

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 11-0451

Appellant, : On appeal from the Court of Appeals,

-vs- : Seventh Appellate District, Mahoning

WILLIE HERRING, : County, Ohio, Case No. 03 MA 12

Appellee. : THIS IS A DEATH PENALTY CASE.

**APPELLEE WILLIE HERRING'S MEMORANDUM IN
OPPOSITION OF JURISDICTION**

PAUL J. GAINS
Mahoning County Prosecuting Attorney

TIMOTHY YOUNG
Office of the Ohio Public Defender

RALPH RIVERA – 0082063
Assistant Prosecuting Attorney
Counsel of Record

KIMBERLY S. RIGBY – 0078245
Assistant State Public Defender
Counsel of Record

JENNIFER A. PRILLO – 0073744
Assistant State Public Defender

Office of the Mahoning County Prosecutor
21 W. Boardman Street, 6th Floor
Youngstown, Ohio 44503
ph: (330) 740-2330
fax: (330) 740-2008

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
ph: (614) 466-5394
fax: (614) 644-0708

Counsel for Appellant

Counsel for Appellee

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

This Court should not accept jurisdiction in this case because it does not involve a substantial constitutional question and is not of public or great general interest. The State's three propositions of law merely ask this Court to engage in error correction. In the State's First and Second Propositions of Law, the State takes issue with the Seventh District Court of Appeals' conclusion that Herring's trial counsel were constitutionally ineffective during the sentencing phase of Herring's trial and that this ineffectiveness prejudiced Herring. In the State's Third Proposition of Law, the State alleges that the Seventh District Court of Appeals erred in their application of *Strickland v. Washington*, 466 U.S. 668 (1984).

Because the court of appeals applied the correct law and analysis, the State's propositions of law merely ask this Court to engage in error correction and are not befitting of this Court's consideration. This case does not present questions warranting further review from this Court. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

I. The Offense.

On April 30, 1996, at approximately 2:00 a.m., five males with masks and guns entered the Newport Inn bar in Youngstown, Ohio. (T.p. 4117-19) Three individuals died as a result of the shootings: Jimmie Lee Jones, Dennis Kotheimer and Herman Naze, Sr. (T.p. 4181, 4183, 4186, 4191) Two others, Deborah Aziz and Ron Marinelli, were shot and severely wounded, but survived. (T.p. 3905-3906, 4135-4137)

II. The Trial.

Appellee Willie Herring was indicted on June 7, 1996, for one count of Aggravated Murder, in violation of O.R.C. § 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. After several changes to the Bill of Particulars, the State finally settled on their theory of the case: that Herring was the principal offender in the murder of Jimmie Lee Jones and aided and abetted in the commission of the aggravated murders of Herman Naze, Sr. and Dennis Kotheimer. All other charges against Herring remained the same. (Doc. #133) Ultimately, the State of Ohio filed a motion to dismiss the § 2929.04(A)(7) specifications for Counts Two and Three, which charged Herring with being the principal offender. (R.E. #135)

On January 29, 1998, Herring was acquitted of the one count of Aggravated Murder, in violation of O.R.C. § 2903.01(B). The jury returned guilty verdicts on three counts of complicity to commit aggravated murder as well as guilty findings as to all other counts and specifications in the indictment.

Despite the wealth of mitigation evidence available to present, there was essentially no mitigation presented at Herring's sentencing phase. Deborah Herring, Willie's mother, and Nikki Herring, Willie's sister, were the only mitigation witnesses, and they spoke for a mere six and one half pages of transcript between the two of them. (T.p. 4754-4760) No other family members testified. Herring himself did not testify. No expert testimony on any subject was presented to the jury. Trial counsel acknowledged to the jury that mitigation was the "most important stage of the proceedings," yet at the same time, conceded that the presentation was brief. (T.p. 4750-4751)

Besides the brief testimony of Herring's mother and sister, the only other evidence trial counsel put on during the sentencing phase concerned the sentences and pleas of Herring's co-defendants and the fact that there were no other persons convicted of aiding and abetting who have received the death sentence and are on death row with an O.R.C. § 2929.04(A)(5) specification. (T.p. 4710-11; 4726) And even that evidence was partly precluded by the trial court. (T.p. 4727)

On the whole, the jury that convicted Herring and sentenced him to death knew very little about Willie Herring. The jury deliberated for over two days on Mr. Herring's sentence, before returning a recommendation of three death sentences for complicity in those deaths. (T.p. 4845)

III. Post-conviction.

Herring's post-conviction relief petition was filed on September 17, 1999, under case number 96-CR-339. In his First, Second, Fourth, and Seventh through Twelfth Grounds for Relief, Herring alleged that he received the ineffective assistance of counsel during the sentencing phase of his capital proceedings because of counsel's failure to investigate and present relevant mitigation evidence from both lay and expert witnesses and because of counsel's

failure to counter evidence offered by the prosecution. (Post-Conviction Petition, pp. 18-23, 27-29, 36-53.) Herring further alleged that during the sentencing phase of the trial, counsel presented only two mitigation witnesses, Deborah Herring, Willie's mother (Mit.T.p. 4754-4757), and Nicole Herring, his sister (Mit.T.p. 4758-4760), amounting to only six and one half transcript pages of testimony.

Herring has large families on both his mother's and father's sides, yet none of those family members were called as mitigation witnesses. As the Seventh District Court of Appeals found, "[Herring] attached numerous affidavits to his postconviction petition executed by family members, Hrdy, a psychologist, and a mitigation specialist. . . Much of this information is highly relevant in considering the statutory mitigating factors." *State v. Herring*, 2011 Ohio 662, 2011 Ohio App. LEXIS 540, *18-19 (7th App. Dist. 2011). Through post-conviction affidavits, Deborah Herring, Nikki Herring, Keith Herring, Vicky Lynn Hayes, Carrie Everson, Willie Chapman, Margie Harrell, and Marlan Everson provided family history, including generational membership in gangs; abuse of alcohol and drugs; and lack of structure, parenting and education. (P.C. Exh. 6, 7, 8, 9, 12, 29, 30, 31) Additionally, Deborah and Nikki were able to provide more crucial details upon interview for post-conviction purposes, than were elicited during their trial testimonies. (P.C. Exh. 9, 12; Mit.T.p. 4754-4757, 4758-4760)

Trial counsel also failed to present psychological testimony to describe and explain Herring's dysfunctional childhood environment. Dr. Jolie Brams noted that "...It is simplistic but urgently significant that the manner in which Willie Herring was raised has marked impact on almost every aspect of his functioning. Herring's childhood was remarkably dysfunctional in almost every aspect." (P.C. Exh. 1) "His childhood was that of a 'feral child,' who roamed the

neighborhood aimlessly, without any adult having meaningful or consistent concern.” (P.C. Exh.

1)

Notwithstanding this evidence, the trial court summarily dismissed Herring’s petition without an evidentiary hearing on January 6, 2003.

A. Post-conviction appeal.

A timely appeal was filed with the Seventh District Court of Appeals. On October 1, 2004, the Seventh District remanded the matter back to the trial court for an evidentiary hearing on Herring’s First Ground for Relief. *State v. Herring*, 2004 Ohio 5357, 2004 Ohio App. LEXIS 4889 (7th App. Dist. 2004). The Seventh District held that “this Court hereby remands this case consistent with O.R.C. § 2953.21(E) for the trial court to conduct an evidentiary hearing to assess whether, ‘counsel’s decision to cease investigating when they did was unreasonable[,]’ and if so whether Herring was prejudiced as a result.” *Id.* at *37 (parenthetical omitted). That Court stated “Specifically, on remand, the trial court must assess whether Herring’s counsel were apprized of Hrady’s investigation’s shortcomings. Only then could counsel have made a reasoned decision to cease investigating.” *Id.* at *37-38.

B. Mandated Evidentiary Hearing.

The mandated evidentiary hearing was held in the Mahoning County Common Pleas Court on August 28, 2006 and December 4, 2006, before the Honorable Judge John Durkin. After a review of the Seventh District’s decision remanding this case, the trial court ruled that it would only consider evidence regarding whether trial counsel’s performance was deficient. Herring’s counsel strenuously objected that it was improper for the trial court to make the determination regarding whether trial counsel’s performance was deficient without having before

it the evidence that could have been uncovered. The trial court denied Herring's objection, so Herring's counsel only argued the first prong of the *Strickland* test.

At this hearing, Herring's counsel presented the testimony of both trial counsel, Gary Van Brocklin and Thomas Zena, and the testimony of mitigation specialist Dorian Hall, M.A., L.S.W. Post-hearing briefing was filed in lieu of final arguments. The trial court found that Herring's trial counsel were not deficient and thus denied Herring's Petition for Post-conviction Relief on Sept. 26, 2008. *State v. Herring*, Entry, No. 96 CR 339 (Sept. 26, 2008).

C. Second Post-conviction Appeal.

A timely appeal was filed in the Seventh District Court of Appeals. On February 11, 2011, the Seventh District stated "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." *State v. Herring*, Feb. 11, 2011 Entry, Case No. 08-MA- 213. That court went on to find in its opinion that "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. . . . Absent a full investigation, counsel could not have made an informed decision on what mitigation evidence to present." *State v. Herring*, 2011 Ohio 662, 2011 Ohio App. LEXIS 540, *33-34 (7th App. Dist. 2011). The court then concluded: "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 undisclosed 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.” *Id.* at *34-35 (citing *Rompilla*, 545 U.S. at 393.).

This appeal follows. This Court should decline jurisdiction in this case.

ARGUMENT

Proposition of Law No. I

IN A CAPITAL CASE, TRIAL COUNSEL'S REPRESENTATION IS CONSTITUTIONALLY INEFFECTIVE WHEN THEY FAIL TO ENSURE THAT A PROPER MITIGATION INVESTIGATION IS COMPLETED AND THEIR CLIENT IS PREJUDICED AS A RESULT.

I. Trial counsel's representation was constitutionally ineffective.

Herring's trial counsel hired mitigation specialist Thomas Hrdy to conduct the mitigation investigation. Hrdy failed to complete the constitutionally required investigation. Regardless of the fact that counsel hired someone to conduct the investigation, the duty to see that it was completed falls squarely on counsel. Accordingly, trial counsel were deficient. As a result of that deficiency, Herring was prejudiced during the mitigation phase of his capital trial.

A. Trial counsel failed in their duty to conduct a thorough mitigation investigation.

The State contends that Herring's trial counsel were not ineffective because they were not aware of their mitigation specialist's shortcomings. (State's MISJ at 12.) The State relies heavily on the assertion that Hrdy, the mitigation specialist at trial, failed to inform trial counsel that he had not conducted a complete investigation. The State argues that trial counsel's performance was not deficient because they were uninformed about Hrdy's failure to complete the investigation. The State attempts to use a post hoc argument to establish that, regardless of the failures of the mitigation investigation, counsel's decision to present only positive mitigation was a strategic one.

Strategic choices made after less than complete investigation are reasonable to the extent that reasonable and professional judgments can support the limitations on the investigation. However, in this case, there was not a reasonable and professional decision to limit the investigation. In fact, this is contrary to the State's own argument that counsel was unaware of

the shortcomings in the investigation. Both cannot be true. Either counsel made an informed decision to forgo further investigation or they were unaware that the investigation was stunted.

The very crux of this issue is that counsel *should have* been aware of the shortcomings in the mitigation investigation. Trial counsel cannot defer to the mitigation specialist's investigation without ensuring that such investigation was actually performed and is complete. The United States Supreme Court has been consistently clear that counsel holds the affirmative duty to investigate mitigating evidence. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000) (counsel must investigate in order to make reasoned, informed decisions); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995) (trial counsel have a duty to investigate all available mitigation factors).

In Herring's case, his trial counsel neither investigated available mitigation evidence themselves nor ensured that the expert they hired conducted a reasonable investigation. It makes no difference if Hrды failed to take affirmative steps to keep counsel apprised of his progress (or lack thereof). It was trial counsel's duty to ensure that an investigation was performed as well as completed. Herring's counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

Moreover, when trial counsel hires any expert, they define and control the role of that expert. *See Richey v. Mitchell*, 395 F.3d 660, 683-84 (6th Cir. 2005), *rev'd on other grounds, Bradshaw v. Richey*, 546 U.S. 74 (2005). The ABA Guidelines also underscore counsel's duty, noting that "counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work." *American Bar Association: Guidelines for the Appointment and Performance of Trial Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913

(Summer 2003) § 10.7.¹ Trial counsel cannot relieve themselves of their duty to conduct an adequate investigation by remaining removed from the process and then putting the blame on the mitigation specialist for not keeping them informed. *Richey*, 395 F.3d at 683-84.

The plethora of mitigating evidence presented in Herring's post-conviction petition demonstrates that this was not a case in which there was no mitigating evidence to be found. It was trial counsel's responsibility to ensure that this available evidence was uncovered and developed. Because counsel did not fulfill that responsibility, their subsequent decision to present only positive mitigation evidence was not based on a reasonable investigation and therefore cannot be considered a strategic decision.

The testimony of trial counsel further demonstrates that they did not fulfill their duties to ensure that a complete mitigation investigation was conducted. Attorneys Gary Van Brocklin and Thomas E. Zena were appointed to represent Herring at trial. Zena had the primary responsibility for the mitigation evidence. (Evid. Hr., p. 21.) Zena hired Hrdy as the mitigation specialist. (Evid. Hr., p. 21, 54.) Herring's trial was originally scheduled to begin on September 9, 1997. (Evid. Hr., p. 56.) Yet trial counsel failed to secure a mitigation specialist until mere weeks before trial—sometime after August 24, 1997. (Evid. Hr., Defense Exh. C, E.) Trial counsel had been appointed to represent Herring well over a year before this. (*Id.* at p. 53-54.)

This was not a case in which trial counsel lacked time to prepare or to request funds for a qualified mitigation specialist—they simply failed to do so. Even after a mistrial was declared on October 1, 1997, counsel failed to take advantage of this additional time to conduct a

¹ Appellant argues that the U.S. Supreme Court has “rejected the notion of holding defense counsel to the ABA standards.” (State's MISJ at 18.) This is an overstatement of *Bobby v. Van Hook*, 130 S. Ct 13, 16 (2009), in which the Court recognizes that the ABA Guidelines can be useful guides to what constitutes reasonableness. *Id.*; *See also, Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

thorough mitigation investigation. As shown in Hrdy's bill, after the mistrial was declared, Hrdy recorded only 8.5 hours of work before Herring's trial, with half of that time used for writing his report and billing and paperwork. (Evid. Hr., Defense Exh. B.)

Trial counsel had no reason to believe that further investigation would be fruitless. Van Brocklin testified that he could not recall whether he met with Hrdy more than one time and could not remember what was discussed the one time he knew they met. (Evid. Hr., p. 31-32.) Zena also testified that he could not remember meeting with Hrdy, but did not dispute the accuracy of the time Hrdy logged on his bill. (Evid. Hr., p. 59.) Both counsel testified that they regarded Hrdy as an expert in the field, "a credentialed mitigation specialist," and they did not want to be his boss. (Evid. Hr., p. 36-59.) But that is exactly what was required of them. It is trial counsel's responsibility to "allocate, direct, and supervise the work" of the defense team. ABA Guideline § 10.7. And, it is ultimately trial counsel's responsibility to complete the mitigation investigation. *Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362; *Strickland*, 466 U.S. 668; *see also Carter*, 218 F.3d 581; *Glenn*, 71 F.3d 1204.

The State takes issue with the use of testimony from mitigation specialist Dorian Hall—contending that she is not qualified to determine whether trial counsel's performance was deficient. (State's MISJ at 21-24.) While Hall is not an attorney, her testimony was regarding the quality of Hrdy's mitigation investigation—something she is qualified to assess.

Hall has been employed with the Office of the Ohio Public Defender since 1988 as a mitigation specialist, and has been supervising mitigation specialists since 1994. Evid. Hrg. T.p. 81-82. She has worked on approximately 300 capital cases as a mitigation specialist—personally conducting about 75 mitigation investigations. *Id.* at 83. She has been qualified as an expert in the area of mitigation investigation in Federal Court in the Northern and Southern

Districts of Ohio. *Id.* at 87-88. While there are no licensing or educational requirements for a mitigation specialist in the State of Ohio, a mitigation specialist is a recognized and integral part of the capital defense team. *See* ABA Guideline § 4.1 . . . (“The defense team should consist of no fewer than two attorneys . . . , an investigator, and a mitigation specialist.”). Hall is qualified to assess Hrды’s mitigation investigation based on her extensive experience as a mitigation investigator.

In addition to Hall’s testimony, Hrды himself affied that his mitigation investigation was substandard. (PC Ex. 33). This substandard investigation is imputed to trial counsel. *See Richey*, 395 F.3d at 683-84. Trial counsel has the ultimate responsibility to provide a thorough mitigation investigation. *Wiggins*, 539 U.S. at 521 (ultimately “*counsel* has a duty to make reasonable investigations.”) (emphasis added). Counsel’s testimony at the evidentiary hearing that they were unaware that a full investigation had not been performed does not absolve them of their responsibility.

B. Trial counsel’s decision to present only positive mitigation evidence was objectively unreasonable.

Trial counsel’s decision to present positive mitigation evidence was not reasonable. To make a determination about the reasonableness of such a decision, it is necessary to determine whether counsel conducted a complete investigation and were aware of the other mitigation evidence available to be presented on Herring’s behalf. Counsel has a duty to investigate the facts “to preserve options” before embarking on or making a conscious choice on a course of mitigation. *Powell v. Collins*, 332 F.3d 376, 399-400 (6th Cir. 2003). Trial counsel can make a decision to forego the presentation of evidence but only when there has been a full investigation. *Williams*, 529 U.S. 362; *Wiggins*, 539 U.S. 510; *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997);

Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005); *Hamblin v. Mitchell*, 354 F.3d 482, 488 (6th Cir. 2001); *Carter*, 218 F.3d at 597; *Glenn*, 71 F.3d at 1208-11 (6th Cir. 1995).

A decision cannot be strategic when trial counsel did not conduct a thorough investigation and therefore does not have all of the relevant information before them to make an informed decision. *Wiggins*, 539 U.S. at 525. Only after a full investigation can counsel make an informed, tactical decision about which information would be helpful in the client's case. *State v. Johnson*, 24 Ohio St. 3d 87, 90 (1986). When the evidence presented at Herring's mitigation hearing is compared to the evidence developed in his post-conviction proceedings, it is clear that no such investigation was performed in his case, and therefore the decision to present only positive mitigation evidence could not have been a strategic one.

II. Herring was prejudiced by his trial counsel's deficient performance.

Herring was prejudiced by his trial counsel's decision to present only positive mitigation evidence. All of the mitigation evidenced developed in Herring's postconviction proceedings goes to the factors set out in R.C. 2929.049(B) that *shall* be considered in determining whether to impose a death sentence.

At Herring's trial, his counsel presented only his mother's and sister's testimony—amounting to only six and a half transcript pages of testimony. (Mit. T.p. 4754-60). By contrast, post-conviction counsel developed evidence from many other sources. From these sources came a complete picture of Herring's troubled life and family, including multi-generational gang membership; alcohol and drug abuse; and a lack of structure, parenting, and education. (P.C. Exh. 6, 7, 8, 9, 12, 29, 30, 31.) Post-conviction counsel also utilized a psychologist to describe and explain Herring's dysfunctional childhood environment. Dr. Jolie Brams noted that "...It is simplistic but urgently significant that the manner in which Willie Herring was raised has

marked impact on almost every aspect of his functioning. Herring's childhood was remarkably dysfunctional in almost every aspect." (P.C. Exh. 1.) "His childhood was that of a 'feral child,' who roamed the neighborhood aimlessly, without any adult having meaningful or consistent concern." (P.C. Exh. 1.)

As in *Rompilla*, the evidence developed on Herring's behalf in post-conviction bears little resemblance to what was presented to the jury. The State contends that Herring was not prejudiced by the failure to present this evidence because the outcome of the trial would not have been different. But the United States Supreme Court has noted that this is not the test. *Rompilla*, 545 U.S. at 393 ("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."). The test is whether "the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome.'" *Id.* As the Seventh District Court of Appeals correctly concluded, the wealth of evidence developed in Herring's post-conviction proceedings, considered as a whole, "might well have influenced the jury's appraisal' of [his] culpability," (*Id.* (quoting *Wiggins*, 539 U.S. at 538)), and therefore undermines confidence in his sentence. See *Herring*, 2011 Ohio App. LEXIS 540 at *34-35.

The States's first proposition of law is without merit and does not demonstrate grounds warranting jurisdiction before this Court.

Proposition of Law No. II

TRIAL COUNSEL HAVE AN AFFIRMATIVE DUTY TO ENSURE THAT A PROPER MITIGATION INVESTIGATION IS PERFORMED AND CANNOT CIRCUMVENT THAT DUTY BY HIRING SOMEONE ELSE TO PERFORM THE NECESSARY TASKS.

Herring does not argue that there is a constitutional right to the effective assistance of a mitigation specialist. Herring was, however, constitutionally entitled to the effective assistance of counsel at the mitigation phase of his capital trial—something he did not receive.

In *Richey v. Mitchell*, the Sixth Circuit recognized that while Richey did not have a constitutional right to the “effective assistance of an expert,” he did have the right to have his expert properly prepared for his testimony by counsel. 395 F.3d 660, 683-84 (6th Cir. 2005), rev’d on other grounds, *Bradshaw v. Richey*, 546 U.S. 74 (2005). In Herring’s case, it is not merely that an expert was hired to testify and counsel failed to properly prepare him; it is more egregious. Counsel hired Hrды to conduct the mitigation investigation—a duty that clearly falls squarely on counsel—and then they failed to involve themselves at all in that investigation.

Herring’s trial counsel chose to utilize the services of Thomas Hrды as the mitigation specialist. When they brought him into the defense team, they had a duty to properly direct and supervise his work. See ABA Guideline § 10.7. It is defense counsel who ultimately bears responsibility to make a reasonable mitigation investigation. *Wiggins*, 539 U.S. at 521. Counsel does not absolve themselves of that duty when they hire a mitigation specialist. As with any expert, it is counsel who must define and control the role of the expert. See *Richey*, 395 F.3d at 683-84.

The State cites to two Federal District Court decisions in habeas corpus cases: *Fears v. Bagley* (July 15, 2008), S.D. Ohio No. 1:01-cv-183, unreported, 2008 U.S. Dist LEXIS 111426; *Moore v. Mitchell* (Feb. 15, 2007), S.D. Ohio No. 1:00-cv-023, unreported, 2007 U.S. Dist.

LEXIS 96523. But these cases both ultimately consider whether counsel was effective because it is counsel's duty to ensure a complete mitigation investigation. In *Moore*, the court stated that "[t]here is no constitutional right to an 'effective mitigation specialist' * * * What is required instead is the effective assistance of counsel in presenting mitigation evidence." *Moore*, 2007 U.S. Dist. LEXIS 96523 at *72-73. The court went on to hold that counsel were effective because they presented adequate mitigation evidence and made a strategic decision to shy away from the mitigation specialist they had hired. *Id.*

Herring's trial counsel could not have made a strategic decision because they had not conducted (independently or through Hrды) a reasonable investigation. This was not a case in which they received complete information from their mitigation specialist and then chose to distance themselves from it. The information they needed to make a decision about how to proceed with mitigation was simply never found nor developed. A strategic decision cannot be made when trial counsel does not have all of the relevant information before them to make that informed decision, and trial counsel cannot make an informed choice among possible mitigating factors without first conducting a thorough investigation. *Wiggins* 539 U.S. at 525. Only after a *full* investigation can counsel make an informed, tactical decision about which information would be helpful in the client's case. *State v. Johnson*, 24 Ohio St. 3d 87, 90 (1986). The evidence presented in Herring's post-conviction petition and at the evidentiary hearing demonstrated that no such investigation was performed in Herring's case.

Contrary to the State's assertions, *Moore* holds that a capital defendant is entitled to the effective assistance of counsel at mitigation. In Herring's case, trial counsel abdicated their duty, relying on Hrды without ensuring that he was doing the job he was hired to do. Because it is counsel's duty to ensure the a proper investigation is being conducted, it was their responsibility

to check in with Hrdy and know what the state of his investigation was. Counsel cannot, particularly when their client's life is on the line, bury their heads in the sand and claim they are not responsible for the failed investigation because they did not know it was not being properly conducted.

The State's second proposition of law is without merit and does not demonstrate grounds warranting jurisdiction before this Court.

Proposition of Law No. III

AN APPELLATE COURT CORRECTLY FINDS THAT TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE WHEN IT FINDS THAT TRIAL COUNSEL WERE DEFICIENT IN THEIR PERFORMANCE AND THAT THE APPELLEE WAS PREJUDICED BY THAT DEFICIENCY UNDER THE ANALYSIS AS SET FORTH IN *STRICKLAND v. WASHINGTON*

The State alleges that the Seventh District Court of Appeals failed to determine whether or not Herring suffered actual prejudice before finding that trial counsel were constitutionally ineffective. Specifically, the State claims that “Nowhere in the Seventh District’s opinion does the court determine that trial counsel’s performance prejudiced Defendant—finding that the trial’s outcome would have been different.” (State’s MISJ at 33.) Clearly, this is not the case. The Seventh District indeed made specific findings as to both prongs of the *Strickland* analysis.

The State first points out that the trial court did not make a finding as to the second prong of *Strickland* (prejudice to Herring). *Id.* Of course, the trial court did not make findings relevant to the second prong of *Strickland*. The trial court found that trial counsel were not deficient under the first prong; as such there was no need to do a further inquiry under the second prong. However that fact does not foreclose the appellate court from making this finding. After determining that the trial court abused its discretion in not finding that counsel were ineffective during the sentencing phase of Herring trial, the Seventh District then went on to conduct a prejudice analysis under the second prong of *Strickland*. Contrary to the State’s assertion, that court did a comprehensive prejudice analysis, citing at length the copious amount of evidence that the jury that sentenced Herring to death was deprived of hearing. *Herring*, 2011 Ohio App. LEXIS 540 at*18-26; *32-35.

Indeed, the Seventh District cited to direct language from Supreme Court case law in making a specific finding as to the actual prejudice to Herring when it stated: “This evidence

adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury . . . As the United States Supreme Court concluded in *Rompilla*, the undisclosed 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.” *Id.* at *34-35 (citing *Rompilla*, 545 U.S. at 393.).

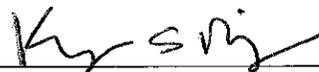
The Seventh District Court of Appeals correctly applied *Strickland* to this case, finding both that Herring’s counsel were constitutionally deficient in their investigation as well as specifically finding that Herring was indeed prejudiced by that deficiency. *Id.* The State’s third proposition of law is not meritorious; jurisdiction should be declined in this case.

CONCLUSION

Appellee Willie Herring respectfully requests that this Court decline jurisdiction as this case does not present either a substantial constitutional question or a matter of great public interest.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER

By: 

Kimberly S. Rigby (0078245)
Assistant State Public Defender
Counsel of Record

By: 

Jennifer A. Prillo (0073744)
Assistant State Public Defender

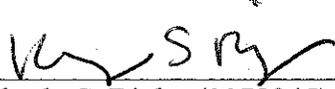
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Telephone: (614) 466-5394
Fax: (614) 644-0708

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing APPELLEE WILLIE HERRING'S MEMORANDUM IN OPPOSITION OF JURISDICTION was sent by first class United States mail to Paul Gains, Mahoning County prosecuting Attorney and Ralph Rivera, Assistant Mahoning County Prosecuting Attorney, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503 on this 18th day of April, 2010.

By: 

Kimberly S. Rigby (0078245)
Assistant State Public Defender

Counsel for Appellee

#341127