuit court under the authority of *Leatherwood*.

the State makes much of the fact that Mrs. Mizell was "well-rehearsed"[140] at the evidentiary hearing, that allegation is baseless. There is no proof to that effect and the extent to which she was prepared is wholly irrelevant because she was testifying truthfully. Further, the State's attempt to weaken her credibility by repeatedly pointing out that she smoked marijuana as a teenager[141] is equally irrelevant -- at most it demonstrates that she was testifying truthfully, even if it meant that she would be harmed or embarrassed in the process. The State also attempts to damage the credibility of the witnesses by alleging – without any basis – that post-conviction counsel furnished information to them.[142] This allegation is unfounded and in fact affects the State's credibility because it is firmly established in the record that the State furnished information to an evidentiary hearing witness.[143]

The State tries to sidestep the powerful evidence that Mr. Davis was a trustee while in jail on capital murder charges by arguing that Sheriff Howell's affidavit carries no weight. The State is wrong. Affidavits are an acceptable form of proof in post-conviction evidentiary proceedings and are afforded the same weight as live in-court testimony.[144] Further, the State did not object

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Davis, 743 So.2d at 341. The record from the evidentiary hearing clearly establishes that the "cursory and non-productive" testimony was the result of lack of preparation rather than risk of harm to Mr. Davis. Mrs. Davis testified that she was not attempting to hide anything from the jury (Evidentiary Hearing Tr. at 45) and that Shaddock failed to prepare her for her trial testimony (Evidentiary Hearing Tr. at 40-42). Mrs. Mizell testified likewise. Evidentiary Hearing Tr. at 23 (Mrs. Mizell was not attempting to hide anything from the jury at trial); Evidentiary Hearing Tr. at 21-24 (discussing Shaddock's failure to prepare her for her trial testimony).

[140] State's Brief at 22.

[141] State's Brief at 23.

[142] State's Brief at 25, footnote 5.

[143] Evidentiary Hearing Tr. at 131-32. The following exchange is between Mr. Davis' counsel and Shaddock:

Q. And do you recall telling me that you don't recall what the plea offer was?
A. Well, somebody refreshed my memory.
Q. Who refreshed your memory?
A. Mr. White.
Q. How did he refresh your memory?
A. He told me what the plea rec was.

[144] Miss. Code Ann. § 99-39-23(4) (2009) ("The court may receive proof by affidavits, depositions, oral testimony or other evidence...")

to the affidavit at the evidentiary hearing or at any other time. Finally, Sheriff Howell's affidavit is substantially supported by the in-court testimony of Linda Davis and Mrs. Mizell.[145] In fact, it is recounted in the State's brief and an undisputed fact that Mr. Davis was allowed to drive cars while dressed in civilian clothing and that a former Sheriff's Department employee testified under oath to this.[146] The fact that Sheriff Howell himself – a stroke victim – did not testify is of no relevance. Finally, the State fails entirely to address the issue of whether the limitation of mitigation evidence at an evidentiary hearing violates Mr. Davis' Fourteenth Amendment Due Process rights.

C. **Mr. Davis Is Entitled to Relief.**

There can be no doubt, after review of the evidence described above and the applicable law, that Shaddock's performance was deficient. Mr. Davis was without question prejudiced by this deficient performance because, given the wealth of compelling mitigation evidence present here, it is likely that at least one juror would have voted for life.[147] Shaddock's representation was constitutionally ineffective, and Mr. Davis is entitled to relief.

III. The Trial Court Clearly Erred by Disallowing Dr. Kramer's Testimony.

The State fails to comprehend why Mr. Davis attempted to call Dr. Kramer at the evidentiary hearing and misrepresents the testimony elicited at that hearing. The State incorrectly assumes that Mr. Davis wanted to call Dr. Kramer to support his claim of ineffective assistance of counsel by showing that Dr. Kramer should have been called during the sentencing phase of Mr. Davis' trial.[148] This assumption is wrong.[149]

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[145] Evidentiary Hearing Tr. at 7:17-11:19.
[146] State's Brief at 20-22.
[147] *See Wiggins*, 539 U.S. at 537; *Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000).
[148] State's Brief at 31, 32-36.

Although it is Mr. Davis' contention that he should have been allowed to support his claim of ineffective assistance of counsel by demonstrating *all* of the mitigation evidence that was available at the time of his trial,[150] the record makes it clear that Mr. Davis attempted to call Dr. Kramer at the evidentiary hearing in response to the State's cross-examination of several mitigation witnesses. Specifically, the State demanded to know whether each witness would change their opinion of Mr. Davis if they knew he had used drugs in the past.[151] The only purpose of this line of questioning was (1) to allege that since they did not know he used drugs in the past, they did not really know him and (2) to suggest that because Mr. Davis had used drugs in the past, he does not possess good character.

Now, the State attempts to defend the trial court's erroneous finding of fact on this issue (that no witness testified that they would change his or her opinion of Mr. Davis if they had known he used drugs) and minimize the effects of its failed cross-examination regarding Mr. Davis' drug use. The State falsely asserts that Darryl Cooley testified that his opinion of Mr. Davis would possibly change because of the facts of the crime, and not because of Mr. Davis' past drug use.[152] The record refutes this assertion:

> Q. I think you said you did not know him to use drugs. Would that change your opinion if you knew that he was addicted to drugs?
>
> A. Would it change my opinion?
>
> Q. Yeah.

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[149] The State spends several pages citing to irrelevant law and arguing that Mr. Davis did not demonstrate that Dr. Kramer was available to testify at Mr. Davis' 1992 trial. State's Brief at 33-36. Modern forms of transportation and communication aside, the State's argument is totally irrelevant because Mr. Davis (staying well within the confines of this Court's remand) did not argue that Shaddock was ineffective for failing to call Dr. Kramer during the sentencing phase of Mr. Davis' trial.

[150] Brief of Appellant at 33-36 (arguing Mr. Davis' Eighth and Fourteenth Amendment rights were violated by the limitations placed on the mitigation evidence he was allowed to present at the evidentiary hearing).

[151] Evidentiary Hearing Tr. at 28 (Mizell); 49-50 (C. Davis); 58-59 (Cochran); 70, 72-73 (Pitts); 77 (Christian); 85 (Cooley); 91-92 (Parnell); 98 (E. Fryfogle); 103 (M. Fryfogle); 111(Lambert).

[152] State's Brief at 35-36, n. 11.

A. Well, probably it would.

Q. So, if he was addicted to drugs the whole time you knew him, that might change your opinion of him?

A. Well, I suppose.[153]

Moreover, the trial court endorsed the State's false impeachment assertions when it repeatedly cited to Mr. Davis' drug use in its opinion denying post-conviction relief. The trial court specifically discounted the testimony of the additional mitigation witnesses in part because they testified that they did not know that Mr. Davis used drugs.[154]

Dr. Kramer's testimony would have refuted this attempted impeachment by the State. Mr. Davis' counsel proffered to the trial court that Dr. Kramer would testify (1) that people that use drugs often hide or mask their drug use and (2) that drug use is not a matter of good or bad character.[155] Dr. Kramer's testimony is plainly relevant[156] and fell within the scope of this Court's remand. The trial court erred in excluding this testimony, and its actions violated Mr. Davis' Eighth and Fourteenth Amendment rights.

Conclusion

George Shaddock was ineffective in his representation of Mr. Davis for two reasons: (1) he incorrectly relayed a plea offer and improperly advised Mr. Davis on the law regarding that plea offer; and (2) he failed to investigate and present a wealth of compelling, non-cumulative mitigation evidence at sentencing that would have, without question, made a difference. Moreover, the trial court erred in disallowing Dr. Kramer's testimony at the evidentiary hearing.

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[153] Evidentiary Hearing Tr. at 85.
[154] C.P. at 225.
[155] Evidentiary Hearing Tr. at 164-170.
[156] *See Smith v. Texas*, 543 U.S. 37, 43-44 (2004) quoting *Tennard*, 542 U.S. at 284-85 quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). *See also* Brief of Appellant at 38-39.

This Court should allow Mr. Davis to accept the plea offered by the State on the morning of trial. In the alternative, this Court should find that Shaddock rendered ineffective assistance and remand for a new sentencing hearing. If this Court is not satisfied with the development of the evidence at the evidentiary hearing, it should remand this case for a full presentation of all mitigation evidence.

RESPECTFULLY SUBMITTED, this the 8th day of August, 2011.

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CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, hereby certify that I have on this day mailed postage fully prepaid a true and correct copy of the foregoing Reply Brief of Appellant:

Honorable Robert B. Krebs
Circuit Court Judge
3104 Magnolia Street
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Honorable Marvin L. White, Jr.
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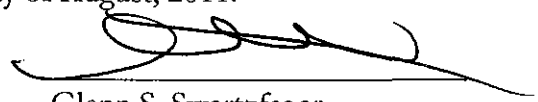
SO CERTIFIED, this the 8th day of August, 2011.



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