

ORIGINAL

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT

-vs-

WILLIE HERRING

DEFENDANT-APPELLEE

CASE NO.:

11-0451

ON APPEAL FROM CASE NO. 2008 MA 213  
BEFORE THE COURT OF APPEALS FOR  
THE SEVENTH APPELLATE DISTRICT

POSTCONVICTION  
DEATH PENALTY CASE

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APPELLANT-STATE OF OHIO'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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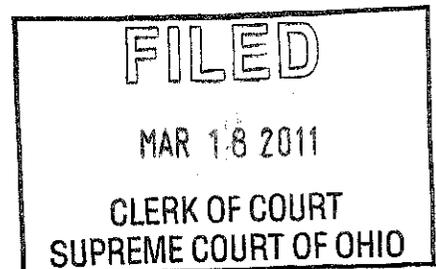
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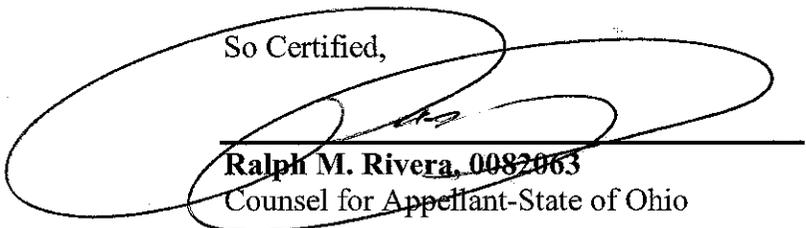


**Certificate of Service**

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**Table of Contents**

Page No.:

CERTIFICATE OF SERVICE.....ii

TABLE OF CONTENTS.....iii

STATEMENT OF WHY THIS IS A CASE OF GREAT PUBLIC OR GENERAL INTEREST THAT PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION..1

STATEMENT OF THE CASE, FACTS, AND INTRODUCTION.....6

LAW AND ARGUMENT.....12

**PROPOSITION OF LAW NO. 1**.....12  
DEFENSE COUNSEL’S PERFORMANCE IS CONSTITUTIONALLY EFFECTIVE UNDER THE FEDERAL AND STATE CONSTITUTIONS WHERE, ABSENT ANY KNOWLEDGE OF A MITIGATION EXPERT’S SHORTCOMINGS, THEY PROCEED REASONABLY IN LIGHT OF THE INFORMATION THAT THEY HAVE OBTAINED, AND DESPITE THE FACT THAT A MITIGATION EXPERT FAILED TO COMPLETE SEVERAL TASKS IN PREPARATION FOR THE SENTENCING PHASE (OF A CAPITAL TRIAL).

**PROPOSITION OF LAW NO. 2**.....31  
CAPITAL DEFENDANTS DO NOT HAVE A FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF A MITIGATION SPECIALIST; THEREFORE, A MITIGATION SPECIALIST’S DEFICIENCIES CANNOT BE IMPUTED TO TRIAL COUNSEL WITHOUT HAVING SUFFICIENT KNOWLEDGE OF THOSE DEFICIENCIES.

**PROPOSITION OF LAW NO. 3**.....32  
AN APPELLATE COURT ERRS IN FINDING THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WITHOUT DETERMINING WHETHER OR NOT THE DEFENDANT SUFFERED ACTUAL PREJUDICE AS A RESULT OF TRIAL COUNSELS’ PERFORMANCE, AS SET FORTH IN *STRICKLAND* v. *WASHINGTON*.

CONCLUSION.....34

APPENDIX

Appx. Page:

Judgment Entry of the Seventh District Court of Appeals  
(February 11, 2011).....A

Opinion of the Seventh District Court of Appeals  
(February 11, 2011).....B

Judgment Entry, Denying Defendant’s Postconviction Petition.....C  
(January 6, 2003)

Judgment Entry, Denying Defendant’s Postconviction Petition.....D  
(September 26, 2008)

**Statement of Why This is a Case of Great Public or General  
Interest that Presents a Substantial Constitutional Question**

Defendant-Appellee Willie Herring's capital postconviction petition involves a matter of great public and general interest that presents a substantial constitutional question—the Sixth Amendment right to counsel during mitigation.

Here, the Seventh District vacated Defendant's death sentence, and remanded for a new sentencing hearing.<sup>1</sup> The Seventh District found that trial counsel was constitutionally ineffective in its mitigation investigation and presentation.

The Seventh District concluded that “the undiscovered mitigating evidence in this case ‘might well have influenced the jury’s appraisal’ of appellant’s culpability and the probability of a different sentence if counsel had presented the evidence is ‘sufficient to undermine confidence in the outcome’ reached by the jury.”<sup>2</sup>

The substantial constitutional question—a capital defendant's Sixth Amendment right to counsel during mitigation—asks whether a reviewing court may find trial counsel to be constitutionally ineffective where counsel presented a reasonable and competent mitigation theory, despite having no knowledge that the mitigation specialist retained by counsel failed to complete several of his intended tasks.

This case does not involve one of trial counsels' failure to investigate into potential theories of mitigation. This case does not involve one of trial counsels' failure to explore deeper into known sources of information to determine potential theories of

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<sup>1</sup> *State v. Herring* (Feb. 11, 2011), 7<sup>th</sup> Dist. No. 08 MA 213, 2011 Ohio 662 (hereafter “*Herring II*”); attached as Appendix B.

<sup>2</sup> *Id.* at ¶ 90, quoting *Rompilla v. Beard* (2005), 545 U.S. 374, 393.

mitigation. And this case does not involve trial counsels' disregard of known information to determine potential theories of mitigation and to develop a viable theory of mitigation.

This case, instead, focuses on Thomas Hrdy's shortcomings and failures in completing several tasks that he indicated to trial counsel would be done.

Looking to Hrdy's investigation, it is clear that he indicated in his affidavit that he failed to complete a number of intended tasks. The most important fact, however, is that he *never* made this known to trial counsel.<sup>3</sup> Had Hrdy made this known to trial counsel, they would have requested more time to prepare, and been able to investigate further.<sup>4</sup> Absent this information, trial counsel believed that Hrdy's investigation was complete and proceeded to present a viable mitigation theory based upon the information they had obtained.

Despite being unaware of Hrdy's deficiencies, trial counsel proceeded in a professionally reasonable manner and presented a competent mitigation theory. Trial counsel proceeded with a positive mitigation theory, to which they highlighted that Defendant had not been convicted as a principal offender in this matter, but only as a complicitor.<sup>5</sup> Trial counsel made this decision having been aware of negative mitigation evidence that existed.

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<sup>3</sup> Postconviction Relief Evidentiary Hearing Transcript, August 28, 2006, before the Honorable John M. Durkin, (hereafter "PCR Tr."). 37.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 36.

In fact, Atty. Gary Van Brocklin testified that they “knew a lot of negative information.”<sup>6</sup> But, Atty. Van Brocklin could not specifically recall the details of that information, because he no longer had the file.<sup>7</sup> Atty. Thomas Zena further testified that Defendant was not forthcoming with any negative information concerning himself or his family.<sup>8</sup> Defendant was protective of his family, and “was not conducive to talking about bad things.”<sup>9</sup> Thus, trial counsels’ decision to cease investigating further into Defendant’s negative family life was professionally reasonable.

Looking now to the additional evidence of Defendant’s background that he now claims would have spared his life; the record establishes that trial counsel disagreed with this approach. Atty. Van Brocklin testified that the decision to present only positive mitigation evidence was based on the lack of viable theories available to them and the jury make-up.<sup>10</sup> The second set of jurors were “far more conservative” than the first, and negative mitigation evidence would not have worked well with the second venire.<sup>11</sup> Atty Van Brocklin stated that he “thought that any kind of information that you would give the

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<sup>6</sup> *Id.* at 45.

<sup>7</sup> *Id.* Atty. Van Brocklin testified that he turned his complete file over to the Ohio Public Defender’s Officer and was told that they would photocopy the file for him, but he never received a copy. Thus, Atty. Van Brocklin was precluded by the Ohio Public Defender’s Office from refreshing his memory with the file.

<sup>8</sup> *Id.* at 73-75.

<sup>9</sup> *Id.* at 74-75.

<sup>10</sup> *Id.* at 36-37.

<sup>11</sup> *Id.* at 45.

second jury panel that [Appellant] had been involved in a life of crime would simply be more ammunition for them to find a death verdict.”<sup>12</sup> To which Atty. Zena concurred.<sup>13</sup>

Atty. Zena believed that putting on negative mitigation would have buried Appellant further, and would not have been helpful.<sup>14</sup> Thus, it was clear that trial counsel made an informed decision to forgo negative mitigation evidence and focus solely on the positive—the little amount that existed.<sup>15</sup>

Furthermore, Atty. Zena met with Defendant’s mother prior to the penalty phase to discuss mitigation, and arrange for “*anybody* she thought would be helpful with mitigation, and we met at their home. I did.”<sup>16</sup> (Emphasis added.) Trial counsel clearly attempted to seek out family members and friends that could possibly serve as mitigation witnesses. Defendant’s relatives, however, came forward *after* he was convicted and sentenced to death.

To answer the substantial constitutional question before this Honorable Court; a reviewing court cannot find trial counsel to be constitutionally ineffective where counsel presented a reasonable and competent mitigation theory, despite having no knowledge

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<sup>12</sup> *Id.* at 47.

<sup>13</sup> *Id.* at 78.

<sup>14</sup> *Id.* at 79-80.

<sup>15</sup> Trial counsel planned to argue Defendant behaved himself in the County Jail, and was conducive to a structured environment, but this theory was abandoned after trial counsel learned that Defendant had either gotten into a fight or threatened to kill someone while in the County Jail. The information they found was “extremely negative.” *Id.* at 38.

<sup>16</sup> *Id.* at 73.

that the mitigation specialist retained by counsel failed to complete several of his intended tasks.

Accordingly, this is a case of great public and general interest that presents a substantial constitutional question. Therefore, the State requests that this Honorable Court accept jurisdiction.

### **Statements of the Case, Facts, and Introduction**

This Court has previously summarized the facts as follows:

Shortly after midnight on April 30, 1996, five masked gunmen intent on robbery entered the Newport Inn, a bar in Youngstown. They shot five people, robbed the till, and left. Three of the five victims died. One of the gunmen, Willie S. “Stevie” Herring, is the appellant in this case. He was convicted of three counts of aggravated murder and sentenced to death on each count.<sup>17</sup>

Herring’s partners in crime were Adelbert Callahan, Antwan Jones, Eugene Foose, Louis Allen, and Kitwan Dalton. On the night of April 29, 1996, these five gathered at Herring’s house. At one point, Callahan and Jones left the house for about fifteen minutes before returning with a stolen van.

Herring and the others got into the van, Callahan taking the wheel. Callahan drove to a blue house on Laclede Avenue near Hillman Street and Rosedale Avenue. Herring went inside the blue house and came back with four guns. He gave a .38 special to Allen, a 9 mm pistol to Callahan, and a .357-caliber pistol to Jones. He did not give a gun to Foose, who was already carrying a .45, or to Dalton, who was to be the getaway driver. Herring kept a 9 mm Cobray semiautomatic for himself.<sup>18</sup>

Herring then said to the others, “If you all know like I know, then you all want to get paid.” It turned out that all six needed money. They therefore decided to commit a robbery. Foose suggested the Newport Inn as a target. Callahan drove the van there.

Everyone but Dalton got out of the van carrying a gun. They put on disguises. Herring donned a white Halloween mask, which Dalton agreed was a “store-bought” mask similar to one seen in “slasher” movies. No one else had such a mask; the others hid their faces with bandanas or, in Allen’s case, a T-shirt. Herring, Allen, and Foose went to the back door of the Newport Inn; Callahan and Jones took the front door.

Ronald Marinelli, the Newport Inn’s owner, was tending bar that night. He had six or eight customers, including Deborah Aziz,

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<sup>17</sup> *State v. Herring* (2002), 94 Ohio St.3d 246, 246.

<sup>18</sup> *Id.* at 246-247.

Herman Naze, Sr., Dennis Kotheimer, and Jimmie Lee Jones. Jones was sitting with a woman at a table in the back.

Sometime between 1:45 and 2:15 a.m., the robbers burst in. Hearing a sound like a gunshot, Marinelli looked and saw four armed black males in the bar. The two at the front door were disguised in dark bandanas. One carried a revolver; one had what looked to Marinelli like a 9 mm semiautomatic pistol. Marinelli saw two more at the rear. One wore a bandana, the other a “white hockey-type mask.” Herring, in the white mask, carried a “very distinctive” gun, which looked like an Uzi or a MAC-10, squarish in shape, with a long clip. Allen, entering last through the back door, saw Jimmie Lee Jones already lying on the floor. At a nearby table, a woman was screaming. Allen told her to be quiet. Then he returned to the van.

One of the other gunmen ordered Herman Naze: “Give me your fucking money.” “I don’t have any money,” Naze replied. The gunman immediately shot him. Then Herring shot Deborah Aziz, who fell to the floor. She managed to crawl away and hide between a cooler and a trash can. She later described her assailant’s mask as “a hard plastic, like one of those Jason masks.”

Now Herring walked around the end of the horseshoe bar toward Marinelli and the cash register. As he approached, he shot Marinelli four times in the stomach from about five feet away.

Somehow Marinelli managed to stay on his feet as Herring came closer. Herring stopped about a foot away from him. Marinelli noticed his assailant’s long reddish-orange hair. Despite the mask, Marinelli could also see that his assailant had an “odd skin pigment,” large eyes “almost like a hazel” color, and buckteeth.<sup>19</sup>

Herring said, “Give me your fucking money.” Despite his wounds, Marinelli obeyed, handing over the cash in the register. But the robber screamed that Marinelli hadn’t given him everything. He had guessed right: in a nearby drawer there was some cash belonging to a pool league.

As Herring threatened to “blow [Marinelli’s] brains out,” Marinelli gave him the money from the drawer. Herring screamed for more. Marinelli urged him to “[b]e cool” and told him there

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<sup>19</sup> *Id.* at 247-248.

was no more. Herring responded by leveling his gun at Marinelli's head.

Marinelli reached into the drawer again. This time, he pulled out a gun of his own. But by now, Marinelli was so weak that Herring easily took the gun from him. Marinelli collapsed. Herring said, "You ain't dead yet, motherfucker," and shot Marinelli in the legs as he lay on the floor.

After Herring shot Marinelli, Aziz heard Dennis Kotheimer say, "You motherfucker." Then she heard more shots. Marinelli saw Kotheimer get shot but did not see who shot him. Nobody saw who shot Jimmie Lee Jones.

Someone reported the gunshots to the Youngstown police, and officers were sent to the Newport Inn. When the officers saw the carnage inside, they summoned emergency personnel.

The five shooting victims were taken to a Youngstown hospital. Herman Naze and Jimmie Lee Jones were both pronounced dead on the morning of April 30. Dennis Kotheimer died on May 1.

Autopsies showed that each victim died of gunshot wounds to the trunk. Jones had been shot twice; one 9 mm slug was recovered from his body. Kotheimer and Naze had each been shot once, but no bullets were recovered from either victim.

On May 7, 1996, Officer Daniel Mikus responded to a report of an unruly juvenile at 641 West Laclede Avenue. There, Mikus confronted sixteen-year-old Obie Crockett, who was sitting on a couch with his hand concealed under a pillow. Mikus looked under the pillow and found State's Exhibit 5, a 9 mm semiautomatic firearm. A forensic scientist at the Bureau of Criminal Identification and Investigation later determined that State's Exhibit 5 had fired the 9 mm slug recovered from the body of Jimmie Lee Jones.

Herring was indicted on three counts of aggravated murder in violation of R.C. 2903.01(B). Count One charged him with killing Jimmie Lee Jones; Count Two, with killing Herman Naze; Count Three, with killing Dennis Kotheimer. The instructions and verdict forms on Count One gave the jury the option of convicting Herring of the aggravated murder of Jones either as the principal offender or as an accomplice. The indictment also included two counts of attempted aggravated murder in violation of R.C. 2923.02(A), and

two counts of aggravated robbery in violation of R.C. 2911.01(A)(1).<sup>20</sup>

Each aggravated murder count originally had two death specifications attached: multiple murder, R.C. 2929.04(A)(5), and felony-murder, R.C. 2929.04(A)(7). Ultimately, the (A)(7) specifications for Counts Two and Three were not submitted to the jury.

On Count One, the jury found Herring not guilty of committing aggravated murder as a principal offender, but guilty of complicity in the aggravated murder of Jones. The jury also found Herring guilty of the (A)(5) multiple-murder specification to Count One. The jury convicted Herring of all other counts and specifications. After a penalty hearing, the jury recommended death for all three aggravated murders, and the trial judge sentenced Herring to death.

During the sentencing phase, Defendant's trial counsel opted for a two-part strategy. First, counsel focused on positive mitigation evidence—for instance that Appellant was well liked and good to his family. Both witnesses pleaded for Defendant's life. Second, counsel offered a proportionality theory: that Defendant's accomplices did not face death. Counsel determined that this would appeal to the jury's sense of fairness, and that the jury would ultimately spare Defendant's life. But, after the penalty phase, the jury recommended death for all three aggravated murders, and the trial judge sentenced Defendant to death.<sup>21</sup> This Court affirmed Defendant's death sentence on February 27, 2002.<sup>22</sup>

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<sup>20</sup> *Id.* at 248-249.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 246.

On September 17, 1999, Defendant filed a petition for postconviction relief, asserting seventeen grounds for relief.<sup>23</sup> The trial court granted the State’s motion for summary judgment, denying Defendant’s petition on January 6, 2003.<sup>24</sup> The Seventh District, however, reversed and issued a mandate directing a hearing on the issue of whether trial counsel’s decision to present positive-only mitigation was professionally reasonable.<sup>25</sup> More specifically, the Seventh District directed an inquiry into whether trial counsel was reasonably apprised of the shortcomings of Thomas J. Hrdy, the mitigation expert, such that their decision to continue with a positive-only mitigation strategy was reasonable.

On remand, the trial court held an evidentiary hearing in which Defendant’s trial counsel—Gary Van Brocklin and Thomas Zena—both testified.<sup>26</sup> After the hearing, the trial court concluded that defense counsel proceeded reasonable in despite Mr. Hry’s shortcomings:

Thomas Hrdy never advised trial counsel that his investigation was not complete, and never asked them for additional time to complete it. Trial counsels['] [sic] decision to present positive mitigation was reasonable, based on an objective review of counsels['] [sic] performance, measured with reasonableness under professional norms, including a context-dependent consideration of

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<sup>23</sup> *State v. Herring* (Oct. 1, 2004), 7<sup>th</sup> Dist. No. 03 MA 12, 2004 Ohio 5357, ¶ 23 (hereafter “*Herring I*”).

<sup>24</sup> *Id.* at ¶ 1; see, also, Judgment Entry, filed January 6, 2003; attached as Appendix C.

<sup>25</sup> *Id.* at ¶ 167; but, see, Judge Vukovich’s dissenting opinion stating that Appellant “had an extensive juvenile record including four counts of aggravated robbery. That factor alone constitutes sufficient reasonableness to justify the tactical decision of trial counsel to present only positive testimony as one could conclude that an alternative tactic as now advocated by [Herring] could bring in such incendiary and negative factors to make a death sentence more likely.” *Id.* at ¶ 169 (Vukovich, J., dissenting).

<sup>26</sup> Judgment Entry, filed September 26, 2008; attached as Appendix D.

the challenged conduct as seen from counsels['] [sic] perspective at the time of that conduct.<sup>27</sup>

The trial court further stated that “consistent with the Trial Court’s opinion that granted summary judgment to the State, “one can only speculate as to what effect, if any, negative evidence would have had in the jury’s deliberations.”<sup>28</sup> Thus, Defendant’s petition for postconviction relief was denied, once again. A second appeal followed.

On February 11, 2011, the Seventh District vacated Defendant’s death sentence, and remanded for a new sentencing hearing.<sup>29</sup> The Seventh District concluded that “the undiscovered mitigating evidence in this case ‘might well have influenced the jury’s appraisal’ of appellant’s culpability and the probability of a different sentence if counsel had presented the evidence is ‘sufficient to undermine confidence in the outcome’ reached by the jury.”<sup>30</sup>

The State now responds with the following argument, and requests this Honorable Court accept jurisdiction and reinstate Defendant’s death sentence.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Herring II*, supra.

<sup>30</sup> *Id.* at ¶ 90, quoting *Rompilla*, 545 U.S. at 393.

## Law and Argument

- I. **PROPOSITION OF LAW NO. 1:** DEFENSE  
COUNSEL'S PERFORMANCE IS CONSTITUTIONALLY EFFECTIVE UNDER THE FEDERAL AND STATE CONSTITUTIONS WHERE, ABSENT ANY KNOWLEDGE OF A MITIGATION EXPERT'S SHORTCOMINGS, THEY PROCEED REASONABLY IN LIGHT OF THE INFORMATION THAT THEY HAVE OBTAINED, AND DESPITE THE FACT THAT A MITIGATION EXPERT FAILED TO COMPLETE SEVERAL TASKS IN PREPARATION FOR THE SENTENCING PHASE (OF A CAPITAL TRIAL).

As for the State's first proposition of law, the State contends that only where defense counsel acted professionally unreasonable after becoming aware of a mitigation expert's shortcomings, and a defendant was prejudiced as a result, may a reviewing court find that counsel was constitutionally ineffective.

The Seventh District's mandate directed a hearing to determine whether trial counsel were properly informed of Thomas Hrdy's (mitigation expert) deficiencies, such that they could make a professional decision as to their mitigation strategy. The evidentiary hearing provided ample amounts of competent and credible evidence that supported counsels' decision to present positive mitigation only. It further established that their decision was reasonable despite the mitigation expert's shortcomings. Therefore, defense counsel was constitutionally effective.

**A. TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, APPELLANT MUST SHOW BOTH DEFICIENT PERFORMANCE AND HE MUST HAVE SUFFERED PREJUDICE AS A RESULT.**

According to the U.S. Supreme Court, “the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial.”<sup>31</sup> Thereby, according to the Court, “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”<sup>32</sup> And “[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.”<sup>33</sup>

Under *Strickland v. Washington*, to prove a claim of ineffective assistance of counsel, the defendant must show that: (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense.<sup>34</sup> This Court has too adopted a two-part test for analyzing whether claims for ineffective assistance of counsel are below the constitutional standard.<sup>35</sup> In order to prove a claim of ineffective assistance of counsel, the defendant must show “(1) that counsel’s performance fell below an objective standard

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<sup>31</sup> *Lockhart v. Fretwell* (1993), 506 U.S. 364, 368, citing *Strickland v. Washington* (1984), 466 U.S. 668, 684; *Nix v. Whiteside* (1986), 475 U.S. 157; *United States v. Cronin* (1984), 466 U.S. 648, 653; *United States v. Morrison* (1981), 449 U.S. 361, quotations omitted.

<sup>32</sup> *Id.*, citing *Cronin* supra, quotations omitted.

<sup>33</sup> *Id.*

<sup>34</sup> *Strickland*, 466 U.S. at 368; see, also, *State v. Bradley* (1989), 42 Ohio St.3d 136.

<sup>35</sup> *State v. Mitchell* (Feb. 10, 2006), 11<sup>th</sup> Dist. No. 2004-T-0139, 2006 Ohio 618.

of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding."<sup>36</sup>

First, a court determines whether trial counsel's assistance was actually ineffective—whether counsel's performance fell below an objective standard of reasonable advocacy or fell short of counsel's basic duties to the client.<sup>37</sup> To prove the performance was deficient, the defendant must show that counsel made errors, which were so serious that counsel was not acting in a manner guaranteed by the Sixth Amendment.<sup>38</sup> Because of the difficulties inherent in making the evaluation, **a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance**; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.<sup>39</sup> (Emphasis added.)

If a reviewing court finds ineffective assistance of counsel on those terms, the court continues to determine whether or not the defendant actually suffered prejudice due to defense counsel's shortcomings, such that the reliability of the outcome of the case

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<sup>36</sup> *Id.*, quoting *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388-89, citing *Strickland*, 466 U.S. at 687-88.

<sup>37</sup> *Bradley*, 42 Ohio St.3d at 136.

<sup>38</sup> *Id.*

<sup>39</sup> *Strickland*, 466 U.S. at 689; see *State v. Vlahopoulos* (Aug. 8, 2005), 8<sup>th</sup> Dist. App. No. 82035, 2005 Ohio 4287, at ¶ 3 (application denied), citing *Jones v. Barnes* (1983), 463 U.S. 745, 750-753; *State v. Spivey* (Feb. 11, 1998), 7<sup>th</sup> Dist. App. No. 89 C.A. 172, unreported, 1998 WL 78656, at \*6, stating "this court must indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" citing *Bradley*, 42 Ohio St.3d at 137; accord *State v. Thompson* (1987), 33 Ohio St.3d 1, 10; *State v. Smith* (1985), 17 Ohio St.3d 98; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299.

should be suspect.<sup>40</sup> According to the courts, **this requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have turned in favor of the defendant.**<sup>41</sup> Thus, according to the U.S. Supreme Court, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."<sup>42</sup> As a point of policy, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him."<sup>43</sup>

Both prongs of this test must be established before a court can make a finding of ineffective assistance of counsel.<sup>44</sup> And if an appellant's ineffectiveness claim can be disposed of on one prong alone, it should not engage in an analysis of the other.<sup>45</sup> The defendant must affirmatively prove the prejudice occurred.<sup>46</sup> "It is not enough for the defendant [Appellant] to show that the errors had some conceivable effects on the outcome of the proceeding."<sup>47</sup>

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<sup>40</sup> *Bradley*, 42 Ohio St.3d at 136.

<sup>41</sup> *Id.*

<sup>42</sup> *Lockhart*, 506 U.S. at 369, citing *Strickland*, 466 U.S. at 687.

<sup>43</sup> *Id.*

<sup>44</sup> *Strickland*, 466 U.S. at 687.

<sup>45</sup> *Bradley*, 42 Ohio St.3d at 143, citing *Strickland*, 466 U.S. at 668.

<sup>46</sup> *Strickland*, 466 U.S. at 693.

<sup>47</sup> *Id.*

1. **STRATEGIC CHOICES MADE AFTER  
A LESS THAN COMPLETE MITIGATION  
INVESTIGATION ARE REASONABLE TO  
THE EXTENT THAT REASONABLE AND  
PROFESSIONAL JUDGMENTS CAN SUPPORT  
THE LIMITATIONS OF THE INVESTIGATION.**

Specific to trial counsel's mitigation investigation, the same reasonableness standard applies. The U.S. Supreme Court has defined what amount of deference is afforded to trial counsel's "strategic decisions" by measuring those decisions in terms of the adequacy of the investigation:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.<sup>48</sup>

Thus, in *Wiggins v. Smith*, the Court stated that its principal concern was "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*."<sup>49</sup> (Emphasis *sic*.) And "[i]n assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a

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<sup>48</sup> *Wiggins v. Smith* (2003), 539 U.S. 510, 521-22, quoting *Strickland*, 466 U.S. at 690-91.

<sup>49</sup> *Wiggins*, 539 U.S. at 523, citing *Strickland*, 466 U.S. at 691, and *Williams v. Taylor* (2000), 529 U.S. 362, 415.

context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time.’”<sup>50</sup> (Internal quotations omitted.)

Germane to mitigation, “[w]hen trial counsel presents a meaningful concept of mitigation”—no particular number or type of witness being required—“the existence of alternative or additional mitigation theories does not establish ineffective assistance of counsel.”<sup>51</sup> Under Ohio law, then, analysis proceeds this way: all circumstances considered, did trial counsel present a meaningful concept of mitigation? Here, trial counsel presented a reasonable and meaningful mitigation argument, one that at the time, trial counsel felt was the strongest one available to persuade the jury to spare Defendant’s life. An argument that trial counsel today believes was the strongest one available.<sup>52</sup>

a.) **Defense Counsels’ Decision to Present Positive Only Mitigation was Professionally Reasonable; Because They Were Unaware that Thomas Hrdy Failed to Complete Several Intended Tasks, and Made a Strategic Decision to Omit Negative Mitigation Evidence Based Upon the Jury’s Composition.**

First, a reviewing court must determine whether trial counsel’s performance was deficient—whether counsel’s performance fell below an objective standard of reasonable advocacy or fell short of counsel’s basic duties to the client.<sup>53</sup> Professionalism—that is,

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<sup>50</sup> *Wiggins*, 539 U.S. at 523, quoting *Strickland*, 466 U.S. at 688-89.

<sup>51</sup> *State v. Turner* (Feb. 21, 2006), 10<sup>th</sup> Dist. No. 04AP-1143, 2006 Ohio 761, ¶ 28, citing *State v. Issa* (Dec. 21, 2001), 1<sup>st</sup> Dist. No. C-000793, unreported, 2001 WL 1635592; *State v. Combs* (1<sup>st</sup> Dist. 1994), 100 Ohio App.3d 90, 97.

<sup>52</sup> See, generally, PCR Tr.

<sup>53</sup> *Bradley*, 42 Ohio St.3d at 136.

what might be professional in this or that situation—depends on all the surrounding circumstances.

Recently, the U.S. Supreme Court has rejected the notion of holding defense counsel to the American Bar Association standards.<sup>54</sup> Previously in *Strickland*, the Court recognized that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”<sup>55</sup>

**i.) The Seventh District’s First Remand.**

Turning first to the Seventh District’s mandate to establish the precise issue for review: “looking at the evidence in a light most favorable to Appellant, we must remand this case for the trial court to conduct an evidentiary hearing relative to Appellant’s trial counsels’ efforts in advance of their decision to present only Appellant’s positive mitigation history.”<sup>56</sup> The evidentiary hearing must assess “whether, ‘counsel’s decision to cease investigating when they did was unreasonable[,]’ and if so whether Appellant was prejudiced as a result.”<sup>57</sup> To be more specific, “whether Appellant’s counsel were apprized of Hrды’s investigations’ shortcomings. Only then could counsel have made a reasoned decision to cease investigating.”<sup>58</sup>

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<sup>54</sup> See *Bobby v. Van Hook* (2009), 130 S. Ct 13, 16; recognized and followed by *Coley v. Bagley* (N.D. Ohio, Apr. 5, 2010), No. 1:02CV0457, 2010 WL 1375217, at \*55; accord *State v. Craig* (Mar. 24, 2010), 9<sup>th</sup> Dist. No. 24580, 2010 Ohio 1169, ¶ 17.

<sup>55</sup> *Bobby*, 130 S. Ct at 16, quoting *Strickland*, 466 U.S. at 688-689.

<sup>56</sup> *Herring I*, supra at ¶ 114.

<sup>57</sup> *Id.* at ¶ 115, citing *Wiggins*, 539 U.S. at 511-12, and *Strickland*, 466 U.S. at 687-88.

<sup>58</sup> *Herring I*, supra at ¶ 116.

The Seventh District, however, conceded that “counsel’s decision to present only a positive history for mitigation purposes is supported by the record as a tactical decision.”<sup>59</sup> That is, the Seventh District concluded that “it must be confirmed that counsel’s decision was a fully informed one.”<sup>60</sup> The trial court took note of that precise issue at the evidentiary hearing, and directed that the hearing proceed to answer that question. Following remand, the trial court found that trial counsel’s performance was neither deficient nor prejudicial, because it was a reasonable and fully informed decision to only present positive mitigation evidence.<sup>61</sup>

A.) **Trial Counsel Had  
No Knowledge that  
Thomas Hrdy Failed to  
Complete Several Intended Tasks.**

First, looking to Thomas Hrdy’s investigation, it is clear that he indicated in his affidavit that he failed to complete a number of intended tasks, but *never* made this

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<sup>59</sup> *Id.* at ¶ 116.

<sup>60</sup> *Id.*

<sup>61</sup> See Judgment Entry, filed September 26, 2008.

known to either Attys. Zena or Van Brocklin.<sup>62</sup> Had Hrdy made this known to trial counsel, they would have requested more time to prepare and continued to investigate.<sup>63</sup>

On appeal, Defendant stated numerous times that Attys. Zena and Van Brocklin could not recall the extent of their communication with Hrdy concerning his mitigation investigation. But, the record clearly answers why they could not recall this information. The reason being that both trial counsel turned their entire files over to the Ohio Public Defender's Office long ago, and were unable to refresh their memory by looking through the material.<sup>64</sup>

Atty. Van Brocklin testified that they had met with Hrdy on at least one occasion, but possibly more, and may have also included several conversations over the phone.<sup>65</sup> And Atty. Zena verified that they (either himself or Atty. Van Brocklin) had spoken to Hrdy on the phone concerning the progress of his investigation, including possible

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<sup>62</sup> PCR Tr. at 37. Defendant also took issue with the amount of time Hrdy had to conduct his mitigation investigation, alleging that trial counsel waited until two weeks before trial to secure a mitigation specialist. Trial counsel, however, did not wait until the last hour to secure a mitigation specialist by choice. Atty. Van Brocklin testified that they had a difficult time locating a mitigation expert. *Id.* at 24. Dr. Isenberg was supposed to be their mitigation expert, but he later canceled, forcing them to find a replacement. *Id.* at 61. Atty. Van Brocklin stated that they had contacted possibly one other person in regards to being their mitigation expert. *Id.* at 24. Therefore, trial counsel was forced to hire Mr. Hrdy when they did, because other experts would not commit, one having canceled after previously committing. And after a mistrial was declared, Hrdy had approximately four months to conduct his investigation. *Id.* at 26-27.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 45, 64. This is the same office that contested that trial counsels' lack of memory equated to a lack of investigation.

<sup>65</sup> *Id.* at 35.

mitigation theories available.<sup>66</sup> Thus, Attys. Zena and Van Brocklin met with Hrdy and/or spoke with him on the phone on several occasions while they prepared for mitigation.

Trial counsels' mitigation also included a psychologist's report that was not beneficial: "[w]e had a psychologist who gave us a report that didn't work well, or was not very definitive."<sup>67</sup>

"We had Mr. Hrdy's findings which were not very—he didn't find very much."<sup>68</sup> Earlier in the direct, Atty. Van Brocklin identified that by the time of mitigation he "had not received any other information from Mr. Hrdy."<sup>69</sup>

Therefore, trial counsel were aware that Hrdy's investigation yielded very little, but were unaware that the investigation's shortcomings were the product of Hrdy's failure to complete several intended tasks pursuant to his mitigation investigation.

**B.) Defendant's Postconviction Mitigation Expert—Dorian Hall.**

Second, Defendant presented the testimony of Dorian Hall, a mitigation specialist employed by the Ohio Public Defender's Office.<sup>70</sup> Hall outlined, in her opinion, what procedures a mitigation expert should take in effectively compiling voluminous and viable mitigation evidence to enable trial counsel to utilize and implement during the penalty phase (assuming the defendant is convicted of a capital specification, of

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<sup>66</sup> *Id.* at 70.

<sup>67</sup> *Id.* at 37.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 36.

<sup>70</sup> PCR Tr. at 91.

course).<sup>71</sup> Hall concluded that Hrdy's mitigation investigation fell below the standard recommended by the American Bar Association.<sup>72</sup>

But, this Court should afford Hall's testimony little to no weight, as did the trial court, in determining whether *trial counsels'* performance fell below the prevailing professional standard.<sup>73</sup>

The Southern District of Ohio previously concluded that "Hall, as a mitigation specialist, is not qualified to offer expert testimony on the performance of attorneys[.]"<sup>74</sup> Accordingly, the court excluded her testimony from the court's consideration of the defendant's ineffective assistance of counsel claim.<sup>75</sup>

Likewise, the Fifth District, in addressing an affidavit submitted by Hall, the court recognized that her testimony carried little weight due to her employment by the and her lack of factual knowledge: "in regard to the Ohio Public Defender affidavit, the evidence therein was given minimal weight because of the interest of the employee in the outcome of the litigation and because she had no direct knowledge of the conversations between Tracie Carter and the mitigation attorneys."<sup>76</sup>

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<sup>71</sup> *Id.* at 91-126.

<sup>72</sup> *Id.* at 125-26.

<sup>73</sup> See, e.g., Judgment Entry, filed September 26, 2008.

<sup>74</sup> *Fears v. Bagley* (July 15, 2008), S.D. Ohio No. 1:01-cv-183, unreported, 2008 WL 2782888, at \*83.

<sup>75</sup> *Id.*

<sup>76</sup> *State v. Lang* (Aug. 23, 2010), 5<sup>th</sup> Dist. No. 2009 CA 187, 2010 Ohio 3975, ¶ 43.

Furthermore, the record here established that Hall was in no way qualified to render any opinion as to the performances of trial counsel.

The State's cross-examination revealed the following: 1) Hall was previously precluded from rendering an expert opinion in regards to an attorney's performance;<sup>77</sup> 2) a "mitigation specialist" is not a recognized title by the State of Ohio;<sup>78</sup> 3) there is no licensing or accreditation required to be a "mitigation specialist;"<sup>79</sup> 4) anyone can call themselves a "mitigation specialist;"<sup>80</sup> 5) anyone can join the associations, so long as they pay their dues;<sup>81</sup> 6) Hall is against the death penalty for *any* defendant;<sup>82</sup> 7) Hall had no prior experience in mitigation before joining the Public Defender's Office;<sup>83</sup> 8) Hall was trained by other employs at the Public Defender's Office; 9) Hall *never* signed an affidavit that the mitigation expert conducted a proper investigation; and 10) Hall *never* signed an affidavit that trial counsel conducted a proper investigation.<sup>84</sup>

And specific to the facts here, Hall had never handled a case previously in Mahoning County; therefore, she was unfamiliar with Mahoning County jurors.<sup>85</sup> Here,

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<sup>77</sup> PCR Tr. at 128-30.

<sup>78</sup> *Id.* at 134.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 138.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 139.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 142.

Hall didn't even know what Defendant had been convicted of, but found out only after the assistant prosecutor told her during her initial deposition.<sup>86</sup> Thus, Hall wasn't even aware that Defendant had been convicted as a complicitor and not the principal offender. A fact that she admitted was significant in preparing for mitigation.<sup>87</sup>

Thus, the Seventh District erred in considering Hall's testimony in regards to trial counsels' performance.<sup>88</sup>

Therefore, Hall could not competently offer an opinion in regards to trial counsels' performance, as she is neither an attorney herself, nor was she qualified as a "mitigation expert" or "mitigation specialist."

ii.) **Trial Counsels' Decision to Present Positive Mitigation Only was Reasonable.**

When the penalty phase began, trial counsel proceeded with a positive mitigation theory, to which they highlighted that Defendant had not been convicted as a principal offender in this matter, but only as a complicitor.<sup>89</sup> Granted, Defendant takes strong exception with this approach, indicating that it defies U.S. and Ohio law, allowing a capital complicitor to endure a death sentence. But this argument does not recognize that such an approach could, indeed, sway the sympathies of a jury away from a death sentence—noting further that Defendant's co-defendants' lives were spared.

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<sup>86</sup> *Id.* at 150.

<sup>87</sup> *Id.* at 151.

<sup>88</sup> See *Herring II*, supra at ¶ 77.

<sup>89</sup> PCR Tr. at 36.

First, trial counsel were aware of negative mitigation evidence that existed. Atty. Van Brocklin testified that they “knew a lot of negative information.”<sup>90</sup> But, Atty. Van Brocklin could not specifically recall the details of that information, because he no longer had the file.<sup>91</sup> Atty. Zena testified that Defendant was not forthcoming with any negative information concerning himself or his family.<sup>92</sup> Defendant was protective of his family, and “was not conducive to talking about bad things. I don’t know where that would’ve gone.”<sup>93</sup> Thus, trial counsels’ decision to cease investigating further into Defendant’s negative family life was professionally reasonable.

Second, looking to the additional evidence of Defendant’s background that he now claims would have spared his life; the record establishes that both Attys. Zena and Van Brocklin disagreed with this approach.

Atty. Van Brocklin testified that the decision to present only positive mitigation evidence was based on the lack of viable theories available to them and the jury make-up.<sup>94</sup> The second set of jurors were “far more conservative” than the first, and negative mitigation evidence would not have worked well with the second venire.<sup>95</sup> Atty Van

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<sup>90</sup> *Id.* at 45.

<sup>91</sup> *Id.* Atty. Van Brocklin testified that he turned his complete file over to the Ohio Public Defender’s Officer and was told that they would photocopy the file for him, but he never received a copy. Thus, Atty. Van Brocklin was precluded by the Ohio Public Defender’s Office from refreshing his memory with the file.

<sup>92</sup> *Id.* at 73-75.

<sup>93</sup> *Id.* at 74-75.

<sup>94</sup> *Id.* at 36-37.

<sup>95</sup> *Id.* at 45.

Brocklin stated that he “thought that any kind of information that you would give the second jury panel that [Appellant] had been involved in a life of crime would simply be more ammunition for them to find a death verdict.”<sup>96</sup> To which Atty. Zena concurred:

This is an awful case as cases go. This isn't a store shooting case. There isn't a robbery with a spec, one on one. This was, for lack of a better word – and I don't mean to judge [Appellant] on this. This was mayhem in a bar where people wound up dead, people would up shot, bullets all over the floor. It was a bad situation. And, you know, you had the jury who had been told, put yourself there, and they know about all these guys coming in. Also, the situation was none of the individuals that were shot were involved in any transgressions with any of the individuals who came in. They were customers in a place, as bad as the place may have been. So those were my problems, our problems.<sup>97</sup>

Atty. Zena believed that putting on negative mitigation would have buried Appellant further, and would not have been helpful.<sup>98</sup> Thus, it was clear that trial counsel made an informed decision to forgo negative mitigation evidence, focusing solely on the positive—the little amount that existed.<sup>99</sup>

Third, focusing on the fact that defense counsel presented two mitigation witnesses—Defendant's mother and sister—mischaracterizes the point. The law requires a mitigation theory, not a particular number of witnesses. Atty. Zena, who was primarily responsible for the mitigation, testified to a meaningful presentation. Atty. Zena met with

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<sup>96</sup> *Id.* at 47.

<sup>97</sup> *Id.* at 78.

<sup>98</sup> *Id.* at 79-80.

<sup>99</sup> Trial counsel planned to argue Defendant behaved himself in the County Jail, and was conducive to a structured environment, but this theory was abandoned after trial counsel learned that Defendant had either gotten into a fight or threatened to kill someone while in the County Jail. The information they found was “extremely negative.” *Id.* at 38.

Defendant's mother prior to the penalty phase to discuss mitigation, and arrange for "anybody she thought would be helpful with mitigation, and we met at their home. I did."<sup>100</sup> Trial counsel clearly attempted to seek out family members and friends that could serve as potential mitigation witnesses.

Atty. Zena undertook this task despite knowing that Defendant was very protective of his family and did not want to talk about anything negative. So what did he do? He focused on what was available for a meaningful mitigation—the positive. Atty. Zena focused on the "good things about him" and on "removing him from the [principal assailants] by saying he was not a principal offender."<sup>101</sup> Granted, after the fact people came forward with *additional* negative information, similar to a "Monday Morning Quarterback." But, this can hardly qualify as lack of professional conduct at that time—which is what U.S. and Ohio law require.<sup>102</sup>

Furthermore, trial counsel planned to argue that Defendant behaved himself while in the county jail, and was conducive to a structured environment. This theory, however, was abandoned after trial counsel learned that Defendant had either gotten into a fight or threatened to kill someone while housed there. The information was "extremely negative."<sup>103</sup> Therefore, trial counsel had initially intended to call more than Defendant's mother and sister.

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<sup>100</sup> *Id.* at 73.

<sup>101</sup> *Id.* at 76.

<sup>102</sup> See *Strickland*, 466 U.S. at 687-689; accord *Thompson*, 33 Ohio St.3d at 10.

<sup>103</sup> PCR Tr. at 38.

Therefore, this Court must find that trial counsels' performance was reasonable in light of prevailing professional standards, and afforded Defendant the effective assistance of counsel during mitigation.

**b.) Assuming Counsels' Decision to Present Positive Only Mitigation was Unreasonable, Defendant Cannot Establish that He was Prejudiced (That the Trial's Outcome Would Have Been Different).**

Only after a reviewing court finds that counsel's performance fell below an objective standard of reasonableness, the court may continue to determine whether or not the defendant actually suffered prejudice due to defense counsel's shortcomings, such that the reliability of the trial's outcome is suspect.<sup>104</sup>

Here, even assuming that trial counsels' decision to only present positive mitigation after Hrdy failed to complete several tasks prior to the sentencing phase, Defendant failed to establish that he was prejudiced as a result—to wit: the jury would have spared him his life.

First, the trial court concluded that “one can only speculate as to what effect, if any, negative evidence would have had in the jury's deliberations.”<sup>105</sup> This conclusion was based upon the trial court's finding that “Van Brocklin and Zena testified that the composition of the jury panel had a great deal to do with the decision to present positive mitigation. The first panel, prior to a mistrial, were a lot less adamant about the death penalty. Trial counsel believed that any information given to the jury about Herring's

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<sup>104</sup> *Bradley*, 42 Ohio St.3d at 136.

<sup>105</sup> Judgment Entry, filed September 26, 2008.

criminal history would have given the jury more ammunition to return with a recommendation of death.”<sup>106</sup>

Second, in *Herring I*, Judge Vukovich’s dissenting opinion agreed that Defendant’s criminal record was extensive and damaging: “appellant had an extensive juvenile record including four counts of aggravated robbery. That factor alone constitutes sufficient reasonableness to justify the tactical decision of trial counsel to present only positive testimony as one could conclude that an alternative tactic as now advocated by [Herring] could bring in such incendiary and negative factors to make a death sentence more likely.”<sup>107</sup>

Further, Judge Vukovich agreed with the trial court’s original denial of Defendant’s petition without a hearing: “I cannot find fault or error in the conclusion of the trial court that ‘one can only speculate as to what effect, if any, negative evidence would have had in the jury’s deliberations.’”<sup>108</sup>

Third, the record is clear that even today, trial counsel believed that any negative mitigation evidence would not have changed the outcome.

Atty. Van Brocklin testified that he “thought that any kind of information that you would give the second jury panel that Mr. Herring had been involved in a life of crime would simply be more ammunition for them to find a death verdict.”<sup>109</sup> To which Atty. Zena concurred:

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<sup>106</sup> *Id.*

<sup>107</sup> *Herring I*, supra at ¶ 169 (Vukovich, J., dissenting).

<sup>108</sup> *Id.* at ¶ 170.

<sup>109</sup> PCR Tr. at 47.

This is an awful case as cases go. This isn't a store shooting case. There isn't a robbery with a spec, one on one. This was, for lack of a better word -- and I don't mean to judge Willie on this. This was mayhem in a bar where people wound up dead, people would up shot, bullets all over the floor. It was a bad situation. And, you know, you had the jury who had been told, put yourself there, and they know about all these guys coming in. Also, the situation was none of the individuals that were shot were involved in any transgressions with any of the individuals who came in. They were customers in a place, as bad as the place may have been. So those were my problems, our problems.<sup>110</sup>

Atty. Zena believed that putting on negative mitigation would have buried Appellant further, and would not have been helpful.<sup>111</sup>

Thus, even assuming that trial counsels' decision to only present positive mitigation after Hrdy failed to complete several tasks prior to the sentencing phase, Defendant failed to establish that he was prejudiced as a result—to wit: the jury would have spared him his life.

Therefore, trial counsel provided Defendant the effective assistance of counsel, as guaranteed to him by the U.S. and Ohio Constitutions.

Appellant-State of Ohio's first proposition of law is meritorious, and jurisdiction must be accepted.

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<sup>110</sup> *Id.* at 78.

<sup>111</sup> *Id.* at 79-80.

**II. PROPOSITION OF LAW NO. 2: CAPITAL DEFENDANTS DO NOT HAVE A FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF A MITIGATION SPECIALIST; THEREFORE, A MITIGATION SPECIALIST'S DEFICIENCIES CANNOT BE IMPUTED TO TRIAL COUNSEL WITHOUT HAVING SUFFICIENT KNOWLEDGE OF THOSE DEFICIENCIES.**

As for the State's second proposition of law, the State contends that because capital defendants do not have a federal constitutional right to the effective assistance of a mitigation specialist, a mitigation specialist's deficiencies cannot be imputed to trial counsel without sufficient knowledge of those deficiencies.

The Southern District of Ohio has previously recognized that "there is no federal constitutional right to effective assistance of a mitigation specialist[.]"<sup>112</sup> Because, a defendant does not have a federal constitutional right to the effective assistance of a mitigation specialist, a mitigation specialist's deficiencies cannot be imputed to trial counsel without counsel having sufficient knowledge of those deficiencies.

In regards to an ineffective assistance of counsel claim, where a mitigation specialist fails to adequately investigate, trial counsel may only be found to have been deficient if counsel had sufficient knowledge of those deficiencies and counsel thereafter acted unreasonably. Further, where trial counsel did not have sufficient knowledge of those deficiencies, trial counsel cannot be found to have been constitutionally ineffective if trial counsel acted reasonably thereafter in presenting a mitigation theory.

Appellant-State of Ohio's second proposition of law is meritorious, and jurisdiction must be accepted.

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<sup>112</sup> *Fears v. Bagley* (July 15, 2008), S.D. Ohio No. 1:01-cv-183, unreported, 2008 WL 2782888, at \*83; accord *Moore v. Mitchell* (Feb. 15, 2007), S.D. Ohio No. 1:00-cv-023, unreported, 2007 WL 4754340, at \*27.

**III. PROPOSITION OF LAW NO. 3: AN APPELLATE COURT ERRS IN FINDING THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WITHOUT DETERMINING WHETHER OR NOT THE DEFENDANT SUFFERED ACTUAL PREJUDICE AS A RESULT OF TRIAL COUNSELS' PERFORMANCE, AS SET FORTH IN *STRICKLAND v. WASHINGTON*.**

As for the State's third proposition of law, the State contends that the Seventh District erred when it concluded that trial counsel was constitutionally ineffective in failing to present negative mitigation evidence during the sentencing phase without determining whether Defendant suffered any actual prejudice as a result of trial counsels' performance.

It is well established that pursuant to *Strickland v. Washington*, to prove a claim of ineffective assistance of counsel, the defendant must show that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense.<sup>113</sup> This Court has too adopted a two-part test for analyzing whether claims for ineffective assistance of counsel are below the constitutional standard: "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding."<sup>114</sup>

Here, (assuming trial counsel was deficient) the Seventh District erred when it failed to find that Defendant was prejudiced by trial counsels' performance. To be sure, Defendant's first assignment of error before the Seventh District only addressed trial

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<sup>113</sup> *Strickland*, 466 U.S. at 368; see, also, *Bradley*, 42 Ohio St.3d AT 136.

<sup>114</sup> *Mitchell*, supra, quoting *Madrigal*, 87 Ohio St.3d at 388-89, citing *Strickland*, 466 U.S. at 687-688.

counselors' performance.<sup>115</sup> No where in the Seventh District's opinion does the court determine that trial counselors' performance prejudiced Defendant—finding that the trial's outcome would have been different.<sup>116</sup> And it is well established that both prongs must be established before a court can make a finding of ineffective assistance of counsel.<sup>117</sup>

In fact, the trial court never reached the second prong (prejudice to Defendant), because the court found that trial counselors' performance was reasonable.<sup>118</sup> Likewise, because Defendant's first assignment of error dealt solely with trial counselors' performance, the Seventh District failed to reach the second prong.

Therefore, absent a determination that trial counselors' performance (assuming that it was deficient) prejudiced Defendant, the Seventh District erred in concluding that trial counselors' performance constituted ineffective assistance pursuant to the Sixth Amendment.

Appellant-State of Ohio's third proposition of law is meritorious, and jurisdiction must be accepted.

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<sup>115</sup> See *Herring II*, supra at ¶ 31.

<sup>116</sup> See *Bradley*, 42 Ohio St.3d at 136.

<sup>117</sup> See *Strickland*, 466 U.S. at 687.

<sup>118</sup> See Judgment Entry, filed September 26, 2008.

**Conclusion**

**WHEREFORE**, Appellant-State of Ohio hereby requests this Honorable Court to Accept Jurisdiction, because Defendant-Appellee Willie Herring's capital postconviction petition involves a matter of great public and general interest that presents a substantial constitutional question—the Sixth Amendment right to counsel.

Respectfully Submitted,

**PAUL J. GAINS, 0020323**  
~~MAHONING COUNTY PROSECUTOR BY:~~



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**RALPH M. RIVERA, 0082063**  
ASSISTANT PROSECUTOR  
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# **APPENDIX – A**

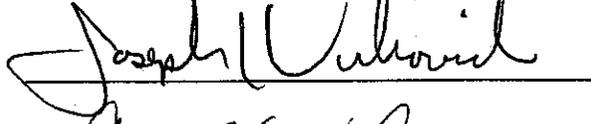
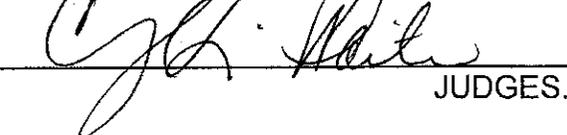
**Judgment Entry  
Seventh District Court of Appeals  
February 11, 2011**

CLERK OF COURTS  
MAHONING COUNTY, OHIO  
FEB 11 2011  
FILED  
ANTHONY VIVO, CLERK

STATE OF OHIO ) IN THE COURT OF APPEALS OF OHIO  
 )  
MAHONING COUNTY ) SS: SEVENTH DISTRICT  
  
STATE OF OHIO, )  
 )  
 PLAINTIFF-APPELLEE, )  
 )  
VS. ) CASE NO. 08-MA-213  
 )  
WILLIE HERRING, ) JUDGMENT ENTRY  
 )  
 DEFENDANT-APPELLANT. )

For the reasons stated in the opinion rendered herein, appellant's first assignment of error has merit and is sustained. Appellant's second assignment of error is moot. Appellant's postconviction petition is hereby granted. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio, imposing the death sentences is reversed. The matter is remanded to the trial court for a new sentencing hearing to be conducted pursuant to R.C. 2929.06, whereby a jury shall be impaneled to consider whether to once again impose the death penalty or to instead impose life in prison. Waite, J. concurs in judgment only.

Costs taxed against appellee.

  
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\_\_\_\_\_  
JUDGES.

# **APPENDIX – B**

**Opinion**  
**Seventh District Court of Appeals**  
**February 11, 2011**

STATE OF COURTS  
MAHONING COUNTY, OHIO  
FEB 11 2011  
FILED  
ANTHONY VIVO, CLERK

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, )  
)  
PLAINTIFF-APPELLEE, )  
)  
VS. ) CASE NO. 08-MA-213  
)  
WILLIE HERRING, ) OPINION  
)  
DEFENDANT-APPELLANT. )

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 96CR339

JUDGMENT: Reversed and Remanded for  
Resentencing

APPEARANCES:  
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For Defendant-Appellant Attorney Kimberly S. Rigby  
Attorney Jennifer A. Prillo  
Assistant State Public Defenders  
8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215

JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite

Dated: February 11, 2011

DONOFRIO, J.

{¶1} Defendant-appellant, Willie Herring, appeals from a Mahoning County Common Pleas Court judgment denying his petition for postconviction relief.

{¶2} The following facts were set out by the Ohio Supreme Court in appellant's direct appeal.

{¶3} "Shortly after midnight on April 30, 1996, five masked gunmen intent on robbery entered the Newport Inn, a bar in Youngstown. They shot five people, robbed the till, and left. Three of the five victims died. One of the gunmen, Willie S. 'Stevie' Herring, is the appellant in this case. He was convicted of three counts of aggravated murder and sentenced to death on each count.

{¶4} "Herring's partners in crime were Adelbert Callahan, Antwan Jones, Eugene Foose, Louis Allen, and Kitwan Dalton. On the night of April 29, 1996, these five gathered at Herring's house. At one point, Callahan and Jones left the house for about fifteen minutes before returning with a stolen van.

{¶5} "Herring and the others got into the van, Callahan taking the wheel. Callahan drove to a blue house on Laclede Avenue near Hillman Street and Rosedale Avenue. Herring went inside the blue house and came back with four guns. He gave a .38 special to Allen, a 9 mm pistol to Callahan, and a .357-caliber pistol to Jones. He did not give a gun to Foose, who was already carrying a .45, or to Dalton, who was to be the getaway driver. Herring kept a 9 mm Cobray semiautomatic for himself.

{¶6} "Herring then said to the others, 'If you all know like I know, then you all want to get paid.' It turned out that all six needed money. They therefore decided to commit a robbery. Foose suggested the Newport Inn as a target. Callahan drove the van there.

{¶7} "Everyone but Dalton got out of the van carrying a gun. They put on disguises. Herring donned a white Halloween mask, which Dalton agreed was a 'store-bought' mask similar to one seen in 'slasher' movies. No one else had such a mask; the others hid their faces with bandanas or, in Allen's case, a T-shirt. Herring,

Allen, and Foose went to the back door of the Newport Inn; Callahan and Jones took the front door.

{¶8} "Ronald Marinelli, the Newport Inn's owner, was tending bar that night. He had six or eight customers, including Deborah Aziz, Herman Naze, Sr., Dennis Kotheimer, and Jimmie Lee Jones. Jones was sitting with a woman at a table in the back.

{¶9} "Sometime between 1:45 and 2:15 a.m., the robbers burst in. Hearing a sound like a gunshot, Marinelli looked and saw four armed black males in the bar. The two at the front door were disguised in dark bandanas. One carried a revolver; one had what looked to Marinelli like a 9 mm semiautomatic pistol. Marinelli saw two more at the rear. One wore a bandana, the other a 'white hockey-type mask.' Herring, in the white mask, carried a 'very distinctive' gun, which looked like an Uzi or a MAC-10, squarish in shape, with a long clip. Allen, entering last through the back door, saw Jimmie Lee Jones already lying on the floor. At a nearby table, a woman was screaming. Allen told her to be quiet. Then he returned to the van.

{¶10} "One of the other gunmen ordered Herman Naze: 'Give me your fucking money.' 'I don't have any money,' Naze replied. The gunman immediately shot him. Then Herring shot Deborah Aziz, who fell to the floor. She managed to crawl away and hide between a cooler and a trash can. She later described her assailant's mask as 'a hard plastic, like one of those Jason masks.'

{¶11} "Now Herring walked around the end of the horseshoe bar toward Marinelli and the cash register. As he approached, he shot Marinelli four times in the stomach from about five feet away.

{¶12} "Somehow Marinelli managed to stay on his feet as Herring came closer. Herring stopped about a foot away from him. Marinelli noticed his assailant's long reddish-orange hair. Despite the mask, Marinelli could also see that his assailant had an 'odd skin pigment,' large eyes 'almost like a hazel' color, and buckteeth.

{¶13} "Herring said, 'Give me your fucking money.' Despite his wounds, Marinelli obeyed, handing over the cash in the register. But the robber screamed that Marinelli hadn't given him everything. He had guessed right: in a nearby drawer there was some cash belonging to a pool league.

{¶14} "As Herring threatened to 'blow [Marinelli's] brains out,' Marinelli gave him the money from the drawer. Herring screamed for more. Marinelli urged him to '[b]e cool' and told him there was no more. Herring responded by leveling his gun at Marinelli's head.

{¶15} "Marinelli reached into the drawer again. This time, he pulled out a gun of his own. But by now, Marinelli was so weak that Herring easily took the gun from him. Marinelli collapsed. Herring said, 'You ain't dead yet, motherfucker,' and shot Marinelli in the legs as he lay on the floor.

{¶16} "After Herring shot Marinelli, Aziz heard Dennis Kotheimer say, 'You motherfucker.' Then she heard more shots. Marinelli saw Kotheimer get shot but did not see who shot him. Nobody saw who shot Jimmie Lee Jones.

{¶17} "Someone reported the gunshots to the Youngstown police, and officers were sent to the Newport Inn. When the officers saw the carnage inside, they summoned emergency personnel.

{¶18} "The five shooting victims were taken to a Youngstown hospital. Herman Naze and Jimmie Lee Jones were both pronounced dead on the morning of April 30. Dennis Kotheimer died on May 1.

{¶19} "Autopsies showed that each victim died of gunshot wounds to the trunk. Jones had been shot twice; one 9 mm slug was recovered from his body. Kotheimer and Naze had each been shot once, but no bullets were recovered from either victim." *State v. Herring* (2002), 94 Ohio St.3d 246, 246-48, cert. denied *Herring v. Ohio* (2002), 537 U.S. 917.

{¶20} The case proceeded to a jury trial where appellant was convicted of three counts of complicity to commit aggravated murder, two counts of attempted aggravated murder, two counts of aggravated robbery, and six firearm specifications.

The jury found that appellant was guilty of conduct involving the purposeful killing or attempt to kill two or more persons, multiple murder death-penalty specifications. It recommended the death sentence for all three murders. On February 23, 1998, the trial court sentenced appellant to death on each count, and the Ohio Supreme Court affirmed the convictions and death sentences.

{¶21} Appellant filed his postconviction petition in the trial court on September 17, 1999. He requested that the trial court declare his convictions and death sentences void or voidable. And he asked that he be granted the opportunity to conduct discovery, to amend his petition, and to be granted an evidentiary hearing pursuant to R.C. 2953.21. Appellant attached 39 exhibits, including numerous affidavits to his petition.

{¶22} Plaintiff-appellee, the State of Ohio, filed a motion for summary judgment. The trial court granted appellee's motion overruling appellant's requests for discovery and for an evidentiary hearing on January 6, 2003. Appellant filed an appeal from this judgment.

{¶23} On appeal, appellant argued in part that the trial court erred in dismissing his postconviction petition because he presented sufficient evidence to warrant an evidentiary hearing and discovery on numerous constitutional issues allegedly resulting in prejudice. The main issue he alleged was ineffective assistance of trial counsel. Specifically, appellant argued that his two trial counsel were ineffective because they only presented two witnesses at his mitigation hearing, his mother and his sister. He further argued his counsel should have presented his extensive negative history to the jury and also should have secured his neuropsychological evaluation and presented corresponding expert testimony as mitigation evidence.

{¶24} On appeal, this court found:

{¶25} "In viewing the additional evidence before this Court as a whole, it is persuasive against the imposition of the death penalty. Without a hearing to determine the extent of the mitigation evidence before Appellant's trial counsel and

their investigative efforts, Appellant's postconviction exhibits may simply present an alternative mitigation tactic. Looking at Appellant's additional evidence in a light most favorable to him, his trial counsel may have been ineffective based on their failure to pursue additional mitigation evidence." *State v. Herring*, 7th Dist. No. 03-MA-12, 2004-Ohio-5357, at ¶104.

{¶26} Consequently, we remanded the matter to the trial court to conduct an evidentiary hearing relative to trial counsel's efforts in advance of their decision to present only appellant's positive mitigation history. We specifically instructed the trial court to assess whether trial counsel were apprised of the shortcomings of Thomas Hrdy's investigation. *Id.* at ¶116.

{¶27} Hrdy was the mitigation specialist hired by appellant's counsel to conduct a mitigation investigation. Hrdy admitted in his affidavit, which appellant attached to his postconviction petition, that he did not complete his intended investigation and research. (Postconviction Petition, Appendix, Exh. 33). He further admitted that he provided a substandard mitigation investigation resulting from his inadequate time to prepare. (Postconviction Petition, Appendix, Exh. 33). And Hrdy stated that he failed to prepare the intended psycho-social history of appellant and his family. (Postconviction Petition, Appendix, Exh. 33).

{¶28} On remand, the trial court held a hearing. The court heard from three witnesses, appellant's two trial attorneys and a mitigation investigation specialist. The trial court concluded that Hrdy never advised trial counsel that his investigation was not complete and never asked them for additional time to complete it. It also noted that trial counsel believed that if they had given any information to the jury about appellant's criminal history, the jury would have been even more inclined to recommend death. The court concluded that trial counsel's decision to present only positive mitigation evidence was reasonable, based on an objective view of counsel's performance, measured with professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at that time. But the court denied appellant's request to present evidence as to what

evidence his counsel could have uncovered had they continued to investigate. Consequently, the trial court once again overruled appellant's postconviction petition.

{¶29} Appellant filed a timely notice of appeal on October 27, 2008.

{¶30} Appellant raises two assignments of error, the first of which states:

{¶31} "THE TRIAL COURT ERRED IN FINDING THAT HERRING'S TRIAL COUNSEL'S INVESTIGATION WAS REASONABLE UNDER THE PREVAILING PROFESSIONAL NORMS."

{¶32} On appeal, this court must affirm a trial court's decision granting or denying a postconviction petition absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, at ¶58. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. "[A] reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Id.*

{¶33} Appellant argues that his counsel failed to present adequate mitigation evidence in the penalty phase of his trial. He asserts that his counsel should have presented negative evidence.

{¶34} The imposition of the death penalty requires that one of ten specific statutory factors is laid out in the indictment and proven beyond a reasonable doubt at trial. R.C. 2929.04(A). In this case, the jury found that appellant was guilty of killing or attempting to kill two or more people, the death-penalty factor specified in R.C. 2929.04(A)(5).

{¶35} After one of the R.C. 2929.04(A) factors is found to have been proven beyond a reasonable doubt, the court or jury "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, *the history, character, and background of the offender*, and all of the following factors:

{¶36} " \* \* \*

{¶37} "(3) Whether, at the time of committing the offense, the offender, *because of a mental disease or defect*, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

{¶38} "(4) The youth of the offender;

{¶39} "(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

{¶40} "(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

{¶41} "(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death." (Emphasis added). R.C. 2929.04(B)

{¶42} The existence of any mitigating factors does not preclude imposition of the death penalty. R.C. 2929.04(C). However, these factors shall be weighed against the aggravating factors. R.C. 2929.04(C).

{¶43} At trial, appellant's counsel only presented appellant's mother's and sister's testimony in mitigation. They both presented positive information about appellant. Their entire testimony totaled seven pages. The only other argument counsel made in support of sparing appellant's life was that his co-defendants did not receive the death penalty. Counsel did not present any negative mitigation evidence on appellant's behalf going to his history, character, or background, nor did it present evidence as to any mental disease or defect appellant may have suffered from.

{¶44} Appellant cites to the American Bar Association's (ABA's) standards for capital defense work, which the United State Supreme Court has referred to as "guides for determining what is reasonable." *Wiggins v. Smith* (2003), 539 U.S. 510, 524. Specifically, appellant asserts that his counsel fell short in meeting the ABA's standards by failing to (1) conduct an "extensive and generally unparalleled investigation into personal and family history"; (2) explore "family and social history (including physical, sexual, or emotional abuse; family history of mental illness,

cognitive impairments, substance abuse, or domestic violence \* \* \*)"; (3) locate and interview the client's family members; (4) conduct a multi-generational investigation; (5) choose experts who are specifically tailored to the needs of the case, instead of relying on an "all-purpose" expert; and (6) prepare to rebut arguments that improperly minimize the mitigation evidence's significance. American Bar Association: Guidelines for the Appointment and Performance of Trial Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (Summer 2003).

{¶45} First, appellant argues that his counsel could not simply defer to Hrdy's investigation. He asserts that it was his counsel's duty to ensure that the mitigation investigation was accurate and complete. He argues that they failed in this duty. Appellant contends that this failure was due to counsel's unreasonably narrow view of his mitigation defense.

{¶46} Appellant contends that because counsel did not conduct a complete investigation, they could not make an informed, strategic decision as to what type of mitigation defense to present. He notes that Attorney Zena hired Hrdy to conduct the mitigation investigation sometime after August 24, 1997, even though his trial was set to start on September 9, 1997 and counsel had over a year to prepare. He further notes that although his first trial ended in a mistrial on October 1, 1997, by this point Hrdy had recorded only 8.5 hours of work, half of which was for writing his report and paperwork.

{¶47} Appellant next points out that Attorney Van Brocklin testified that although he was disappointed in Hrdy's work, he assumed Hrdy had done all that was necessary in investigating appellant's background. He notes that Attorney Van Brocklin made this assumption after only one meeting with Hrdy. And appellant notes that Attorney Zena, who was in charge of the mitigation, testified that the extent of his investigation included speaking to appellant's mother about arranging a meeting with anybody that she thought might be helpful to mitigation.

{¶48} Based on the above, appellant argues that counsel's assumption that Hrdy's investigation was all that they needed to prepare for mitigation without any investigation on their own was unreasonable and deficient.

{¶49} Second, appellant argues that counsel's decision to present only positive mitigation evidence was unreasonable. He acknowledges that counsel wanted to emphasize the argument that he was not convicted as the principal offender. However, he contends that it was unreasonable for counsel to rely on this to the exclusion of other mitigating evidence. He points out that prior to the mitigation phase, the trial court ruled that certain defense exhibits were inadmissible as mitigating evidence. These exhibits included documents indicating the resolution of appellant's co-defendants' cases and demonstrated that none of his co-defendants received the death penalty. (Trial Tr. 4632-40; Def. Exhs. 1-14). In light of the trial court's ruling, appellant argues, counsel should have presented other mitigating evidence or asked for additional time to further investigate.

{¶50} Third, appellant notes that both counsel testified that the jury makeup had a great deal of influence on their mitigation theory. And appellant argues, assuming this is true, the composition of the jury would have no effect on how counsel conducted their mitigation investigation. Appellant further notes that a jury seated in Mahoning County is likely to vote more Democratic. Furthermore, appellant notes again that counsel failed to even secure a mitigation specialist until two weeks before trial was set to begin. Thus, no investigation was complete by the time counsel were choosing a jury. And appellant notes that both counsel conceded that they should have had an idea of what their mitigation theme would be before starting voir dire.

{¶51} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, the appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus. Second, the appellant

must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, the appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶152} The appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. In Ohio, a licensed attorney is presumed competent. *Id.*

{¶153} *Strickland*, 466 U.S. 668, like the case at bar, dealt with the defendant's claim that counsel failed to conduct a full investigation in furtherance of mitigation. The Supreme Court discussed strategic choices and reasonable investigations:

{¶154} "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 690-91.

{¶155} Trial counsel holds the affirmative duty to investigate mitigating evidence. *Rompilla v. Beard* (2005), 545 U.S. 374; *Wiggins v. Smith* (2003), 539 U.S. 510, 521; *Williams v. Taylor* (2000), 529 U.S. 362. Trial counsel can make the decision to forego the presentation of evidence, but only after a full investigation. *Williams*, *supra*; *Wiggins*, *supra*. Only after completing a full investigation can counsel make an informed, tactical decision about what information to present in their client's case. *State v. Johnson* (1986), 24 Ohio St.3d 87, 90, citing *Pickens v. Lockhart* (C.A. 8, 1983), 714 F.2d 1455, 1467.

{¶156} As we detailed in *Herring*, 7th Dist. No. 03-MA-12, appellant attached numerous affidavits to his postconviction petition executed by family members, Hrdy,

a psychologist, and a mitigation specialist. These affidavits set out information counsel could have uncovered had they conducted a comprehensive investigation. Much of this information is highly relevant in considering the statutory mitigating factors. As stated in *Herring*, supra:

{¶57} "The extended family affidavits in the instant cause reveal: Appellant had almost a lifelong involvement in gangs (9/17/99 Postconviction Petition, Appendix, Exh. 6, p. 1 ¶ 3.); Appellant's mother abused crack cocaine for approximately 12 years while he was growing up (9/17/99 Postconviction Petition, Appendix, Exh. 6, ¶ 6, 8; Exh. 12, ¶ 10.); Appellant's father was shot and killed, apparently in a drug dispute in 1983 when Appellant was only a toddler (9/17/99 Postconviction Petition, Appendix, Exh. 7, ¶ 5; Exh. 12, ¶ 2.); Appellant started selling drugs and carrying a gun in his early teens (9/17/99 Postconviction Petition, Appendix, Exh. 8, ¶ 2, 8; Exh. 11, ¶ 4, 21; Exh. 31, ¶ 10.); growing up Appellant's stepfather was addicted to drugs (9/17/99 Postconviction Petition, Appendix, Exh. 12, ¶ 3.); Appellant abused alcohol and drugs almost daily since an early age (9/17/99 Postconviction Petition, Appendix, Exh. 9, ¶ 6; Exh. 11, ¶ 15; Exh. 29, ¶ 4; Exh. 31, ¶ 9.); Appellant dropped out of high school in the tenth grade, and his mother does not know if he ever graduated (9/17/99 Postconviction Petition, Appendix, Exh. 11, ¶ 8; Exh. 12, ¶ 14.); Appellant's grandmother's telephone calls and request to testify were unreturned by his trial counsel (9/17/99 Postconviction Petition, Appendix, Exh. 7, ¶ 2, 7.); Appellant's aunt, uncle, cousin, and grandmother would have testified had they been asked. (9/17/99 Postconviction Petition, Appendix, Exh. 6, ¶ 2; Exh. 7, ¶ 2; Exh. 29, ¶ 2; Exh. 31, ¶ 2.)

{¶58} "Appellant also points to the affidavit of Thomas J. Hrды, the trial mitigation specialist retained by his trial counsel. Hrды concludes that he provided a substandard mitigation investigation resulting from his lack of adequate time to prepare. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶ 2, 5 and 7.) Hrды states that he failed to prepare the intended and requisite psycho-social history of Appellant and his family due to time constraints. Hrды also states that he interviewed

Appellant four times and Appellant's mother once; that he met with Appellant's lawyers once; and that Hrdy had only provided mitigation services in capital cases two or three times prior to Appellant's trial. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶¶ 2, 5 and 7.)

{¶59} "While Hrdy did not do his intended and requisite research, he is uncertain whether he advised Appellant's trial counsel of his failure. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶ 5.) Hrdy does not believe that he requested any of Appellant's historical documents or records, including those from the Ohio Department of Youth Services or Mahoning County Human Services. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶ 8.) Attachment A to Hrdy's Affidavit sets forth his intended course of action relative to Appellant's mitigation, however, Hrdy's affidavit confirms his failure to complete most of his identified tasks. (9/17/99 Postconviction Petition, Appendix, Exh. 33.)

{¶60} \* \* \*

{¶61} "In addition, Appellant supplied the affidavit of Jolie S. Brams, Ph.D. a psychologist in support of this claimed error. Brams was contacted in 1998, following Appellant's conviction, in order to review the quality and thoroughness of the mitigation presented at Appellant's sentencing hearing, with regard to the requisite psychological analysis. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 3.) Her affidavit states that the jury should have been provided a thorough analysis of Appellant and his family. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 5-7.) She stresses that his trial counsel did not dwell on Appellant's youth (he was 19 years old at the time of the offense) and that counsel inaccurately presented Appellant's family as caring. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 8.) Brams also stresses that the jury was never advised of Appellant's 'dysfunctional role models'. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 8.)

{¶62} "Further, Brams states that, '[c]ertainly, an appropriate presentation of lay and expert witnesses would have provided the jurors with ample opportunity to

render a decision in favor of sparing the life of [Appellant].’ (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 9.)

{¶63} “In addition to reviewing Appellant's historical documents, Brams also relied on the public defender mitigation specialist's interviews with Appellant and his family. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 10.) Brams' 43-page affidavit states in part that Appellant:

{¶64} “ ‘ \* \* \* was not exposed to adults whose behavior placed them anywhere within the normative range of socially accepted behavior in our society. Frequent, if not daily, criminal activities, drug dealing and other illegal activities in the home, open drug and alcohol abuse, unemployment and disdain for working an honest job, and deceitfulness and manipulation, were the only adult behaviors that [Appellant] had an opportunity to emulate. \* \* \* [Appellant] was \* \* \* actually dissuaded from engaging in behaviors that did not fit this familiar and sociocultural norm. [Appellant] would have been an outcast of his family had he chosen to behave differently \* \* \* .

{¶65} “ ‘ \* \* \*

{¶66} “ ‘The persons given the responsibility of supervising [Appellant throughout his childhood] were intoxicated, engaging in criminal activities on a daily basis, or generally unconcerned with his functioning. These issues are a remarkably important part of [Appellant's] developmental history.

{¶67} “ ‘It is beyond the scope of this lengthy affidavit to detail the marked dysfunction in [Appellant's] upbringing, regarding the inappropriate behaviors to which [Appellant] was exposed, the lack of problem solving taught him in his upbringing, and the lack of supervision and stability.

{¶68} “ ‘ \* \* \*

{¶69} “ ‘Lastly, substance abuse seemed to be a way for [Appellant] to self-medicate a significant degree of depression. \* \* \*

{¶70} “ ‘ \* \* \*

{¶71} “ \* \* \* Without this presentation [of Appellant's substance abuse and history], jurors \* \* \* saw only a young drug dealer, and user [sic] not a fully humanized portrait of a young man who was faced with serious difficulties in his life, \* \* \*

{¶72} “ \* \* \*

{¶73} “ [Further,] \* \* \* even as an adult, [Appellant's] perceptual learning skills are only those of a ten-year old.

{¶74} “ \* \* \*

{¶75} “ \* \* \* based on his specific IQ and achievement profiles, his history which is suggestive of learning disabilities, and his chronic and early on set [sic] substance abuse, a neuropsychological evaluation should have be [sic] conducted to establish whether [Appellant] suffers from organic brain impairment. Such an evaluation should have been conducted along with a general psychological evaluation at the time of the trial. \* \* \* ’ (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶ 15, 19, 20, 29, 31, 33, 34, 38, 46.)

{¶76} “ \* \* \*

{¶77} “Appellant also points to Exhibit 18, the affidavit of Dorian L. Hall, in support of this argument. Hall's affidavit sets forth his extensive involvement in death penalty cases and stresses the importance of a psychosocial investigation and analysis for the mitigation phase of a capital sentencing. (9/17/99 Postconviction Petition, Appendix, Exh. 18, ¶ 4-5, 9-13.) Hall lists the records, documents, and the interviews that should have been conducted and analyzed in Appellant's case. (9/17/99 Postconviction Petition, Appendix, Exh. 18, ¶ 6-7.) Hall concluded that Appellant, ‘should have been evaluated by a neuropsychologist to determine whether brain impairment exists.’ (9/17/99 Postconviction Petition, Appendix, Exh. 18, ¶ 8.)” Id. at ¶¶70-90.

{¶78} All of the information set out in the affidavits goes to the R.C. 2929.04(B) factors that *shall* be considered when weighing whether to impose the death penalty. The information likewise is considered highly relevant by the

American Bar Association's Professional Standards: "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. *Investigation is essential to fulfillment of these functions.*" (Emphasis sic.) *Powell v. Collins* (C.A. 6, 2003), 332 F.3d 376, 399, quoting 1 ABA Standards for Criminal Justice, Standard 4-4.1 (1982 Supp.)

{¶79} Thus, the information clearly goes to highly relevant factors. Most importantly, the information in the affidavits brought to light appellant's deeply troubled childhood, his complete lack of any positive role models, his substance abuse problems, his depression, his low IQ, and his possible organic brain impairment. These areas of appellant's life, had they been investigated and explored fully, are all very significant factors to be weighed and considered in determining what mitigation evidence to present. And counsel did not have this information before them when they made the decision to present only positive mitigation evidence. This court previously found that appellant's counsel could not have made an intelligent strategic decision without the proper investigation before them. *Herring*, at ¶100, citing *Williams v. Taylor* (2000), 529, U.S. 362, and *Glenn v. Tate* (C.A. 6, 1995), 71 F.3d 1204. And Hrdy himself admitted in his affidavit that his investigation was "substandard" and that he did not complete many of the tasks that he should have in investigating appellant's background.

{¶80} At the postconviction hearing, both attorneys said that they did not want to go the route of presenting negative mitigation evidence. For instance, Attorney Van Brocklin opined that negative information regarding appellant's life of crime would have been more ammunition for the death penalty. (Postconviction Tr. 47). He testified that the jury was conservative and he did not think that negative information would have worked well with them. (Postconviction Tr. 45). And Attorney Zena testified that he did not want to put on any negative evidence because it would "bury him [appellant] further." (Postconviction Tr. 79-80).

{¶81} But neither attorney was asked whether, if they knew the specifics of what was later uncovered about appellant's family life, substance abuse, low IQ, etc., would they have presented it to the jury in mitigation. Attorney Zena's testimony is especially telling. He testified that he knew nothing specific about appellant's family at the time of the trial or any negative information. (Postconviction Tr. 73, 74, 76). When asked was the decision to present only positive mitigation evidence a conscious choice, Attorney Zena responded, "*To the extent of what I thought was there, yes.*" (Emphasis added; Postconviction Tr. 76). And Attorney Van Brocklin testified that he was "disappointed" in what was done by the mitigation investigator. (Postconviction Tr. 40). Attorney Van Brocklin was also asked about the mitigation theory. He stated that it was twofold: (1) to present positive information and (2) to argue that appellant was not convicted as a principal offender. (Postconviction Tr. 36). However, he then went on to state, "that basically *at the time is what we had to - in my estimation, to work with. We had not received any other information from Mr. Hrdy.*" (Emphasis added; Postconviction Tr. 36).

{¶82} This testimony by appellant's trial attorneys further confirms that Hrdy's investigation, and therefore, trial counsel's mitigation investigation was less than adequate. And in a situation where the death penalty is to be considered, a deficient mitigation investigation is cause for grave concern. The American Bar Association Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (Emphasis sic.) *Wiggins*, 539 U.S. at 524, quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). Clearly, the information regarding appellant's family life and background was "reasonably available." Furthermore, counsel could not simply rely on Hrdy's investigation as Attorney Van Brocklin suggested. It is trial counsel's duty to ensure that a complete investigation is undertaken. *Wiggins*, 539 U.S. at 521; *Powell*, 332 F.3d at 399-400.

{¶83} We acknowledge that generally the existence of an alternative mitigation theory does not establish ineffective assistance of trial counsel. *State v. Combs* (1994), 100 Ohio App.3d 90, 105. However, this case involves more than a simple assertion that counsel should have presented other mitigation evidence. Here, given what they could have uncovered with a complete investigation, counsel had scarcely any information about appellant's background. One of his attorneys admitted that he did not know the negative things about appellant's family. Without a full picture of appellant's upbringing and family life, counsel could not have made an informed, strategic decision about what mitigation evidence to present to the jury. The defect in this case does not involve counsel's decision to present one theory of mitigation over another. Instead, the defect rests with the fact that counsel could not have made a reasonable decision about what mitigation theories to pursue given they did not have the information they needed to make such a decision.

{¶84} We are also mindful that counsel is not ineffective for failing to present additional witnesses whose postconviction affidavits add only additional detail to support the original mitigation theory. *State v. Williams* (1991), 74 App.3d 686, 695. But "the facts herein reveal that the postconviction evidence dehors the record presents not additional evidence or detail, but a completely opposite line of evidence." *Herring*, 7th Dist. No. 03-MA-12, at ¶99.

{¶85} Two United States Supreme Court cases in particular support our decision.

{¶86} In *Wiggins*, 539 U.S. 510, the Supreme Court found Wiggins' trial counsel was ineffective for failing to fully investigate Wiggins' life history. Wiggins' counsel drew from three sources in presenting his mitigation evidence: psychologist reports regarding Wiggins' IQ, trouble coping, and possible personality disorder; a written presentence investigation with a one-page description of his childhood; and Department of Social Services (DSS) records documenting Wiggins' foster home placements. The Court found that counsels' decision not to expand their investigation fell below the prevailing professional standards. *Id.* at 524. The Court

pointed to various other avenues counsel could have pursued including the preparation of a social history report, which would have been paid for by the public defender's office, and delving into the limited information contained in the DSS report that Wiggins' mother was an alcoholic, Wiggins was shuttled from foster home to foster home, he had extended school absences, and at least once his mother left him and his siblings alone for days without food. *Id.* at 524-25. The Court determined that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Id.* at 525.

{¶187} And in *Rompilla*, 545 U.S. 374, at the syllabus, the U.S. Supreme Court held "that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." The extent of defense counsel's mitigation evidence was testimony from five family members arguing residual doubt and professing their belief that Rompilla was a good man and testimony from Rompilla's 14-year-old son that he loved his father and would visit him in prison. This was after counsel interviewed Rompilla and the five family members and examined reports by three mental health witnesses. The Supreme Court reversed the Circuit Court of Appeals' determination that counsel's investigation was reasonable. In so doing, the Court found that trial counsel's investigative efforts were unreasonable because they failed to look at the file on Rompilla's prior conviction, which they knew was in the state's possession. *Id.* at 390. The Court pointed out that had counsel examined just this one file, they would have found a range of mitigation leads to follow particularly regarding Rompilla's dreadful childhood, low intellectual functioning, and possible alcoholism. *Id.* The Court concluded:

{¶88} "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [Rompilla's] culpability,' *Wiggins v. Smith*, 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S.Ct. 1495), 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, *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052." *Id.* at 393.

{¶89} In considering whether trial counsel exercised reasonable professional judgment, the central question "is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of \* \* \* [the defendant's] background was itself reasonable." (Emphasis sic.) *Wiggins*, 539 U.S. at 522-23. Given the wealth of mitigating evidence that could have been discovered in this case had counsel conducted a thorough investigation into appellant's childhood, family background, and mental condition, we cannot conclude that the investigation itself was reasonable. "[A] lack of reasonable investigation and preparation for the sentencing phase of a capital trial constitutes ineffective assistance of counsel." *State v. Johnson* (1986), 24 Ohio St.3d 87, 89. Absent a full investigation, counsel could not have made an informed decision on what mitigation evidence to present. "[I]t is only *after* a full investigation of *all* the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client's case." (Emphasis sic.) *Id.*, quoting *Pickens v. Lockhart* (C.A. 8, 1983), 714 F.2d 1455.

{¶90} Based on the foregoing, we must conclude that the trial court's decision denying postconviction relief was an abuse of discretion. As the United States Supreme Court concluded in *Rompilla*, the undiscovered mitigating evidence in this

case “ ‘ “might well have influenced the jury's appraisal” ’ ” of appellant's culpability and the probability of a different sentence if counsel had presented the evidence is “sufficient to undermine confidence in the outcome” reached by the jury. (Internal citation omitted.) 545 U.S. at 393. Accordingly, appellant's first assignment of error has merit.

{¶91} Appellant's second assignment of error states:

{¶92} “THE TRIAL COURT ERRED WHEN IT PRECLUDED HERRING FROM PRESENTING EVIDENCE REGARDING MITIGATION THAT COULD HAVE BEEN PRESENTED HAD TRIAL COUNSEL PERFORMED AN ADEQUATE INVESTIGATION.”

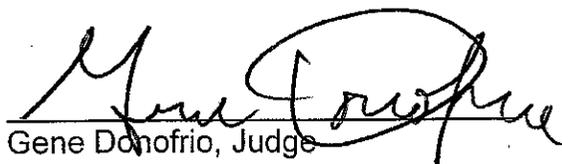
{¶93} Because we have already concluded that the mitigation investigation was inadequate, appellant's second assignment of error is moot.

{¶94} For the reasons stated above, appellant's postconviction petition is hereby granted. The judgment of the trial court imposing the death sentences is reversed. This matter is remanded to the trial court for a new sentencing hearing to be conducted pursuant to R.C. 2929.06, whereby a jury shall be impaneled to consider whether to once again impose the death penalty or to instead impose life in prison.

Vukovich, .J., concurs.

Waite, P.J., concurs in judgment only.

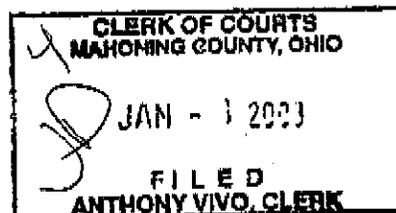
APPROVED:

  
Gene Donofrio, Judge

# **APPENDIX – C**

**Judgment Entry  
Mahoning County Court of Common Pleas  
Judge John M. Durkin  
January 6, 2003**

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO



STATE OF OHIO )  
 )  
 PLAINTIFF )  
 )  
 VS. )  
 )  
 WILLIE S. HERRING )  
 )  
 DEFENDANT )

CASE NO. 96-CR-339  
JUDGE JOHN M. DURKIN  
JUDGMENT ENTRY  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter came on for consideration on the Defendant-Petitioner, Willie S. Herring's (hereinafter referred to as the Defendant) post-conviction petition and the Plaintiff- Respondent, State of Ohio's (hereinafter referred to as the Plaintiff) Motion for Summary Judgment. The Defendant did not file a response to the Plaintiff's Motion for Summary Judgment.

The Defendant was indicted on June 7, 1996, for one count of Aggravated Murder, a violation of Ohio Revised Code Section 2903.01(B), three counts of Complicity to Commit Aggravated Murder, two counts of Attempted Aggravated Murder, three death penalty specifications involving the purposeful killing of or attempt to kill two or more persons, six firearm specifications, and two counts of Aggravated Robbery.

The Jury Trial began on December 16, 1997 with individual voir dire. On January 29, 1998, the Jury returned with a verdict of not guilty of the Aggravated Murder of Jimmie Lee Jones in Count One, but was found guilty of complicity to commit the offense of aggravated murders of Jimmie Lee Jones in Count One, Herman Naze, Sr., in Count Two and Dennis Kotheimer in Count Three, along with a finding of guilty of conduct involving the purposeful killing or attempt to kill two or more persons in Counts One, Two and Three.

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The Defendant was also found guilty as to all other counts and specifications in the Indictment.

The mitigation phase began on February 12, 1998. On February 16, 1998, the jury returned with a recommendation of death in Counts One, Two and Three. Pursuant to R.C. 2929.03(D)(3), the Court found by proof beyond a reasonable doubt that the aggravating circumstance the Defendant was found guilty of committing outweighed the mitigating factors, and imposed a sentence of death.

The Petition for Post-Conviction Relief raises seventeen grounds for relief.

The first, second, third, fourth, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, fifteenth and seventeenth grounds for relief all assert that the judgment and sentence are void or voidable because his trial counsel failed to provide adequate assistance in his defense during the sentencing phase of the trial. Defendant asserts that trial counsel was ineffective in not conducting an adequate investigation; failing to interview witnesses; failing to present evidence regarding the Defendants upbringing; and failing to call expert witnesses relating to gang culture, and psychological evaluation and assessment.

It is well settled that "it is the obligation of counsel to make reasonable investigations or to make a reasonable decision that makes specific investigations unnecessary. A particular decision not to investigate must be examined for reasonableness under the circumstances with strong measures of deference to counsel's judgment." State v. Williams, (1991) 74 Ohio App. 3d. 686.

It is clear from the transcript of the sentencing phase that counsel elected to present positive evidence from the Defendant's family, and not to present negative evidence concerning the Defendant's childhood. At this point, one can only speculate as to what effect, if any, negative evidence would have had in the jury's deliberations. Tactical decisions and strategic choices must be reviewed with the strong presumption that effective legal counsel is rendered. State v. Bradley, (1989) 42 Ohio St. 3d 136. A different opinion, which varies from the theory used at trial does not depict ineffective assistance of counsel. State v. Combs, (1994) 42 Ohio App. 3d 90. If the evidence is cumulative of,

or alternative to the material presented at trial, the court may properly deny a hearing. State v. Combs, supra at p. 98.

In the instant case, Defendant simply suggests and speculates that trial counsel's failure to present an alternative theory, specifically, negative testimony concerning his childhood, amounts to ineffective assistance of counsel. This Court does not agree, and the Defendant is not entitled to a hearing as to these claims.

Defendant also asserts that trial counsel was ineffective in failing to call other witnesses in both the trial and penalty phase, including the "eyewitness expert" and witnesses who would have testified regarding his negative upbringing. It is well settled that "decisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics." State v. Coulter, (1992) 75 Ohio App. 3d 219. Initially, the individual proposed by the Defendant to offer testimony regarding "eyewitness identification" has been rejected in this County. State v. Group, Mahoning County Common Pleas Court, Case No. 97-CR-66.

Additionally, Defendant asserts that there were other witnesses trial counsel should have called in the penalty phase. Trial counsel did present witnesses during the penalty phase. The mere fact that there are other possible witnesses trial counsel could have called does not demand the conclusion that trial counsel was therefore ineffective. A claim of prejudice must constitute more than vague speculation.

Defendant also complains that trial counsel should have secured the assistance of a neuro-psychologist. Defendant's Exhibit 28 is a psychological report prepared and submitted by a defense psychologist, Dr. Darnall. The report does not recommend that the Defendant be examined by a neuro-psychologist. Additionally, there were specific findings made by Dr. Darnall that were not favorable to the Defendant.

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A Defendant must demonstrate that had counsel acted differently, a change in the proceedings would have resulted. Mere allegations or speculation that a Defendant was prejudiced by counsel's actions does not overcome the presumption that counsel was effective. State v. Otte, (1996) 74 Ohio St. 3d 555. There is simply nothing the record to support this claim, and this claim is dismissed without a hearing.

Defendant also asserts that trial counsel was ineffective for not presenting evidence that Ronald Marinelli was lying when he identified the Defendant as the man who shot him. The Defendant did not receive the death penalty for shooting Ronald Marinelli. In addition, the statement allegedly overheard by Ms. Herring is vague and subject to various interpretations. To suggest that Ronald Marinelli was willing to commit perjury is purely speculative. The claims of prejudice must constitute more than vague speculation. More allegations or speculation that a Defendant was prejudiced by counsel's actions does not overcome the presumption that counsel was effective. State v. Otte, supra, at p. 555.

The Defendant also attacks the manner in which the death penalty is imposed in Ohio (Claims Five and Six). Defendant's arguments overlook the fact that the Ohio Supreme Court has repeatedly found that the death penalty by means of lethal injection is not cruel and unusual punishment. State v. Carter, (2000) 89 Ohio St. 3d 593.

In addition, although Defendant presents material outside the record concerning the death penalty, this fact alone is not the sole determining factor that would require a trial court to hold a hearing in a post-conviction relief claim. Instead, the Defendant is required to submit evidentiary documents which contain sufficient operative facts to demonstrate constitutional claims. State v. Jackson, (1980) 64 Ohio St. 2d 107. In addition, claims that were raised or could have been raised at trial or on direct appeal are barred by res judicata. State v. Steffen, (1994) 70 Ohio St. 3d 399.

The materials presented by the Defendant fails to meet a minimum level of cogency to support the claim. The material does not deal with his specific case and therefore does not pass the minimum threshold of cogency required to raise a constitutional claim. State v. Cole, (1982) 2 Ohio St. 3d 112. Additionally, these are claims that were or could have been raised on his direct appeal, and are barred by res judicata. State v. Steffen, (1994) 70 Ohio St. 3d 399.

Defendant's Thirteenth ground for relief concerns the Ohio Jury Instruction, specifically, that instructions to capital juries are overly broad so as to allow them to consider non-statutory aggravating circumstances. This ground for relief challenges the statutory scheme of Ohio law, and is not a constitutional challenge. In addition, this is an issue which was, or could have been raised on direct appeal, and is barred by res judicata. State v. Steffen, supra at p. 399.

In the sixteenth ground for relief, the Defendant asserts that the trial court instructed the jury to disregard Ronald Marinelli's identification of the Defendant. This is a misstatement of the instructions given by the Court. The actual instructions were that the jury should "disregard the comments of Mr. Marinelli where he identified Willie Herring as the perpetrator from that photograph." The trial court did not instruct the jury to disregard Mr. Marinelli's testimony concerning the similarities between the Defendant and the perpetrator. The jury is presumed to have followed the instructions given by the trial court unless the Defendant has proof otherwise. Paus v. Minich, (1990) 53 Ohio St. 3d 186. In the instant case there is no evidence that the jury did not follow the instructions from the Court.

Finally, in his seventeenth ground for relief, the Defendant asserts that trial counsel was ineffective, and the trial court erred, when it gave instructions that allowed the jury to consider the death penalty when the Defendant had only been convicted of Complicity to Aggravated Murder. Since this is a claim that was or could have been raised at trial, or that was raised on direct appeal, this claim is barred by res judicata. State v. Steffen, supra at p. 399.

The Defendant's request for discovery and request for an evidentiary hearing are overruled.  
The State of Ohio's Motion for Summary Judgment is sustained.

1/6/03  
DATE:

*John M. Durkin*  
JUDGE JOHN M. DURKIN

*Done*  
CLERK: COPY TO ALL COUNSEL  
OR UNREPRESENTED PARTY.

# **APPENDIX – D**

**Judgment Entry**  
**Mahoning County Court of Common Pleas**  
**Judge John M. Durkin**  
**September 26, 2008**

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

STATE OF OHIO

) CASE NO. 96 CR 339

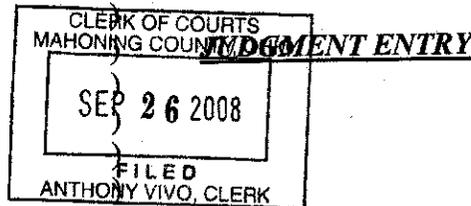
) JUDGE JOHN M. DURKIN

PLAINTIFF

VS.

WILLIE S. HERRING

DEFENDANT



Appellant, Willie S. Herring (Herring), seeks post-conviction relief from his three death sentences. Herring filed an appeal from a decision of this Court on January 6, 2003, that sustained the State of Ohio's Motion for Summary Judgment, and overruling Herring's Petition for Post-Conviction Relief.

The Seventh District Court of Appeals remanded this case to the Trial Court and Ordered that an evidentiary hearing be held to answer one question – did Thomas J. Hrdy, a mitigation specialist hired by Herring's trial counsel, advise counsel that he did not do his intended and requisite research prior to trial? If he did, then counsels decision to proceed at mitigation with only positive mitigation was not a fully informed decision, and a claim for ineffective assistance of counsel would be warranted.

If, on the other hand, Hrdy failed to advise counsel that he did not do his intended and requisite research, than trial counsels decision to present only positive mitigation was a fully informed and reasonable decision, and his counsel was not ineffective.

This Court did hold an evidentiary hearing on August 28, 2006, where Attorney Gary Van Brocklin and Attorney Thomas Zena, the trial counsel appointed to represent Herring, testified.

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The hearing was reconvened on December 4, 2006. Dorian Hall, a mitigation specialist from the Ohio Public Defenders Office, who holds a masters degree in Sociology, testified on behalf of Herring. Hall testified that the mitigation evidence presented at the second phase did not comply with the standards of the ABA. She admitted that she was not able to render an opinion regarding the competence or effectiveness of trial counsel.

Attorney Van Brocklin and Zena testified that they were never informed of Hrды's investigation shortcomings, and they believed Hrды did all the work that he needed to do at the time. Trial counsel also testified that Hrды never asked for more time to complete his investigation, and if he had, trial counsel was confident that the Trial Court would have given the defense more time to prepare for mitigation.

Finally, Van Brocklin and Zena testified that the composition of the jury panel had a great deal to do with the decision to present positive mitigation. The first panel, prior to a mistrial, were a lot less adamant about the death penalty. Trial counsel believed that any information given to the jury about Herring's criminal history would have given the jury more ammunition to return with a recommendation of death.

At the conclusion of the hearing, the parties requested leave to file post-hearing briefs. The Ohio Public Defender's Office filed their brief on May 2, 2007, and the State of Ohio filed their response on October 15, 2007.

Based on this evidence, it is abundantly clear that Thomas Hrды never advised trial counsel that his investigation was not complete, and never asked them for additional time to complete it. Trial counsels decision to present positive mitigation was reasonable, based on an objective review of counsels performance, measured with

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reasonableness under professional norms, including a context-dependent consideration of the challenged conduct as seen from counsels perspective at the time of that conduct.

In addition, consistent with the Trial Court's opinion that granted summary judgment to the State, "one can only speculate as to what effect, if any, negative evidence would have had in the jury's deliberations."

Based on the foregoing, Herring's Petition for Post-Conviction Relief is overruled.

9/26/08

DATE:

*John M. Durkin*

JUDGE JOHN M. DURKIN

*Dme*  
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OR UNREPRESENTED PARTY

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