IN THE SUPREME COURT OF MISSISSIPPI

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

Jeffery Keller Davis, *Appellant*

v.

State of Mississippi, *Appellee*

Certificate of Interest Persons

The undersigned counsel of record certifies that the following listed persons have had an interest in the outcome of this case. These representations are made so that the justices of this Court may evaluate disqualification or recusal.

1. Judge Robert B. Krebs.
2. Appellant Jeffrey Keller Davis.
3. Counsel for appellant: Glenn S. Swartzfager, Louwlynn Vanzetta Williams, and Amy Strickland, Office of Capital Post-Conviction Counsel, Jackson, Mississippi.
4. Counsel for appellee: Marvin L. White, Jr., Assistant Attorney General.
5. Original post-conviction counsel for appellant: Ross Parker Simons.
6. Trial counsel for appellant: George Shaddock.
7. District attorney at trial: Circuit Judge Dale Harkey.

SO CERTIFIED, this the 6th day of April, 2011.

Glenn S. Swartzfager (MSB#[redacted]

Statement Requesting Oral Argument

Jeffrey Keller Davis requests oral argument before the Mississippi Supreme Court in this case. Mr. Davis is under a sentence of death. He files this appeal from the denial of post-conviction relief by the Greene County Circuit Court after an evidentiary hearing conducted as a result of this Court's remand. This case involves a complex-constitutional analysis and intensive-factual analysis of the record. Therefore, Mr. Davis believes that oral argument will greatly aid the Court in the disposition of this case.

Table of Contents

Table of Authorities

Federal Cases

United State Supreme Court Cases

United State Court of Appeals Cases

Federal District Cases

State Cases

Mississippi State Cases

Statutes

Other Authorities

Statement of the Issues

1. Mr. Davis' trial counsel was ineffective in communicating the plea offered by the State. He failed to communicate the correct offer and improperly advised Mr. Davis on the law regarding the offer he had communicated.

2. Mr. Davis' counsel was woefully inadequate in investigating, developing, and presenting the available mitigation evidence. He inquired about possible mitigation witnesses for the first time less than twenty-four hours before sentencing and did not adequately prepare the available witnesses for their testimony. Because of such glaring shortcomings, Mr. Davis was robbed of effective assistance of counsel, and the circuit court erred in finding otherwise.

3. The circuit court erred in refusing to allow Dr. Kramer's testimony because the testimony he would have given would have been relevant, within the scope of the remand, and necessary to dispel false assumptions created by the State's attempted impeachment of witnesses.

Introduction

On Friday, July 12, 1991, Jeffrey Keller Davis called Greene County Sheriff Tommy Miller to report that he had killed Linda Hillman in her home. Since that time, Jeffrey has been completely truthful regarding the crime for which he was convicted no matter if that truth benefited or harmed him. He cooperated with law enforcement during the investigation. He turned over a knife used in the crime and consented to a search of his residence. He accompanied Sheriff Miller to the search of his residence, as well as to show Sheriff Miller the location of the clothing and shoes he had worn the morning of the crime. He told Sheriff Miller his story twice after voluntarily waiving his *Miranda* rights each time.[1]

Throughout these proceedings, many witnesses' accounts of what happened have

[1]The question of guilt or innocence is not an issue before this Court. Rather, the issue is whether Jeffrey Davis was denied rights to him assured by the Constitutions of the United States of America and the State of Mississippi.

waivered—one statement made in an affidavit yet a totally conflicting statement at the evidentiary hearing. Jeffrey's accounts, however, have remained constant. With his life at stake, he has told the truth even when it was not to his benefit. Jeffrey Davis has consistently testified that his trial counsel George S. Shaddock told him the morning of trial that the State made an offer of two consecutive twenty-year terms without the possibility of parole. No one has offered direct testimony to the contrary.

At the post-conviction evidentiary hearing during his direct examination, Jeffrey specifically brought out the fact that he had been previously mistaken about the number of times his trial attorney George S. Shaddock visited him before trial. He readily corrected his mistake and conceded that Mr. Shaddock visited him *more* times than he had previously thought.[2] Even so, the fact that there were more visits than Jeffrey initially recalled makes no substantive difference to his claims because no trial preparation was done, and the end result was the same as if no visits had taken place.

Unfortunately, the same cannot be said for all of the witnesses in Mr. Davis' case. At the evidentiary hearing, Mr. Shaddock changed his testimony after having met with the State. Specifically, Mr. Shaddock—who had given an affidavit prior to the hearing stating that the prosecution had *never* made any plea offers prior to trial—testified that the morning of trial the State made a plea offer of life plus twenty years. When questioned regarding his sudden change of testimony, Mr. Shaddock admitted that his recollection had been refreshed by "Mr. White."[3] When questioned further, he recanted that he could not remember the specific terms of the offer

[2] These visits were insignificant, at best, consisting mostly of Mr. Shaddock stopping by to say hello while he was at the jail working on other cases. No wonder Jeffrey forgot about them.
[3] H. Tr. 131-132. To avoid confusion, cites to the transcript to Appellant's trial are cited as "T. Tr." while cites to the transcript of the post-conviction evidentiary hearing are cited as "H. Tr."

made the morning of trial.[4]

Circuit Judge Dale Harkey, the prosecuting District Attorney at Mr. Davis' trial, signed an affidavit prior to the evidentiary hearing stating that before trial he conveyed a plea offer of life plus ten or twenty years to George Shaddock. Consequently, after having "read the Supreme Court opinions in the case," Judge Harkey testified that he "kind of regretted the imprecision of the language when it indicates that [he] tendered a plea offer."[5] He gave this testimony in spite of the fact that he admittedly had the opportunity to review and make changes to his affidavit before signing it.

The District Attorney, not Jeffrey Davis, made the plea offer–an offer the District Attorney was not required to make. Once the offer was made, Mr. Davis had a constitutional right to hear the correct terms of that offer and to have it properly explained to him. Had Mr. Davis' attorney conveyed and explained the correct terms of the offer, Mr. Davis would have taken the offer, as evidenced by the fact he had instructed his attorney to pursue a plea deal for a life sentence,[6] and never would have never been sentenced to death. Once the case was forced to trial by Mr. Shaddock's ineffectiveness, a death sentence would have been highly unlikely if the jury had heard the compelling mitigating evidence Mr. Shaddock failed to investigate, develop, or present.

The witnesses who testified on Jeffrey Davis' behalf at the evidentiary gave compelling testimony regarding Jeffrey's character as a hard-working, non-violent, and trustworthy individual who volunteered to help others without asking for anything in return. Witnesses also testified that the crime was completely out of character for Jeffrey. In fact, while housed in the George County Jail awaiting trial, Jeffrey was made a trustee by the Sheriff and was allowed to

[4] H. Tr. 132-133.
[5] H. Tr. 159.
[6] H. Tr. 176-177.

drive patrol cars around the corner, unescorted in civilian clothes,[7] to change the oil. These witnesses' testimonies attest to Jeffrey's staunch character.

In contrast, even though the State put on no additional evidence at sentencing, in his closing argument the District Attorney portrayed Jeffrey as a law-breaking, "drug-crazed" "animal" who had betrayed the friendship, trust, and loyalty of his friend and victim, Linda Hillman.[8] Thus, it was critical for the jury to hear the testimony of these witnesses which would have been even more compelling juxtaposed against the District Attorney's portrayal of Jeffrey. But because of Mr. Shaddock's ineffectiveness, the jury never heard any of this evidence at trial.

Jeffrey Davis does not believe, and is not arguing, that a death sentence is necessarily inappropriate in his case. Rather, Mr. Davis is arguing that his sentence of death is inappropriate until he has received due process and all constitutional protections guaranteed by the federal and state constitutions–protections he has not yet received. Mr. Davis recognizes that victims in this case are entitled to have justice served, and he is not trying to rob them of that justice. Nonetheless, justice also dictates that Mr. Davis should not be forced to give away his constitutional rights.

Because of the blatant ineffectiveness of trial counsel, Mr. Davis has not received the rights guaranteed to him by the United States and Mississippi Constitutions. Therefore, his sentence of death, *in these circumstances*, is inappropriate, and the Court should grant the relief that Mr. Davis is requesting.

---

[7] The George County Jail did not have regular uniforms at the time that Jeffrey was housed there. H. Tr. 9-10.

[8] T. Tr. 610-612; 612.

Statement of the Case

A. Statement of the Proceedings

On July 1, 1999, the Mississippi Supreme Court remanded, Mr. Davis' case to the Greene County Circuit Court for an evidentiary hearing to determine if his trial attorney was ineffective for: 1) failing to properly convey and explain a plea offer; 2) failing to properly investigate, prepare, and call character witnesses on Mr. Davis' behalf at sentencing; 3) failing to request a special jury venire; and 4) failing to move to quash the jury venire as a result of improper contact. Through no fault of Mr. Davis, the evidentiary hearing did not take place until February 24 and 25, 2010.

Jeffrey Davis was appointed counsel for purposes of the remand by the Greene County Circuit Court on January 7, 2000.[9] During the course of his representation of Mr. Davis, Ross Parker Simons, Mr. Davis' counsel, filed various motions seeking funds for the assistance of an expert toxicologist.[10] Mr. Simons also filed a Petition for Interlocutory Appeal on March 11, 2003, seeking to have the scope of the remand expanded.[11] By an order dated July 27, 2004, the Mississippi Supreme Court denied Mr. Davis' Petition for Interlocutory Appeal.[12] On December 28, 2004, Mr. Simons filed a Motion to Expand Record in a Manner that will Provide for Meaningful Review of the Consequences of Trial Counsel's Failure to Investigate Mitigation Witnesses, which is the subject of this Court's ineffective-assistance-of-counsel remand.[13] The

---

[9] C.P. 58-60.
[10] C.P. 61-110; 121-122; 130-131; 138-139.
[11] C.P. 113; See also Mississippi Supreme Court Case No. 2003-M-00472.
[12] C.P. 137.
[13] See Mississippi Supreme Court Case No. 2003-M-00472-SCT.

Mississippi Supreme Court denied Mr. Davis' motion in an order dated January 14, 2005.[14]

On August 29, 2005, Hurricane Katrina slammed the Mississippi Gulf Coast causing massive destruction. As a result of the disarray, the evidentiary hearing in Mr. Davis' case was unable to take place for a period of time.

The Appellate Defender's Office for the Nineteenth Judicial Circuit Court Judicial District was defunded and ceased to exist as of September 29, 2006. As a result, Mr. Simons filed a motion to withdraw as counsel of record on October 4, 2006. On January 10, 2007, the Greene County Circuit Court appointed Robert M. Ryan, the Director of the Mississippi Office of Capital Post-Conviction Counsel, to represent Mr. Davis in his post-conviction proceedings.[15]

Mr. Ryan resigned as the Director of the Mississippi Office of Capital Post-Conviction Counsel effective December 31, 2007, and Glenn S. Swartzfager was appointed as Director effective January 1, 2008. A status conference was held on August 17, 2009. As a result, ten days later the Greene County Circuit Court set the evidentiary hearing for February 24 and 25, 2010. The parties were ordered to file post-hearing briefs at the conclusion of the evidentiary hearing.[16] In his post-hearing brief, Mr. Davis conceded that he was unable to meet his burden of proof on the claim of inappropriate juror contact and ineffective assistance of counsel for failing to request a special venire.

The circuit court denied Mr. Davis relief on his remaining claims, and Mr. Davis filed a Motion to Amend or Alter Judgment. The circuit court denied the motion, and this appeal followed.

B. Statement of Facts

---

[14] See Mississippi Supreme Court Case No. 2003-M-00472-SCT.
[15] C.P. 148-150.
[16] H. Tr. 222.

Jeffrey Keller Davis was arrested on July 12, 1991, after he telephoned the Greene County Sheriff to report that he had killed Linda Hillman. After his arrest, Jeffrey told his story two more times after waiving his *Miranda* rights and otherwise cooperated with law enforcement throughout the investigation. He was subsequently indicted for capital murder by a Greene County Grand Jury on September 20, 1991.

George S. Shaddock was appointed to represent Jeffrey on his capital murder charge by the Greene County Circuit Court on August 21, 1991. From the start, Mr. Shaddock's pre-trial preparation was almost non-existent. From his appointment in August of 1991 until February 5, 1992, Mr. Shaddock only met with Jeffrey three times. These visits were superficial at best. Mr. Shaddock failed to discuss details of the case or elicit information about Jeffrey's life. On February 5, 1992, unsure of whether the State would seek the death penalty and with a February 25, 1992 trial date—less than twenty days away—fast approaching, Mr. Shaddock finally wrote the District Attorney's Office. In this letter, Mr. Shaddock wrote that he "would like to dispose of [Mr. Davis'] case at the February term" and if he was not informed immediately whether the State would seek the death penalty, he would be forced to ask for a continuance.[17] Even had Mr. Shaddock been notified instantaneously that the State was seeking death, twenty days of preparation for a capital trial is inadequate on its face.[18] The State sought a continuance seven days prior to trial because the Mississippi Crime Lab had not completed testing of the evidence.[19] The case was continued to May 19, 1992.

Even after Mr. Shaddock eventually learned that the State would be seeking the death penalty, his trial-preparation efforts did not increase. In fact, he only visited with Jeffrey two more times between February 5, 1992 and May 19, 1992—one of those times being the day

[17] H. Tr. 125. Plaintiff's Exhibit 4, February 5, 1992 Letter from George S. Shaddock to Dale Harkey.
[18] See *Williams v. Taylor*, 529 U.S. 362 (2000).
[19] C.P. 13-15.

before the trial began.[20] Mr. Shaddock made no efforts even to obtain Jeffrey's basic records such as his school, military, or medical records. Additionally, Mr. Shaddock failed to otherwise inquire about Jeffrey's life in order to learn of other possibly mitigating information. As a result, Mr. Shaddock was under the false assumption that Jeffrey had no close friends and did not live in the George County/Greene County community even though Mr. Shaddock had ample opportunity to learn that both were not true.

Nor did Mr. Shaddock undertake any independent efforts to find witnesses who could testify on Jeffrey's behalf at trial. The day before the trial began, Mr. Shaddock met with Jeffrey's mother Christine Davis at her house. When Mr. Shaddock arrived Mrs. Davis' home, he was introduced to a long-time family friend Betty Cochran and was told that she had known Jeffrey all of his life. Mr. Shaddock did not interview her and instead met with Mrs. Davis on the porch outside the presence of Mrs. Cochran.

Before the trial began, the State conveyed a plea offer to Mr. Shaddock where, in exchange for a plea of guilty, the State would recommend a sentence of life imprisonment for murder and ten or twenty years for armed robbery with the sentences to run consecutively. However, Mr. Shaddock incorrectly informed Jeffrey Davis that the State's offer was two-consecutive twenty-year sentences. When Mr. Davis asked how much of the forty years he would be required to serve before being eligible for parole, Mr. Shaddock also incorrectly informed him that he would have to serve all forty years without being eligible for parole. Mr. Davis refused the offer because he felt it was tantamount to a death sentence.

Immediately after Jeffrey was convicted of capital murder, Mr. Shaddock met with Jeffrey, his mother, and his sister Cynthia Lambert, who now goes by Cynthia Mizell. For the first time, Mr. Shaddock asked if they knew any witnesses who could testify on Jeffrey's behalf

[20] H. Tr. 130.

at sentencing, which was set to commence the very next morning. He did not elaborate on what type of information these witnesses could give the jury during sentencing or what type of witnesses would be helpful.

Less than twenty-four hours later on the morning of the sentencing hearing, Mr. Shaddock spent about ten minutes with Jeffrey's sister Cynthia (Lambert) Mizell preparing her to testify. He only asked her if she and Jeffrey had grown up together and what type of person Jeffrey was. For Mrs. Davis' testimony, Mr. Shaddock's only preparation was to tell her to "get up there and beg for her son's life."[21]

A total of four witnesses testified on Jeffrey's behalf at sentencing: Jeffrey's mother, his sister, former landlord Clayton Evans, and current Deputy Sheriff Kevin Fortenberry. Their testimonies were very brief and provided the jury with few details regarding Jeffrey's true nature. The entire sentencing-hearing testimony of the defense witnesses encompasses a total of fifteen pages of transcript. After hearing the evidence and arguments of counsel, the jury sentenced Jeffrey to death.

At the post-conviction evidentiary hearing, eleven mitigation witnesses testified on Jeffrey's behalf. With the exception of Jeffrey's mother and sister who testified at the original sentencing hearing, every witness testified that they had not been contacted by Mr. Shaddock prior to trial and that they would have testified on Jeffrey's behalf at trial had they been asked. Their testimonies painted quite a different picture than the bare-bones depiction the defense case gave to the jury at sentencing.

[21] H. Tr. 44.

Standard of Review

In an evidentiary hearing of a post-conviction case, the petitioner must show that he is entitled to relief by a preponderance of the evidence.[22]

After an evidentiary hearing in a post-conviction case, the Mississippi Supreme Court "will not disturb the trial court's factual findings unless they are found to be clearly erroneous."[23] For this Court to make that determination, it "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 inference which may be drawn therefrom and which favor the lower court's finding of fact . . . .' "[24] During that determination, the Court is to give the circuit judge deference as the "sole authority for determining credibility of the witnesses."[25] But if questions of law are raised, the Court must apply a de novo standard of review.[26]

To obtain such relief in an ineffective-assistance-of-counsel claim, using the test set forth by the United State Supreme Court in *Strickland v. Washington*,[27] adopted by the Mississippi Supreme Court in *Stringer v. State*,[28] and reiterated in *Ross v. State*,[29] the Court must examine if trial counsel's conduct "so undermined the proper functioning of the adversarial process that the

---

[22] Miss. Code Ann. § 99-39-23(1); See also *Doss v. State*, 19 So. 3d 690, 694 (Miss. 2009).
[23] *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); See also *Doss v. State*, 19 So. 3d at 694; *Loden v. State*, 971 So. 2d 548, 572-573 (Miss. 2007).
[24] *Mullins v. Ratcliff*, 515 So.2d 1183, 1189 (Miss.1987) (quoting *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss. 1983)); See also *Doss v. State*, 19 So. 3d at 694; *Loden v. State*, 971 So. 2d at 572-573.
[25] *Mullins v. Ratcliff*, 515 So.2d at 1189 (citing *Hall v. State ex rel. Waller*, 157 So.2d 781, 784 (Miss. 1963)); See also *Doss v. State*, 19 So. 3d at 694; *Loden v. State*, 971 So. 2d at 572-573.
[26] *Brown v. State*, 731 So.2d at 598 (citing *Bank of Mississippi v. Southern Mem'l Park, Inc.*, 677 So.2d at 191).
[27] 466 U.S. 668 (1984); See also *Doss v. State*, 19 So. 3d at 694.
[28] 454 So. 2d 468 (Miss. 1984).
[29] 954 So. 2d 968 (Miss. 2007).

trial cannot be relied on as having produced a just result."[30] The *Ross* Court went on to state that to meet the first prong of the test "defendant must demonstrate that his counsel's performance was deficient . . . ."[31] For the defendant to meet the second prong, trial counsel's deficient performance must prejudice the defendant.[32] The Court also laid out criteria to establish if these standards have been met:

> To establish deficient performance, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[33]

Furthermore, the evaluating court must not focus on one single element of the representation; instead, all of the circumstances must be taken into account to conclude if the representation was reasonable.[34] All of these circumstances "must be viewed in light of the nature and seriousness of the charges and the potential penalty."[35] No charge is more serious than capital murder, and no penalty more severe than death.

Summary of the Argument

The circuit court erred in failing to find Mr. Davis' trial counsel ineffective regarding the plea offered by the State. Mr. Davis' trial counsel Mr. Shaddock incorrectly communicated the

---

[30] *Id.* at 1003 (citing *Irby v. State*, 893 So. 2d 1042, 1049 (Miss. 2004)); See also *Strickland v. Washington*, 466 U.S. at 686.
[31] *Ross v. State*, 954 So. 2d at 1003. (internal citations omitted). See also *Davis v. State*, 897 So. 2d 960, 967 (Miss. 2004); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).
[32] *Id.*
[33] *Id.*
[34] *Id.* See also *Strickland v. Washington*, 466 U.S. at 688.
[35] *Id.* at 1004 (citing *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990) (*Washington v. Watkins*, 655 F.2d 1346, 1356-57 (5th Cir. 1981)).

State's plea offer to Mr. Davis. When Mr. Davis questioned Mr. Shaddock about the terms of the offer, Mr. Shaddock wrongly stated the portion of the sentence the law mandated he serve.

The circuit court also erred in finding that Mr. Shaddock's inadequate assistance was not deficient and that Mr. Davis was not prejudiced as a result. Mr. Shaddock failed to perform even the most cursory of investigations. His failure to present the plethora of available mitigation evidence at sentencing was not, and could not have been, a strategic decision. Instead, it was a result of sheer inaction.

Furthermore, the circuit court erred in refusing to allow all available mitigation evidence to be presented at the evidentiary hearing. Dr. Kramer's testimony was relevant and within the scope of the remand. The testimony also was necessary to dispel the false assumptions created when the State attempted to impeach several witnesses.

Law and Argument

1. Mr. Davis' trial counsel was ineffective in communicating the plea offered by the State. He failed to communicate the correct offer and improperly advised Mr. Davis on the law regarding the offer he had communicated.

At Mr. Davis's evidentiary hearing, the testimony clearly showed that prior to the trial, and/or on the morning of trial, the State made an offer of life imprisonment for murder plus ten or twenty years for armed robbery with the sentences to run consecutively. The evidence also shows that the specific offer made by the State was never properly conveyed to Mr. Davis.

After taking the stand at the hearing, Jeffrey Davis testified that he had requested his trial attorney Mr. Shaddock to pursue a plea bargain for a life sentence. He further testified that on the fourth visit, Mr. Shaddock told him that the State had made an offer of two consecutive

twenty-year sentences.[36] According to his testimony, when Mr. Davis asked specifically how much time he would have to serve on such a sentence, Mr. Shaddock informed him that he would have to serve every day of forty years.[37] Mr. Davis also testified that on the morning of trial he asked Mr. Shaddock if the State had made any other offers. Mr. Shaddock informed him that it was the same offer of two consecutive twenty-year sentences without the possibility of parole.[38]

During Mr. Shaddock's testimony at the evidentiary hearing, he said the State only made one offer—the offer made the morning of trial. He initially testified that the offer made the morning of trial was life plus twenty years.[39] When questioned regarding his sudden change of testimony, Mr. Shaddock admitted that his recollection had been refreshed by "Mr. White," the Assistant Attorney General representing the State.[40] On further cross-examination, Mr. Shaddock finally admitted that he did remember an offer being made the morning of trial, but he could not remember the specific terms of the offer.[41]

In his affidavit Judge Harkey, the District Attorney who prosecuted Mr. Davis, clearly and unambiguously states that he made a plea offer to Mr. Davis prior to trial.[42] Nevertheless, at the evidentiary hearing, he testified that he made a "tentative offer somewhat" prior to trial.[43] When questioned regarding his change in testimony, he testified that after having

> read the Supreme Court opinions in the case, especially the opinion of the Supreme Court on, [he supposes], Mr. Davis' motion for leave to file a post-conviction relief motion – petition, and the discussion of the plea negotiations that

---

[36] H. Tr. 76.
[37] H. Tr. 76.
[38] H. Tr. 83.
[39] H. Tr. 131-132.
[40] H. Tr. 131-132.
[41] H. Tr. 132-133.
[42] C.P. 91. See Affidavit of Dale Harkey.
[43] H. Tr. 158.

> the Supreme Court – [he] kind of regretted the imprecision of the language when it indicates that [he] tendered a plea offer. That's pretty imprecise.[44]

Judge Harkey admitted that he had the opportunity to review and make changes to the affidavit before signing it, but he made no changes to the affidavit before signing it.[45] Judge Harkey's affidavit was hardly imprecise. In it, he specifically declares:

> Prior to the trial thereof, I tendered to the Defendant, Jeffrey K. Davis, a plea offer whereby in exchange for a plea of guilty to Murder and Armed Robbery, the State of Mississippi would recommend a sentence of Life imprisonment for Murder, and ten (10) or (20) years imprisonment, consecutive, for Armed Robbery. This offer was not reduced to writing, but communicated to the attorney of record for Jeffrey K. Davis.[46]

Judge Harkey testified that he had no memory of whether a plea offer was made on the morning of trial. Although he confessed that such a plea offer was possible, he did not recall for certain whether an offer was tendered on the morning of trial or not.[47] Judge Harkey testified that he did not recall ever making a plea offer of two twenty-year terms, with the sentences to run consecutively.[48]

Even if the State's offer prior to trial was a "tentative offer," which Mr. Davis in no way concedes that it was, without question an offer made on the morning of trial. Both Mr. Shaddock and Mr. Davis agree that an offer was made by the State on the morning of trial. Judge Harkey admitted he has no recollection one way or the other regarding an offer made the morning of trial. Thus, the only point in question is the exact terms Mr. Shaddock actually conveyed to Mr. Davis on the morning of trial. Mr. Shaddock has no independent recollection of the terms of the State's offer or what exactly he conveyed to Mr. Davis on the morning of trial.[49] Mr. Davis

---

[44] H. Tr. 159.
[45] H. Tr. 160.
[46] C.P. 91.
[47] H. Tr. 58-59.
[48] H. Tr. 57.
[49] H. Tr. 132-133.

specifically recalls that Mr. Shaddock conveyed to him an offer of two consecutive twenty-year sentences, which he had been previously told would have to be served without the possibility of parole.[50] The State offered absolutely no evidence to the contrary.

In its order, the circuit court erroneously found that "Harkey's testimony made it clear that there was no true plea offer on the table."[51] Even taking this incorrect finding into account, the circuit court failed to address the testimony by Mr. Shaddock, and Mr. Davis that a plea was offered on the morning of trial. Mr. Davis noted this failure in his Motion to Alter or Amend Judgment. Yet the circuit court remained silent on this issue.

Numerous courts have examined whether the failure to disclose the existence of a plea offer by the prosecution or to provide complete and accurate information regarding the offer constitutes ineffective assistance of counsel. In determining if "the right to effective assistance of counsel blankets a defendant's decision to reject a plea offer, even if the defendant subsequently received a fair trial," [52] the court in *State v. Donald* relied on a plethora of cases that all concluded "counsel's failure to provide competent advice to a criminal defendant concerning a plea offer constitutes deficient performance."[53]

Absolutely without question, a trial attorney performs deficiently when he or she fails to disclose the State's offer to the defendant or "while disclosing the plea offer, provides the defendant with incomplete or misleading information with regard to the offer."[54] For a petitioner

---

[50] H. Tr. 177.
[51] Order Denying Post-Conviction Relief 2.
[52] *State v. Donald*, 10 P.3d 1193, 1198-99 n.4 (Ariz. Ct. App. 2000) (citing *U. S. v. Day*, 969 F.2d 39 (3d Cir. 1992); *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991); *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988) (vacated on other grounds sub nom.); *Tennessee v. Turner*, 492 U.S. 902 (1989); *In re Alvernaz*, 830 P.2d 747 (Cal. 1992); *Garcia v. State*, 736 So. 2d 89 (Fla. Dist. Ct. App. 1999)).
[53] *Id.*
[54] *Williams v. State*, 605 A.2d 103, 108-109 (Md. 1992) (citing *U.S. v. Rodriguez*, 929 F.2d 747, 752 (1st Cir. 1991); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986), *cert. denied*, 479 U.S. 937 (1986); *Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982); *Barentine v. U.S.*, 728 F. Supp. 1241, 1251 (W.D.N.C. 1990); *Williams v. Arn*, 654 F. Supp. 226, 235-236 (N.D. Ohio 1986); *Rasmussen v. State*, 658

to prove trial counsel's deficient performance during the plea negotiations, he must show that his counsel "either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea."[55]

Mr. Shaddock failed to convey the correct terms of the offer to Mr. Davis. Instead of the life-plus-ten-or-twenty-years offer made by the State, Mr. Shaddock conveyed to Mr. Davis an offer of two consecutive twenty-year terms without the possibility of parole—meaning he would have to serve every day of forty years. Under the law in existence at the time of Mr. Davis' trial, he would have been eligible for parole in twenty years had he received a sentence of life plus ten or twenty years.[56] According to the version of Mississippi Code Annotated § 47-7-3 in effect at the time of Mr. Davis' trial, he would have had to serve ten years on the murder charge and ten years on the armed robbery charge regardless of whether he was sentenced to ten or twenty years on the armed robbery charge.[57]

State v. Donald is strikingly similar to the case before the court. There, the court found that if Donald's allegations proved to be true that his attorney did not advise him that the State's plea offered the possibility of parole, then his attorney's representation was deficient.[58] In so doing, the *Donald* court found that in discussing a plea offer with a defendant, "The explanation must suffice to permit the defendant to make a reasonably informed decision whether to accept or reject a plea offer."[59] Here, Mr. Shaddock conveyed the wrong offer to Mr. Davis. Therefore,

---

S.W.2d 867, 868 (Ark. 1983); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978); *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983)).

[55] *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Bowers*, 966 P.2d 1023, 1026 (Ariz. Ct. App.1998)).

[56] See Miss. Code Ann. § 47-7-3 (Rev. 1992).

[57] *Id.*

[58] *State v. Donald*, 10 P.3d at 1200-01.

[59] *State v. Donald*, 10 P.3d at 1198 (citing *Hill v. Lockhart*, 474 U.S. at 56-7; *U.S. v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998)).

Shaddock's miscommunication could not possibly have permitted Mr. Davis to make "a reasonably informed decision whether to accept or reject" the plea offer.[60]

To satisfy the prejudice prong of the ineffective-assistance-of-counsel test, the petitioner "may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would have been imposed as a result of a plea."[61] An increase of the length and severity of sentence is not the only means by which a petitioner can show prejudice. He may also demonstrate to the court "that the risks inherent in proceeding to trial [were] so substantially outweighed [by] the benefits of the plea that proceeding to trial was an unreasonable risk."[62] In other words, Mr. Davis is not required to "prove with absolute certainty that he would have [pled] guilty, that the [circuit] court would have approved the plea arrangement, and that he therefore would have received a lesser sentence."[63] Indeed, the standard laid out in *Strickland* only requires petitioner to prove to a degree of " 'reasonable probability' " that effective assistance of counsel would have resulted in a different outcome.[64]

The federal courts have "pointed to the disparity between the plea offer and the potential sentence exposure as strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer."[65] Here, Mr. Davis was facing the death penalty. The disparity between the plea offer, the sentence that Mr. Davis was facing, and the

---

[60] *Id.*
[61] *State v. Donald*, 10 P.3d at 1201 (citing *U.S. v. Day*, 969 F.2d at 45; *In re Alvernaz*, 830 P.2d at 755-756)).
[62] *Id.* See also *Williams v. State*, 605 A.2d 103 (Md. Ct. App. 1992); *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978); *U.S. v. Day*, 969 F.2d 39 (3d Cir. 1992).
[63] *U.S. v. Day*, 969 F.2d at 45.
[64] *Id.* (citing *Strickland v. Washington*, 466 U.S. at 693-94; *Hill v. Lockhart*, 474 U.S. at 57).
[65] *Smith v. U.S.*, 348 F.3d 545, 552 (6th Cir. 2003) (citing *Griffin v. U.S.*, 330 F.3d 733 (6th Cir. 2003); *Magana v. Hofbauer*, 263 F.3d 542, 552-553 (6th Cir. 2001); *U. S. v. Day*, 969 F.2d 39 (3d Cir. 1992); *U.S. v. Gordon*, 156 F.3d 376, 377-381 (2d Cir. 1998).

sentence he ultimately received could not have been more chasmic. There is no more "substantially . . . harsher sentence" than death.[66]

Additionally, Mr. Davis testified that he would have taken the plea offer tendered by the State had the proper offer been conveyed to him.[67] The fact he turned down the two consecutive twenty-year sentences that Mr. Shaddock inaccurately conveyed to him is of no moment. Mr. Davis testified he was told he would have to serve forty years, day for day.[68] On cross-examination when the State erroneously stated that he would have had to serve thirty years under the offer made by the State, Mr. Davis testified he would have accepted even that offer.[69]

The United States Supreme Court in *Mabry v. Johnson* and *Santobello v. New York* "indicated that specific performance of a plea agreement is a constitutionally permissible remedy."[70] Multiple courts have recognized that granting the petitioner a fair retrial is *not* a proper remedy where the petitioner was deprived of effective assistance of counsel that resulted in a failure "to communicate a plea offer to defendant . . . ."[71] Instead of offering an incomplete remedy of a subsequent fair trial, the proper remedy that would render the petitioner whole would be to "[put] him in the position he was prior to the Sixth Amendment violation [which would] ordinarily . . . involve reinstating the original offer."[72] Ordering such a remedy would comply with the thrust of the policy in *Kimmelman v. Morrison*[73] where the United States Supreme Court held that "[t]he Constitution constrains our ability allocate as we see fit the cost

---

[66] *State v. Donald*, 10 P.3d at 1201 (citing *U.S. v. Day*, 969 F.2d at 45; *In re Alvernaz*, 830 P.2d at 755-56).
[67] H. Tr. 187-188. 194-195.
[68] H. Tr. 177.
[69] H. Tr. 194-195.
[70] *Mabry v. Johnson*, 467 U.S. 504, 510 n. 11 (1984). See also *State v. Donald*, 10 P.3d at 1203; *Santobello v. New York*, 404 U.S. 257, 263 (1971); *Ex parte Lemke* 13 S.W.3d 791, 797-798 (Tex. Crim. App. 2000); *Williams v. State*, 605 A.2d at 110-111.
[71] *Id.* (citing *Caruso v. Zelinsky*, 689 F.2d at 438; *Alvernaz v. Ratelle*, 831 F.Supp. 790, 797-799 (S.D. Cal. 1993); *Turner v. Tennessee*, 858 F.2d at 1208)).
[72] *Ex parte Lemke*, 13 S.W.3d at 797-798.
[73] 477 U.S. 365 (1986).

of ineffective assistance. The Sixth Amendment mandates that the State [or the government] bear the risk of constitutionally deficient counsel."[74]

Relying on *Kimmelman*, the court in *Lemke* held that under the rationale of the High Court in *Kimmelman* the best remedy to return the petitioner to whole would be to reinstate the plea bargain the State had offered.[75] The remedy here is to put Mr. Davis "back in the position he would have been in if the Sixth Amendment violation had not occurred."[76] Therefore, Mr. Davis should be allowed to accept the State's offer.

2. Mr. Davis' counsel was woefully inadequate in investigating, developing, and presenting the available mitigation evidence. He inquired about possible mitigation witnesses for the first time less than twenty-four hours before sentencing and did not adequately prepare the available witnesses for their testimony. Because of such glaring shortcomings, Mr. Davis was robbed of effective assistance of counsel, and the circuit erred in finding otherwise.

The Mississippi Supreme Court remanded this post-conviction cause in part to consider whether trial counsel was ineffective for failing to develop and present mitigating evidence.[77] The Court noted that the defense penalty testimony amounted to a mere fifteen pages.[78] Actually, the Court overstated the extent of the defense penalty phase because that portion of the transcript included a proffer of evidence the jury was not allowed to hear.[79]

---

[74] *Id.* at 379. See also *Ex patre Lemke*, 13 S.W.3d at 797-798; *U.S. v. Blaylock*, 20 F.3d 1458, 1468-1469 (9th Cir. 1994).
[75] *Id.* (footnotes omitted). See also *Williams v. State*, 605 A.2d at 110-11; *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986).
[76] *Ex parte Lemke* 13 S.W.3d at 797-798.
[77] *Davis v. State*, 743 So. 2d 326 (Miss. 1999).
[78] *Id.* at 339.
[79] T. Tr. 561-575.

The scant penalty phase had four witnesses: Clayton Evans, Cynthia (Lambert) Mizell, Kevin Fortenberry, and Christine Davis. Jeffrey Davis' former landlord Clayton Evans testified that Jeffrey "was real accommodating," that he did not have a reputation in the community for being violent, and that he believed Jeffrey had served in the military.[80] Jeffrey sister, Cynthia (Lambert) Mizell, testified that he had been in the military, had two children, worked construction, and was not inclined to violence.[81] Deputy Sheriff Kevin Fortenberry testified that Jeffrey did not have any prior felony convictions but did have two prior D.U.I. convictions.[82] Finally, Jeffrey's mother Christine Davis testified that Jeffrey was thirty-one years old, had never been convicted of a felony, and was not a violent person.[83] She then begged the jury for mercy for her son.[84]

In the Mississippi Supreme Court's opinion remanding this case, the Court stressed that counsel's failure to present a witness "must be based on a genuine effort to locate or evaluate the witness, and not on a mistaken legal notion or plain inaction."[85] In particular, the Court was troubled by Mr. Shaddock's failure to present "impressive" testimony from the sheriff of George County that Mr. Davis was made a trustee at the jail even though he faced a capital-murder trial.[86] In remanding this issue, this Court was particularly concerned with trial counsel's "preparation time and efforts" and the credibility of the affiants, including the sheriff of George County.[87]

---

[80] T. Tr. 562-65.
[81] T. Tr. 568-571.
[82] T. Tr. 571-573.
[83] T. Tr. 573-575.
[84] T. Tr. 44-45.
[85] *Id.* at 339.
[86] *Id.*
[87] *Id.* at 340.

To prevail on this ground for relief, Mr. Davis must show that his trial counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that at least one juror would have voted for a life sentence.[88] At the evidentiary hearing, counsel called Mr. Shaddock and eleven mitigation witnesses—including family, friends, and a former employee of the George County Sheriff's Department confirming Mr. Davis's trustee status.

a. Mr. Shaddock failed to investigate, develop, or present available mitigation evidence. This failure was plain inaction and not a strategic choice.

Counsel in a death-penalty case has an obligation to investigate his client's background. But a cursory investigation does not suffice; the investigation into the defendant's background must be thorough.[89] To establish the standards trial counsel must meet in representing a capital defendant, the United States Supreme Court has long looked to the ABA standards as "guides to determining what is reasonable."[90] Those guidelines provide that mitigation investigations "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[91] This Court has held that trial counsel must meet the minimum requirement "to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."[92] The decision not to interview witnesses "cannot be considered an effective strategic choice."[93]

---

[88] *Strickland v. Washington,* 466 U.S. 668 (1984); *Wiggins v. Smith,* 539 U.S. 510 (2003); *Lockett v. Anderson,* 230 F.3d 695 (5th Cir. 2000). See also *Davis v. State,* 743 So. 2d 326 (Miss. 1999).
[89] *Williams v. Taylor,* 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).
[90] *Wiggins v. Smith,* 539 U.S. 510, 535 (2003) (quoting *Strickland v. Washington,* 466 U.S. at 688).
[91] *Williams v. Taylor,* 529 U.S. 362 (2000) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)).
[92] *State v. Tokman,* 564 So. 2d 1339, 1342 (Miss. 1990) (citing *Ferguson v. State,* 507 So. 2d 94, 96 (Miss. 1987)). See also *Johns v. State,* 926 So. 2d 188, 196 (Miss. 2006) (counsel has "duty to interview

Mr. Shaddock's performance was not the result of a meaningful strategic decision because he failed to conduct the constitutionally necessary investigation. All of the evidentiary-hearing witnesses, who were not called at the penalty phase of Mr. Davis' trial, testified at the evidentiary hearing that Mr. Shaddock had not contacted them prior to trial. Furthermore, all of the witnesses said that they would have been willing to speak with him and to testify on Jeffrey's behalf had they been asked.[94]

Mr. Shaddock's interviews with the few witnesses he spoke to were superficial at best. Jeffrey's mother Christine Davis testified that she was not properly prepared to testify on Jeffrey's behalf at sentencing. Mr. Shaddock only spent about an hour with Mrs. Davis the day before trial.[95] Jeffrey's sister Cynthia (Lambert) Mizell testified that Mr. Shaddock spent about ten minutes with her the morning of the sentencing hearing preparing her to testify.[96] She testified that he asked only "did [she and Jeffrey] grow up together and what kind of person [Jeffrey] was."[97] Mr. Shaddock did not ask Jeffrey, his mother, or his sister if there were any other witnesses who could testify on Jeffrey's behalf until the day before the sentencing hearing, mere hours before the witnesses would testify. Nor did Mr. Shaddock explain what type of information the witnesses could give the jury during sentencing.[98] Mr. Shaddock's sole instruction to Christine Davis before testifying was to "get up there and beg for [her] son's life."[99] Jeffrey's mother and sister both gave limited testimony, not because they were trying to

---

potential witnesses and to make independent investigation of the facts and circumstances of the case") (emphasis in original).

[93] *Johns v. State*, 926 So. 2d 188, 196 (Miss. 2006).

[94] See generally H. Tr. 1-114, Feb. 24, 2010.

[95] H. Tr. 40.

[96] H. Tr. 22.

[97] H. Tr. 22.

[98] H. Tr. 22-23; 41; 44-45.

[99] H. Tr. 44.

keep any bad information from the jury,[100] but because they had no guidance as to what testimony should be given.

Mr. Shaddock's fee petition corroborates the testimony of the mitigation witnesses who testified at the hearing. Mr. Shaddock recorded in his fee petition that he visited with Jeffrey a total of five times before trial and only twice after February 5, 1992.[101] One of those visits was in the Greene County Jail the day before the capital trial began on May 19, 1992.[102] In fact, Mr. Shaddock made no preparation for the penalty phase prior to February 5, 1992—only twenty days before the trial was scheduled to begin—because he did not know for certain whether the State was going to seek the death penalty.[103] Although the State sought a continuance on February 18, 1992 because of the Mississippi Crime Lab had not completed testing the evidence and the Court continued the case until two months later, Mr. Shaddock did not take this addition time to investigate Mr. Davis' case or develop a relationship with him.

Because of his failure to conduct more than the most cursory of investigations, Mr. Shaddock barely knew his own client. Mr. Shaddock was under the mistaken notion that Jeffrey "had no close friends, and he didn't – [to Mr. Shaddock's] best recollection is he didn't – he slept there when he was not working, but didn't live here as such. He didn't live here in the community as such. [Mr. Shaddock thinks] he stayed here."[104] Nothing could have been farther from the truth. Jeffrey lived in the George County/Greene County area his entire life except for the period of time he was in the military.[105] Additionally, Mr. Shaddock testified that he did not

---

[100] H. Tr. 23; 45.
[101] H. Tr. 123.
[102] H. Tr. 124, 135.
[103] H. Tr. 125; Plaintiff's Exhibit 4.
[104] H. Tr. 137.
[105] H. Tr. 171-172.

undertake any independent efforts to find witnesses who could testify on Jeffrey's behalf or attempt to obtain military, school, or medical records.[106]

Mr. Shaddock certainly knew better than to delay and even forego a comprehensive mitigation investigation. In materials he prepared on defending death-penalty cases for a seminar sponsored by the Public Defender's Association, Mr. Shaddock wrote, "Do a social history early. This is most important. Start from birth and go through the day of your interview. Past school, military, medical records, may prove most useful. Post traumatic syndrome – stress disorder is a biggy."[107] On the witness stand, Mr. Shaddock confessed that he failed to do *any* of these things in preparation for Mr. Davis' trial.[108] Mr. Shaddock testified that this preparation is important "so you have the information at hand, and you don't have to go out at the last minute and run it down."[109]

This type of performance has often been found to be deficient. For example, the United States Supreme Court in *Porter v. McCollum*[110] found defense counsel ineffective when the attorney had only one short meeting with his client regarding the penalty phase and failed to obtain key records. Like *Porter*, Mr. Davis's trial counsel failed to take even the first step to request or obtain records or interview potential witnesses.[111] As the Court found in *Porter*, here, Mr. Shaddock's failure to investigate does not "reflect reasonable professional judgment."[112]

Similarly, in *Williams v. Taylor*,[113] the United States Supreme Court found an attorney's conduct deficient where counsel did not begin to prepare for sentencing until the week before the

---

[106] H. Tr. 142. See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003).
[107] H. Tr. 141.
[108] H. Tr. 142.
[109] H. Tr. 142.
[110] 130 S. Ct. 447 (2009).
[111] *Id.* at 453.
[112] *Id.*
[113] 529 U.S. 362 (2000).

trial.[114] The Court specifically pointed out that "[c]ounsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program . . . ."[115] The present case is even more egregious than in *Williams*. Here, Mr. Shaddock did not begin preparing for the sentencing trial until the day before trial when he met with Jeffrey's mother for the first time.[116] Mr. Shaddock failed even to interview Betty Cochran who was introduced to him at Mrs. Davis' home as a long-time friend who had known Jeffrey all of his life.[117] [118] Additionally, Mr. Shaddock failed to inquire about possible mitigation witnesses until less than twenty-four hours before the sentencing hearing began.

At the evidentiary hearing, numerous witnesses testified on Jeffrey's behalf who were never contacted by Mr. Shaddock to testify at the trial. Their testimony painted a completely different picture of the Jeffrey Davis that the jury heard about at trial. This lack of preparation has previously been contemplated by this Court. In *Leatherwood v. State*,[119] the Mississippi Supreme Court stated:

> In view of the importance of mitigating evidence in the sentencing phase it is difficult to understand why favorable, willing witnesses who could be discovered by questioning the defendant would not be called. If it were within the financial ability of the defendant to arrange for the appearance of a representative group of

---

[114] *Id.* at 395.
[115] *Id.* at 396.
[116] H. Tr. 40.
[117] H. Tr. 41; 45-46; 64.
[118] There are a number of similar cases in which trial counsel was found to have performed deficiently. See, *e.g., Hamilton v. Ayers,* 583 F.3d 1100 (9th Cir. 2009) (counsel ineffective for interviewing at most five witnesses shortly before jury selection and for failing to interview defendant's sister about his troubled background); *Mason v. Mitchell,* 543 F.3d 766 (6th Cir. 2008) (counsel found deficient where he failed to contact siblings and other close relatives); *Poindexter v. Mitchell,* 454 F.3d 564 (6th Cir. 2006) (counsel deficient for calling only four witnesses besides the defendant and eliciting only cursory testimony and for failing to uncover history of abuse in the family); *Marshall v. Cathel,* 428 F.3d 452 (3rd Cir. 2005) (counsel ineffective for failing to discover and interview at least a dozen witnesses); *Ainsworth v. Woodford,* 268 F.3d 868 (9th Cir. 2001) (counsel ineffective for failing to introduce evidence of positive adjustment to prison life and for cursory examination of witnesses).
[119] 473 So. 2d 964 (Miss. 1985).

them, this would have a strong bearing on whether trial counsel provided effective assistance.[120]

Every witness who testified at the evidentiary hearing that they had not been contacted by Mr. Shaddock stated without question that he or she would have been willing to come and testify on Jeffrey's behalf at trial had they been asked.[121] This evidence is a "strong bearing" to prove Mr. Shaddock's performance was clearly deficient in this case and meets the first prong of the *Strickland* test.

In its order, the circuit court "[could not] say that counsel's performance was deficient . . . The Court finds that the evidence [found] to overcome the presumption that counsel at trial was competent."[122] Besides this conclusory finding, the circuit court failed to address Mr. Shaddock's complete lack of investigation. The Mississippi Supreme Court was specifically concerned with Mr. Shaddock's preparation time and efforts in the case. Yet the circuit court wholly declined to address this Court's concerns—even though a wealth of evidence regarding Mr. Shaddock's lack of preparation was presented at the evidentiary hearing.

The circuit court also did not mention Mr. Shaddock's failure to inquire about mitigation witnesses until twenty-four hours before sentencing, failure to interview Betty Cochran life-long friend of the family who was introduced to Mr. Shaddock at Mrs. Davis' home, and failure to visit Jeffrey more than twice after the State informed Mr. Shaddock that it would be seeking the death penalty.

Mr. Shaddock did not conduct a proper investigation. As stated above, without a conducting a proper investigation, counsel cannot make a strategic choice regarding what

---

[120] *Id.* at 970.
[121] See generally H. Tr. 1-114, Feb. 24, 2010.
[122] Order Denying Post-Conviction Relief 4.

evidence should be put on at trial. The circuit court clearly erred in finding that trial counsel's performance was not deficient.

b. Mr. Davis was prejudiced by his counsel's ineffective assistance. Had the jury been presented the available mitigation evidence, there is a reasonable probability that at least one juror would not have voted for a death sentence.

To satisfy the showing of prejudice, a petitioner need only show that there is a reasonable probability that at least one juror would not have voted for a death sentence.[123] The wealth of evidence produced at the evidentiary hearing about Mr. Davis's troubled family background and his positive characteristics satisfies this requirement—especially when contrasted with the Mr. Davis that the State depicted at trial and that Mr. Shaddock failed to rebut.

During the closing arguments at trial, the State portrayed Jeffrey Davis as a privileged man with an enviable life. The State referred to Jeffrey as "young" and "handsome" with "a family that loves him." After romanticizing Jeffery and his charmed life, the State then asked:

> Where would the mitigation be on that? The guy that ain't never had a chance, or the one who had every chance in the world and knew better. I kind of lean towards this guy who never had a chance. Give him a break. Jeffrey Davis doesn't deserve a break.[124]

At the evidentiary hearing, quite a different narrative of Jeffrey Davis emerged from the one that the jury heard at trial. Jeffrey grew up in a tumultuous household with an abusive, alcoholic father where he had to intervene physically between his mother and father and was forced to call law enforcement on his father.[125] In its opinion, the circuit court specifically noted that although evidence was presented that Jeffrey lived in a household where his father was

---

[123] See *Wiggins v. Smith,* 539 U.S. 510 (2003); *Lockett v. Anderson,* 230 F.3d 695 (5th Cir. 2000).
[124] T. Tr. 612-613.
[125] H. Tr. 16-19.

abusive to his mother, the evidence failed to show that Jeffrey was ever on the receiving end of his father's physical abuse. This finding is simply contrary to the evidence. Jeffrey's sister Cynthia (Lambert) Mizell recounted a specific instance of violence in the home:

> [Our father] came home and was in one of his rages, and he was 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 him, and then he kind of 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 underneath a tree. He had to stay out there. And we waited until [our father] went to sleep so that we could bring him back inside.[126]

Jeffrey was clearly subject to abuse at the hands of his father. He was "pushed" off his father when he attempted to intervene. Furthermore, he was refused entry into his home and forced to sleep outside. And this testimony was only one account of such violence. When asked if this type of occurrence was unusual in the home, Cynthia (Lambert) Mizell said, "It happened regularly, at least every weekend."[127]

In *Sears v. Upton*,[128] the United States Supreme Court contemplated a case were the prosecutor, like the State in this case, told the jury, "[w]e don't have a deprived child from an inner city; a person who[m] society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected ever opportunity that was afforded him."[129] At Sears' post-conviction evidentiary hearing, new evidence emerged demonstrating "that Sears was far from 'privileged in every way.' "[130] Although Sears' had material comforts, the Court noted the abuse that he had suffered: "His parents had a physically abusive relationship and

---

[126] H. Tr. 17.
[127] H. Tr. 17.
[128] 130 S. Ct. 3259 (2010).
[129] *Id.* at 3262.
[130] *Id.*

divorced when Sears was young; he suffered sexual abuse at the hands of an adolescent male cousin; his mother's 'favorite word for referring to her sons was 'little mother fuckers;' and his father was verbally abusive."[131]

As the Court did in *Sears*, the circuit court was required to look at the totality of the mitigation evidence developed at Mr. Davis' evidentiary hearing juxtaposed against the "privileged" person presented at sentencing to determine if counsel failed to investigate available mitigation evidence. Instead, the circuit court brushed off this compelling evidence and found that this evidence did not overcome the presumption of competence afforded to Mr. Shaddock without ever evaluating Mr. Shaddock's clearly deficient performance. And with the same abbreviated assessment, the circuit court also found that Mr. Shaddock's failure to present this compelling evidence to the jury did not prejudice Jeffrey Davis.

Despite such a volatile upbringing, Jeffrey never showed a propensity for violence. In fact, Donnie Parnell testified that Jeffrey "was always calming [him] down."[132] Jeffrey's mother Christine Davis recalled an incident where Jeffrey was hit by another man in her presence but he did not retaliate.[133] Likewise, Mike Fryfogel testified that he would have to intervene and protect Jeffrey because Jeffrey did not even want to fight to defend himself.[134] Several witnesses testified that because of Jeffrey's gentle nature, the crime for which he was convicted was completely out of character for him.[135]

Additional testimony was given that Jeffrey served in the military until he requested and received a hardship honorable discharge. He left the service in the hope of working on his marriage. But when he returned home, he found that his wife was pregnant with another man's

---

[131] *Id.* (internal citations omitted).
[132] H. Tr. 88.
[133] H. Tr. 39.
[134] H. Tr. 103.
[135] See generally H. Tr. 1-114, Feb. 24, 2010.

child.[136] Even though he and his wife divorced, Jeffrey equally cared for this daughter as for his biological daughter and even gave her his last name.[137]

Mr. Davis also presented evidence that this Court has previously found most "impressive," namely his selection as trustee.[138] Linda Davis, a former employee of the George County Jail where Jeffrey was a trustee, testified that Jeffrey "went around doing errands and all for the jail during the day."[139] She further testified that she never had any trouble out of him while he was there and that he was "a very nice and polite fellow."[140] While housed at the George County Jail, Jeffrey was outside the confines of the jail unescorted in civilian clothes.[141] In fact, when he changed the oil in the patrol cars, he was allowed to drive them around the corner unescorted to get to the facility where that task was done.[142] Also, he and his family were allowed to take family pictures in the courthouse in front of the Christmas tree.[143]

The circuit court's opinion is completely void of any mention of the testimony regarding Jeffrey's trustee status, an issue which this Court specifically addressed in its opinion remanding the case for an evidentiary hearing. The fact that the George County Sheriff made a trustee even though he was charged with capital murder is compelling, and undoubtedly would have been very influential to a jury in light of how Jeffrey was otherwise portrayed by the State at trial.

Moreover, at the evidentiary hearing, counsel elicited testimony about Jeffrey's involvement in his church and community. Mark Pitts—a deacon in Pineview Missionary Baptist Church in Agricola, Mississippi, and life-long friend of Jeffrey's—testified that Jeffrey

---

[136] H. Tr. 24.
[137] H. Tr. 24.
[138] H. Tr. 8.
[139] H. Tr. 8.
[140] H. Tr. 9.
[141] H. Tr. 9-10.
[142] H. Tr. 174.
[143] H. Tr. 40.

made a profession of faith and asked the Lord to save him.[144] He further testified that Jeffrey was active in the church, helped with youth programs put on by the church, and sang in the choir.[145] Wayne Christian, a former member of the George County Board of Supervisors for twelve years, testified regarding Jeffrey's profession of faith and his involvement with the church.[146] Also, several people testified that Jeffrey volunteered to help out other people without asking for anything in return.[147] Jeffrey had access to the keys to the homes of at least two other people and never abused the privilege.[148] Jeffrey was regarded as a hard worker and usually had a job of some sort.[149]

Jeffrey Davis had no prior criminal record except driving under the influence. After he developed a severe addiction, he committed this crime, which was totally out of character for him. Shortly after he was arrested and removed from drugs, even the George County Sheriff Eugene Howell realized that Jeffrey was again trustworthy, helpful, and nonviolent.

Had this evidence of his trustee status, church involvement, and trustworthy nature, taken as a whole, been presented at trial, it would have undoubtedly influenced the jury's assessment of Jeffrey Davis' culpability, and, "the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing."[150] Such is the case here, and the remedy in this instance is to grant a new sentencing trial.[151]

In its opinion, the circuit court found the compelling testimony of these mitigation witnesses to be "repetitive," discounting the testimonies to the point of irrelevance. However, in

---

[144] H. Tr. 75.
[145] H. Tr. 76-77.
[146] H. Tr. 85-86.
[147] H. Tr. 21; 61; 91; 93; 108.
[148] H. Tr. 61; 93-94.
[149] H. Tr. 99; 108; 115.
[150] *Rompilla v. Beard*, 545 U.S. at 393 (quoting *Strickland v. Washington*, 466 U.S. at 694); See also *Doss v. State*, 19 So. 3d at 708; *Wiggins v. Smith*, 539 U.S. at 535; *Williams v. Taylor*, 529 U.S. at 395).
[151] See also *Leatherwood v. State*, 473 So. 2d 964 (Miss. 1985).

its opinion the Mississippi Supreme Court requested the development of the very information the circuit court found irrelevant. Specifically, this Court was concerned with the brevity of Mrs. Davis' and Cynthia (Lambert) Mizell' testimony at sentencing. At the evidentiary hearing, both testified that the reason for their limited testimonies at sentencing was a direct result of Mr. Shaddock's failure to prepare or inform them about what type of information they were allowed to convey to the jury, and not because they were attempting to hide unfavorable evidence from the jury. The circuit court's opinion failed to address this issue entirely. The order also failed to address the testimony regarding Jeffrey's trustee status, which was another specific point of interest in the Mississippi Supreme Court's remand of this case.

The circuit court incorrectly found that much of the testimony presented at the evidentiary hearing was repetitive and offered the same opinion as was presented at sentencing. But that finding is factually incorrect. At trial, the evidence presented at sentencing included testimony that Jeffrey was not inclined to violence, did not have a reputation for violence in the community, had served in the military, had two children, was thirty-one years old, and was "real accommodating." Nothing regarding his trustee status, his involvement in his church, his trustworthiness, or the fact that the crime was completely out of character for him was brought out at sentencing—all information that was specifically given by the witnesses at the evidentiary hearing. This testimony was anything but repetitive. Each witness call on Mr. Davis' behalf added another layer to the testimony previously given. Because each witness' testimony built on the information given by the prior witnesses, a much more complete account of who Jeffrey Davis was prior to the crime was presented to the court. The circuit court's findings regarding the repetitive nature of these testimonies are clearly erroneous.

The circuit court also incorrectly intermingles the two prongs of the *Strickland* test. Without addressing Mr. Shaddock's failure to perform even a cursory investigation, the circuit court concluded that deficient performance did not exist. Yet in the very next sentence the circuit court speaks of the "repetitive" testimony and the "adverse effect" that testimony may have had—a discussion that falls under the prejudice prong of the ineffective-assistance-of-counsel test. The circuit court's findings of fact are clearly erroneous, and it erred in finding that Jeffrey was not prejudiced by Shaddock's deficient performance.

Mr. Davis's trial counsel was deficient in his performance, and Mr. Davis was clearly prejudiced by this deficient performance. Because of his trial counsel's constitutionally ineffective assistance, Jeffrey Davis is entitled to a new sentencing hearing.

c. Mr. Davis' Eighth and Fourteenth Amendment rights were violated by the improper restriction of presentable mitigation evidence.

At the evidentiary hearing, Mr. Davis was restricted from putting on all of the mitigating evidence that was available at the time of his sentencing hearing. Mr. Davis' prior post-conviction counsel Mr. Ross Parker Simons had sought funding for an expert psychologist and toxicologist.[152] The circuit court denied funding, and Mr. Simons filed a Petition for Interlocutory Appeal which was denied by this Court.[153] Mr. Simons' then filed a Motion to Expand Record in a Manner That Will Provide for Meaningful Review of the Consequences of Trial Counsel's Failure to Investigate Mitigation Witnesses, Which is the Subject of this Court's Ineffective Assistance of Counsel Remand.[154] A Panel of this Court denied the motion. Thus, Mr. Davis was forced to present the mitigating evidence within the narrow confines of this

[152] C.P. 131-33.
[153] See Mississippi Supreme Court Case No. 2003-M-00472-SCT.
[154] *Id.*

Court's opinion remanding the case for an evidentiary hearing and the circuit court's erroneously-narrow interpretation of that remand.

The United States Supreme Court set out in *Lockett v. Ohio*[155] that the Eighth and Fourteenth Amendments of the federal constitution require a sentencer to be able to consider *any* aspect of the defendant's character. The Court held that it was imperative that a sentencer be free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation . . . ."[156]

Furman v. Georgia[157] and its progeny, including *Lockett*, established the United States Supreme Court's refusal to allow death sentences to be "freakishly"[158] imposed. Furthermore, if such a weighty sentence could not "be imposed fairly, and with reasonable consistency,"[159] then it should not be imposed at all. The Court in *Eddings* reiterated the importance of consistency when it stated, "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."[160]

In *Woodson v. North Carolina*,[161] the Court found that the sentencing phase of a capital trial must allow for the trier to fact to contemplate the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[162] To show the "character and record of the individual," a full spectrum of mitigating evidence must be allowed to be presented to prevent

---

[155] 438 U.S. 586 (1978).
[156] *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. at 605).
[157] 408 U.S. 238 (1972).
[158] *Id.* at 293.
[159] *Eddings v. Oklahoma*, 455 U.S. at 112.
[160] *Id.*
[161] 428 U.S. 280 (1976).
[162] *Id.* at 304. See also *Lockett v. Ohio*, 438 U.S. at 601.

such a "false consistency" that the *Eddings* Court cautioned against. By limiting the mitigation testimony in Mr. Davis' case, a recipe for "false consistency" was created. The circuit court noted specifically that the witnesses called failed to testify that they ever knew Jeffrey Davis to use drugs. Had Mr. Davis been permitted to put on the psychologist and toxicologist that Mr. Simons had requested and had the circuit court allowed addiction expert Dr. Kramer to testify, a full depiction of Mr. Davis would have been given, instead of the one riddled with "false consistenc[ies]" that was presented at the evidentiary hearing.

Recently, in *Fulgham v. State*,[163] this Court reversed and remanded for a new sentencing hearing on the grounds that an expert in social work was not allowed to testify. The Court, noting the life and death stakes in a capital murder trial, held that "[a] defendant is permitted to introduce virtually any relevant and reliable evidence touching upon the defendant's background and character, or the crime itself, which is offered as a basis to persuade a jury to return a sentence of less than death."[164] The Court "caution[ed] prosecutors and trial judges about limiting mitigation evidence offered by a defendant when it is presented fairly, and is relevant to the defendant's character, background, or the circumstances surrounding the crime."[165]

When a post-conviction case is remanded for an evidentiary hearing to determine whether trial counsel was ineffective in failing to investigate and put on mitigating evidence at sentencing, the petitioner bears the burden of proving trial counsel's performance was both deficient and that he or she suffered prejudice as a result of trial counsel's deficiency.[166] Moreover, this Court has held, "'[S]trategic choices made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of

---

[163] 46 So. 3d 315 (Miss. 2010).
[164] *Id.* at 336.
[165] *Id.*
[166] *Doss v. State*, 19 So. 3d at 694 (quoting *Strickland v. Washington,* 466 U.S. at 687).

mitigating evidence.' . . . 'It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover.'" [167] Thus, it is imperative that a petitioner not be restricted in presenting evidence regarding all of the mitigating evidence that was available to trial counsel to present at sentencing.

As a result of the restrictions placed on Mr. Davis in presenting *all* of the mitigating evidence available for his trial counsel to put on at sentencing, Mr. Davis has been denied his right to due process under the United States Constitution.[168] The type of tourniquet that restricts relevant and available mitigation evidence from being presented does not matter. Under the Courts decisions, "it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett* v. *Ohio*; *Hitchcock* v. *Dugger*; by the sentencing court, *Eddings* v. *Oklahoma*; or by an evidentiary ruling, *Skipper* v. *South Carolina.*"[169] The holdings of these cases are no less applicable to a post-conviction case remanded for an evidentiary hearing than they are in a trial case.

Thus, should the Court find that Mr. Davis has met his burden of proving his trial counsel's performance was deficient but is not satisfied that he has met his burden of proving his was prejudiced by his trial counsel's deficient performance, then the Court should remand Mr. Davis' case back to the circuit court where he can be allowed to develop and put on all evidence of prejudice stemming from his trial counsel's deficient performance.

---

[167] *Ross v. State*, 954 So.2d at 1004 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 696-697 (6th Cir. 2006)); See also *Doss v. State*, 19 So. 3d at 696.

[168] See *Panetti v. Quarterman*, 549 U.S. 1106 (2007); *Rivera v. Quarterman,* 505 F.3d 349 (5th Cir. 2007).

[169] *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (internal citations omitted).

3. The circuit court erred in refusing to allow Dr. Kramer's testimony because the testimony he would have given would have been relevant, within the scope of the remand, and necessary to dispel false assumptions created by the State's attempted impeachment of witnesses.

At the evidentiary hearing, Mr. Davis sought to have James J. Kramer, M.D. testify.[170] Dr. Kramer, who is a board-certified M.D. in Addiction Medicine and Internal Medicine, would have listened to Mr. Davis' testimony regarding his prior drug use, and then testified how drug use, such as that of Mr. Davis', would relate or not to a person's character.[171] The circuit court excluded Dr. Kramer from testifying.

Dr. Kramer's testimony would have fallen well within the scope of the remand. This Court remanded seeking a determination of Mr. Shaddock's ineffective assistance of counsel specifically as to Jeffrey Davis' character. Because the circuit court erroneously constricted the scope of the remand even further, Mr. Davis was prevented from being able to show this Court all available mitigation evidence regarding his character or even to rebut the assertions by the State that Jeffrey's drug use equated to bad character. Indeed, the circuit court, in its opinion, repeatedly cited to Jeffrey's drug use and specifically discounted the additional mitigation witness' testimonies in part because they did not know that Jeffrey had used drugs.

Had Dr. Kramer been allowed to testify, he would have shown that the American Medical Association has classified addiction as a disease; that someone cannot choose to be addicted to something; that genetics play a part in addiction; that addiction affects part of a person's brain

---

[170] H. Tr. 168. See Plaintiff Exhibit 5 (marked for identification only), C.V. of James J. Kramer, M.D.
[171] Dr. Kramer was not a toxicologist and was not going to testify on cocaine psychosis or any other issue which had previously been ruled on. H. Tr. 169-170.

which, in turn affects a person's behavior; that a person tends to mask his drug use; and that the fact a person has used drugs is not a matter of character—good or bad.[172]

After Mr. Davis attempted to call Dr. Kramer to testify, the State objected to relevance of the testimony. But Dr. Kramer's testimony meets the relevance bar delineated by the United States Supreme Court in *Smith v. Texas.*[173] There, the High Court held:

> The jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by " ' "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." ' " [174]

Dr. Kramer's testimony easily overcomes such a low threshold. This testimony would have clarified why the witnesses were unaware of Jeffrey Davis' drug use. Moreover, the testimony would have spoken to the neutrality of drug use and character—specifically repudiating the implications by District Attorney Harkey at trial and Assistant Attorney General White at the evidentiary hearing that drug use is a sign of bad character.

In excluding Dr. Kramer from testifying, the court found, "No witnesses on Cross-Examination said he or she would change their minds with respect to the Cross-Examination questions, not only as to the supposed addiction, drug use, but none of them would say they would change their mind, even after being told the facts of the case."[175] The Court refused to allow Dr. Kramer to testify, resting on its opinion that the testimony would not be "relevant under the rulings of the Supreme Court for those four issues."[176]

---

[172] H. Tr. 61-68.
[173] 543 U.S. 37 (2004).
[174] *Id.* at 43-44 (quoting *Tennard v. Dretke*, 542 U.S. 274, 284-285 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)).
[175] H. Tr. 65.
[176] H. Tr. 65.

However, in the order denying relief, the circuit court stated, "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."[177] One of the reasons that counsel attempted to call Dr. Kramer to testify was to rebut the State's attempted impeachment of the character witnesses on the grounds that they did not really know Mr. Davis because they never knew he used drugs. Dr. Kramer's testimony would have shown the falsity of that assertion by demonstrating, through reliable expert testimony, that people who use drugs tend to mask or hide their drug use. Because of that veil of secrecy, it is not unusual for people who are close to an addict to be utterly unaware of his drug use.

On cross-examination, the State also asked several of Mr. Davis' character witnesses if the fact that they knew he used drugs would have changed their opinion regarding him.[178] This line of questioning was designed for one purpose and one purpose only—to repeatedly assert that because Mr. Davis has used drugs in the past, he is not of good character. Dr. Kramer's testimony would have refuted this unfounded assertion by the State by showing that drug use is not a matter of character and that people who use drugs are not of good or bad character because of their drug use.

This Court has previously spoken to a lower court's allowance of a rebuttal witnesses in order to rehabilitate other witnesses. In *Cooper Tire and Rubber Co. v. Tuckier*,[179] the Mississippi Supreme Court held that the plaintiff was entitled to rehabilitate their expert witness through the use of evidence, which had been previously excluded by the trial court.[180] In so holding the Court found Cooper had called into question the credibility of the plaintiffs' expert

[177] Order Denying Post-Conviction Relief 4.
[178] H. Tr. 49-50; 58-59; 70; 72-73; 77; 85; 91-92; 98; 103; 111.
[179] 826 So. 2d 679 (Miss. 2002).
[180] *Id.* at 689.

witness.[181] And because of that questioning, the plaintiffs were allowed to elicit testimony to rehabilitate their expert witness with relevant evidence—regardless of previous rulings on pretrial motions.[182]

Just as in *Cooper Tire*, Mr. Davis was entitled to negate the State's attempted impeachment of his character witnesses by calling Dr. Kramer. Dr. Kramer's testimony would have shown that although the witnesses may not have been aware of Mr. Davis' drug use, it did not mean that they did not know him well or that he was not of good character.

Moreover, the circuit court's ruling was based on an erroneous finding of fact. The circuit court stated at the hearing that no witness had said if he had known of Mr. Davis' drug use, he would have changed his mind.[183] But that finding is incorrect. In his testimony, Daryl Cooley testified "it probably would" change his opinion had he known that Mr. Davis was addicted to drugs.[184] Dr. Kramer's testimony therefore was indeed relevant, and Mr. Davis was entitled to rebut the State's accusations on cross-examination that a person who uses drugs is not of good character.[185]

Furthermore, at trial the State repeatedly commented on the fact that Jeffery Davis "voluntarily ingested these drugs, put them in his veins, and turned himself into a cold-blooded cowardly murderer."[186] The State repeatedly used the voluntariness of Jeffrey's drug use to infer that if Jeffrey had been of better character, he would not have used drugs. Dr. Kramer's testimony would have directly rebutted this unsupported assertion that one voluntarily chooses to become a drug addict and because of such, he is weak in character.

---

[181] *Id.*
[182] *Id.*
[183] H. Tr. 65.
[184] H. Tr. 97.
[185] *Cooper Tire and Rubber Co. v. Tuckier*, 826 So. 2d 679 (Miss. 2002).
[186] T. Tr. 609-610.

The circuit court erred in prohibiting Dr. Kramer from testifying. Should this Court not grant relief to Mr. Davis on the other issues raised, it should remand to the circuit court to allow the full development of Dr. Kramer's testimony.

Conclusion

Mr. Shaddock's representation of Jeffrey Keller Davis fell well below the constitutionally-mandated standard. Mr. Shaddock relayed an incorrect plea offer from the State. When Jeffrey Davis asked questions about that plea, Mr. Shaddock improperly advised him of the law. Mr. Shaddock failed to develop a relationship with his client; failed to inquire about his life; failed to request medical, school, or military records; failed to visit his client more than twice after learning the State was seeking the death penalty; failed to inquire about possible mitigation witnesses until less twenty-four hours before sentencing; and failed adequately prepare the available witnesses for their testimony. Clearly, Mr. Shaddock's performance was deficient. Because deficient performance, the jury was never presented with the available mitigation evidence including Jeffrey Davis' status as a trustee at the George County Jail, his involvement with his church, and his trustworthy nature. Had this compelling evidence been presented to the jury at sentencing, one juror may have not voted for a sentence of death.

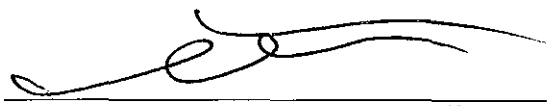
Dr. Kramer should have been allowed to testify at the evidentiary hearing. His testimony was relevant and within the scope of the remand. This testimony was also necessary to dispel the false assumptions created by the State when it attempted to impeach several witnesses.

As a result, the circuit court erred in failing to find that Mr. Shaddock improperly advised Mr. Davis regarding the plea offer. The circuit court also erred in failing to find that Mr.

Shaddock's performance was deficient and because of that deficient performance, Mr. Davis was prejudiced. Furthermore, the circuit court erred in refusing to allow Dr. Kramer to testify.

For these reasons, this Court should allow Mr. Davis to accept the plea offered by the State. In the alternative, this Court should find that Mr. Davis' counsel was ineffective and remand this case for a new sentencing hearing. However, if this Court is not satisfied with the development of evidence used to show prejudice, Mr. Davis asks this Court to remand his case to the circuit court in order to fully present all available mitigation.

RESPECTFULLY SUBMITTED, this the 6th day of April, 2011.



Glenn S. Swartzfager (MSB#[redacted]

Of Counsel:

Glenn S. Swartzfager (MSB#[redacted]
Louwlynn Vanzetta Williams (MSB#[redacted]
Amy Strickland (MSB#[redacted]
Office of Capital Post-Conviction Counsel
239 North Street, Suite 404
Jackson, Mississippi 39211
Telephone: (601) 359-5733
Facsimile: (601) 359-5050

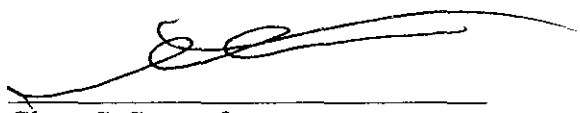
CERTIFICATE OF SERVICE

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

Honorable Robert B. Krebs
Circuit Court Judge
3104 Magnolia Street
Pascagoula, Mississippi 39567

Honorable Marvin L. White, Jr.
Assistant Attorney General
Post Office 220
Jackson, Mississippi 39205

SO CERTIFIED, this the 6th day of April, 2011.



Glenn S. Swartzfager