ORIGINAL

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO PLAINTIFF-APPELLANT -vs- **WILLIE HERRING** DEFENDANT-APPELLEE	**CASE NO.: 2011-0451** ON APPEAL FROM CASE NO. **2008 MA 213** BEFORE THE COURT OF APPEALS FOR THE **SEVENTH APPELLATE DISTRICT** **POSTCONVICTION DEATH PENALTY CASE**

APPELLANT-STATE OF OHIO'S REPLY BRIEF

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR

RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

OFFICE OF THE MAHONING COUNTY PROSECUTOR
21 W. BOARDMAN ST. 6TH FL.
YOUNGSTOWN, OH 44503
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

COUNSEL FOR PLAINTIFF-APPELLANT

TIMOTHY YOUNG, 0059200
OHIO PUBLIC DEFENDER

KIMBERLY S. RIGBY, 0078245
ASSISTANT PUBLIC DEFENDER

GREGORY A. HOOVER, 0083933
ASSISTANT PUBLIC DEFENDER

OFFICE OF THE OHIO PUBLIC DEFENDER
250 EAST BROAD STREET, SUITE 1400
COLUMBUS, OH 43215
PH: (614) 466-5394
FX: (614) 644-0703

COUNSEL FOR DEFENDANT-APPELLEE

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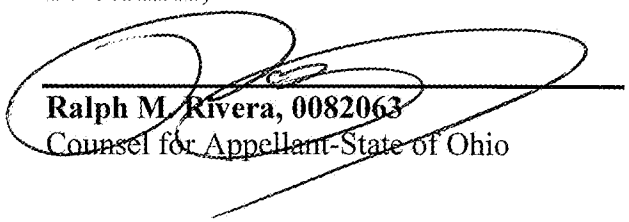
I certify that a copy of the State of Ohio's Reply Brief was sent by **Regular U.S. Mail** to the following parties on July 15, 2013:

Kimberly S. Rigby, Esq.
Gregory A. Hoover, Esq.
Elizabeth Arrick, Esq.
Office of the Ohio State Public Defender
250 E. Broad Street, Suite 1400
Columbus, OH 43215

So Certified,



Ralph M. Rivera, 0082063
Counsel for Appellant-State of Ohio

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Statements of the Case, Facts, and Introduction

Appellant-State of Ohio will rely upon its Statements of the Case, Facts, and Introduction set forth in its Merit Brief.

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 this Court must conclude that trial counsel's actions fell within the range of professionally acceptable conduct where counsel presented a reasonable and competent mitigation theory despite being unaware that the mitigation specialist failed to complete his investigation.

Contrary to Defendant's argument, this Court must focus on Thomas Hrdy's failure to complete his mitigation investigation and inform counsel of his shortcomings. It must further focus on trial counsel's strategic decision—based upon the information that was discovered—to keep Defendant's negative family background and criminal record from the jury, because counsel "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***." (Emphasis added.) (Postconviction Transcript, August 28, 2006, before the Honorable John M. Durkin, at 47.)

Following Defendant's initial appeal to the Seventh District, the court directed a hearing to determine whether trial counsel were properly informed of Hrdy's shortcomings, such that they could present a reasonable mitigation theory. On remand, the evidentiary hearing provided ample amounts of competent and credible evidence that supported trial counsel's decision to focus on positive mitigation evidence and the disparity in sentences between Defendant and his accomplices, rather than highlighting Defendant's "life of crime." It further established that their decision was professionally reasonable, because trial counsel discovered "a lot of negative information" despite Hrdy's failure to complete his investigation.

Therefore, trial counsel's performance was constitutionally effective, because their actions fell within the wide range of professionally acceptable conduct where counsel presented a reasonable and competent mitigation theory, despite having no knowledge that Hrdy failed to complete his mitigation investigation.

A. TRIAL COUNSEL'S DECISION TO FOCUS ON POSITIVE MITIGATION EVIDENCE AND TO KEEP DEFENDANT'S NEGATIVE HISTORY AND CRIMINAL RECORD FROM THE JURY AFTER COUNSEL THOUGHT HRDY HAD COMPLETED HIS INVESTIGATION WAS PROFESSIONALLY REASONABLE, BECAUSE THEY BELIEVED THAT THE NEGATIVE EVIDENCE WOULD HAVE BEEN "MORE AMMUNITION" FOR A DEATH VERDICT.

Here, it was professionally reasonable for trial counsel to believe that Thomas Hrdy had completed his mitigation investigation prior to sentencing, and to rely on his investigation rather than ensuring for themselves that the investigation was accurate and complete. If trial counsel must essentially retrace an expert's steps and repeat the investigation, what is the point of hiring a mitigation expert in the first place?

1. It was Professionally Reasonable for Trial Counsel to Believe that Hrdy Had Completed His Investigation and to Rely on His Credentials as a Mitigation Expert—Who was Recommended by the Office of the Ohio Pubic Defender—Absent Any Credible Assertions to the Contrary.

Much to Defendant's chagrin, it was professionally reasonable for trial counsel to believe that Thomas Hrdy had completed his investigation prior to sentencing, and to rely on his status as a mitigation expert. This Court must be reminded that trial counsel only learned of Thomas Hrdy through the Office of the Ohio Public Defender, and it was this same office that recommended his services to trial counsel. (PCR Tr., at 24.)

Thus, one must wonder how the Office of the Ohio Public Defender can recommend the services of a mitigation specialist that later fails to complete several tasks that he ensured trial counsel would be complete; then years later be in a position to argue that trial counsel were constitutionally ineffective for relying upon this same expert that it recommended in the first place.

First, Defendant takes issue with the amount of time that Hrdy had to conduct his mitigation investigation, alleging that trial counsel waited until the "eve of trial" to secure a mitigation specialist. Defendant clearly ignored the troubles that trial counsel had in securing a mitigation specialist. And contrary to Defendant's contention, trial counsel 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. (PCR Tr., at 24.) Van Brocklin stated that originally Dr. Isenberg was supposed to be their mitigation expert, but he later canceled, forcing them to find a replacement. (PCR Tr., at 61.) Further, Van Brocklin stated that they had contacted possibly one other person in regards to being their mitigation expert. (PCR Tr., at 24.) Therefore, trial counsel was forced to hire 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. (PCR Tr., at 26-27.)

Thus, trial counsel proceeded reasonable in securing a mitigation expert, and the delay they experienced was through no fault of their own.

Second, *Drummond v. Houk* did in fact address a similar issue regarding trial counsel's reliance on an expert during its mitigation investigation that is illustrative here. *See Drummond v. Houk*, 761 F. Supp.2d 638 (N.D. Ohio 2010).

In *Drummond*, the defendant argued in habeas proceedings that trial counsel failed to provide Dr. Fabian, a clinical psychologist, with sufficient time and records to present an adequate representation during the penalty phase of his trial. *See Drummond*, 761 F. Supp.2d at 660. Fabian further asserted that a gang expert should have been retained, because he was not sufficiently qualified to discuss the effect of gangs during mitigation. And like here, Hrdy was appointed as the mitigation expert. *See Drummond*, 761 F. Supp.2d at 698.

In habeas, trial counsel testified that Fabian, like Hrdy here, never asked for or indicated that he needed more time to prepare for mitigation. *See Drummond*, 761 F. Supp.2d at 699-700. Further, trial counsel testified that Fabian never indicated that information from the defendant's family was hard to locate. *See Drummond*, 761 F. Supp.2d at 699.

At the hearing's conclusion, the District Court found that "Dr. Fabian never expressed concerns about having sufficient time to prepare for his testimony." *Drummond*, 761 F. Supp.2d at 703. The court further found that it "***was reasonable for counsel to rely on Dr. Fabian's self-described experience*** with gang members ***and to presume that Dr. Fabian had sufficient time to prepare for his trial testimony absent any credible assertions to the contrary***." (Emphasis added.) *Drummond*, 761 F. Supp.2d at 703.

In *Drummond*, the District Court concluded that trial counsel could not be held responsible for Fabian's misrepresentations or omissions. *See Drummond*, 761 F. Supp.2d at 703.

Here, the record demonstrates that trial counsel was professionally reasonable to believe that Hrdy had in fact completed his investigation despite the fact that he had not, because Hrdy never expressed any concerns to trial counsel that did not have enough time and resources to complete his mitigation investigation.

While the record is clear that Hrdy stated that he failed to complete his investigation, the record is also clear that Hrdy *never* made this known to trial counsel. Specific to his affidavit, Hrdy stated that "I do not recall if I told trial counsel that I was running out of time." (Hrdy Affidavit, PCR Petition, App., Exhibit No. 33, at ¶ 5.)

On remand, the trial court specifically found that trial counsel were never informed of Hrdy's failure to complete his investigation: "Attorney Van Brocklin and Zena testified that they were never informed of Hrdy's investigation shortcomings, and they believed Hrdy did all he work that he needed to do at the time." (Judgment Entry, September 26, 2008.)

Furthermore, enclosed with Hrdy's invoices, he submitted a letter in which he discussed his investigation. Hrdy stated "[t]his has been ***a most difficult case to find mitigation on as you well know I know you did your best you could with the little I provided***." (Emphasis added.) (PCR Tr., at 28; Defendant's PCR Hrg. Exhibit A.) Thus, Hrdy's letter indicated that he had in fact completed his investigation, which corroborated counsel's belief that Defendant was protective of his family, Defendant "was not conducive to talking about bad things[.]" and that Hrdy "didn't find very much." (PCR Tr., at 37, 74-75.)

Thus, trial counsel was aware that Hrdy's investigation produced little relevant information for use at mitigation, but they were unaware that Hrdy failed to complete several tasks that he ensured them he would complete.

The Sixth Circuit previously recognized that "an ineffective-assistance-of-counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken[.]" *Drummond*, 761 F. Supp.2d at 703, quoting *Campbell v. Coyle*, 260 F.3d 531, 551 (6th Cir., 2001), citing *White v. McAninch*, 235 F.3d 988, 995 (6th Cir., 2000).

Here, like *Drummond*, the record demonstrates that trial counsel was professionally reasonable to believe that Thomas Hrdy had completed his investigation prior to sentencing, and to rely his investigation rather than ensuring for themselves that the investigation was accurate and complete absent any indication from Hrdy to the contrary.

2. The Trial Court Properly Disregarded Dorian Hall's Opinion in Regards to Trial Counsel's Performance.

On remand, Defendant presented the testimony of Dorian Hall, a mitigation specialist employed by the Ohio Public Defender's Office. (PCR Tr., at 91.) 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 course). (PCR Tr., at 91-126.) Hall concluded that Hrdy's mitigation investigation fell below the standard recommended by the American Bar Association. (PCR Tr. at 125-126.)

But this Court, just as the trial court did, should disregard Hall's testimony, and give it little to no weight in determining whether trial counsel's performance fell below the prevailing professional standard. (Judgment Entry, September 26, 2008.)

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[.]"*Fears v. Bagley*, S.D. Ohio No. 1:01-cv-183, 2008 WL 2782888, at *83 (July 15, 2008). Accordingly, the Southern District of Ohio excluded her testimony from the court's consideration of the defendant's ineffective assistance of counsel claim. *See id.*

Likewise, the Fifth District Court of Appeals, in addressing an affidavit submitted by Hall, recognized that her testimony carried little weight due to her employment by the Ohio Public Defender's Office 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." *State v. Lang*, 5th 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 trial counsels' performance.

At the evidentiary hearing, 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; 2) a "mitigation specialist" is not a recognized title by the State of Ohio; 3) there is no licensing or accreditation required to be a "mitigation specialist;" 4) anyone can call themselves a "mitigation specialist;" 5) anyone can join the associations, so long as they pay their dues; 6) Hall is against the death penalty for *any* defendant; 7) Hall had no prior experience in mitigation before joining the Public Defender's Office; 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. (PCR Tr., at 128-139.)

And specific to the facts here, Hall had never handled a case previously in Mahoning County; therefore, she was unfamiliar with Mahoning County jurors. (PCR Tr., at 142.) Here, 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. (PCR Tr., at 150.) Thus, Hall wasn't even aware that Defendant had been convicted as a complicitor rather than the principal offender. A fact that she admitted was significant in preparing for mitigation. (PCR Tr., at 151.)

Thus, the Seventh District erred in considering Hall's testimony in regards to trial counsel's performance, because Hall could not competently offer an opinion in regards to trial counsel's performance, as she is neither an attorney herself, nor was she qualified as a "mitigation expert" or "mitigation specialist." *See State v. Herring*, 7th Dist. No. 08 MA 213, 2011 Ohio 662, ¶ 77.

3. Trial Counsel's Decision to Focus on Defendant's Positive Mitigation Without a Further Investigation Resulted from a Reasonable Reliance Upon Hrdy's Representations Rather Than a Complete Failure to Investigate, or an Unreasonable and Deficient Decision to Abandon their Investigation.

Here, the Seventh District found that trial counsel were constitutionally ineffective, because they failed to perform a complete investigation in an attempt to uncover additional background information; thus, the court concluded that their decision to only present positive mitigation evidence was not an informed, strategic decision. *See Herring* II, supra at ¶ 83. The Seventh District concluded that "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." *Id.*

Here, however, trial counsel's decision to focus on and present a positive mitigation theory without the need for a further investigation and to rely on the information they and Hrdy had obtained prior to sentencing was professionally reasonable. Contrary to the Seventh's District's opinion, counsel's decision was made after they had obtained "a lot of negative information," and despite Defendant's refusal to discuss negative information about himself or his family.

Thus, trial counsel's decision to focus on the positive and avoid Defendant's negative family background and criminal record was the product of a strategic, informed decision rather than a complete failure to investigate, or an unreasonable decision to abandon the investigation prior to sentencing.

For example, in *Wiggins v. Smith*, the U.S. Supreme Court found that trial counsel's performance was unreasonable after "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

In *Wiggins*, the Court based its decision on the fact that had counsel investigated further, they would likely have discovered a wealth of information that was contained within the records that counsel had discovered. *See Wiggins*, 539 U.S. at 525. Thus, the Court concluded in *Wiggins* that trial counsel was constitutionally ineffective after it found that trial counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

Likewise in *Williams v. Taylor*, the Court found that trial counsel's failure to investigate and present relevant mitigation evidence resulted from counsel's inattention and incompetence rather than a reasoned strategic judgment. *See Williams v. Taylor*, 529 U.S. 362, 398-399 (2000).

For instance, trial counsel failed to obtain the defendant's juvenile and social services records because he incorrectly thought that state law prohibited the acquisition. *See Williams*, 529 U.S. at 373. Further, counsel acknowledged his "failure to contact a potentially persuasive character witness was likewise not a conscious strategic choice, but simply a failure to return that witness' phone call offering his service." *Williams*, 529 U.S. at 373.

Instead, trial counsel argued in mitigation that "Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that." *Williams*, 529 U.S. at 398. The Court found this was not the product of a strategic decision, and concluded that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398.

Further, in *State v. Johnson*, this Court found that trial counsel's performance was constitutionally ineffective after counsel failed to conduct any investigation into the defendant's background, and had not even spoke to the defendant about the penalty phase until he was convicted. *See State v. Johnson*, 24 Ohio St.3d 87, 88-89 (1986). This Court noted that trial counsel's decision was not a tactical decision, but rather one he "abdicated all responsibility for defending his client in the sentencing phase." *Id.* at 90.

As stated above, this case does not involve trial counsel's complete failure to conduct a mitigation investigation, or a failure to explore deeper into known sources of information to determine potential mitigation theories. *See, e.g., Glenn v. Tate*, 71 F.3d 1204, 1207-1208 (6th Cir., 1995) (trial counsel's performance was unreasonable when they waited until after the verdict to prepare for mitigation, failed to interview any family members or friends, and

conducted minimal research into mitigation); *Austin v. Bell*, 126 F.3d 843, 848-849 (6th Cir., 1997) (trial counsel's performance was unreasonable when he failed to investigate and/or present any mitigating evidence despite several relatives and friends were available and willing to); *O'Guinn v. Dutton*, 88 F.3d 1409, 1424 (6th Cir., 1996) (en banc) (Merritt, C.J., concurring) (trial counsel's performance was unreasonable after a near-complete failure to investigate and/or present mitigating evidence because each attorney thought the other was preparing it).

Here, unlike in *Wiggins, Williams*, and *Johnson*, trial counsel's decision to focus on positive mitigation evidence was based upon Defendant's unwillingness to discuss his negative family life, and counsel's decision to keep Defendant's negative family background and criminal record from the jury. Trial counsel's decision was a reasoned, informed decision rather than one that resulted from inattention or incompetence like in *Williams*. And any inattention and incompetence that occurred was that of Thomas Hrdy, not trial counsel.

Thus, trial counsel's decision to focus on positive mitigation evidence without a further investigation was the product of a strategic, informed decision rather than a complete failure to investigate, or an unreasonable and deficient decision to abandon the investigation like in *Wiggins*, *Williams*, and *Johnson*.

4. It was Professionally Reasonable for Trial Counsel to Focus on Positive Mitigating Factors Without a Further Investigation, Because Counsel Made a Strategic Decision to Avoid Informing the Jury of Defendant's Negative Family Background and Extensive Criminal Record.

Here, trial counsel's actions further fell within the wide range of professionally acceptable conduct where counsel presented a reasonable and competent mitigation theory that sought to keep Defendant's negative family history and criminal record from the jury.

Despite Defendant's lack of cooperation and willingness to discuss his negative family background, trial counsel obtained and were aware of Defendant's negative family background. Atty. Van Brocklin testified that they "***knew a lot of negative information***." (Emphasis added.) (PCR Tr., at 45.) Van Brocklin explained that trial counsel "***knew a number of negative things through our own investigation and through criminal records*** and those kinds of things that were supplied to us during the lengthy discovery process. (PCR Tr., at 45-46.)

Van Brocklin, however, could not specifically recall the details of that information because he no longer had his file. (PCR Tr., at 45.) Van Brocklin stated that he turned his complete file over to the Ohio Public Defender's Office. Van Brocklin was told that his file would be photocopied, but he never received a copy. Thus, without his file to refresh his memory, Van Brocklin could not recall the specific negative information that was known at the time of trial. (PCR Tr., at 45.)

Looking to the evidence that Defendant now claims would have spared his life, the record establishes that trial counsel made a strategic decision to keep Defendant's negative background history and criminal record from the jury.

Atty. Zena testified that he met with Defendant's mother prior to the penalty phase to discuss the mitigation phase, and arrange for "*anybody* she thought would be helpful with mitigation, * * *." (PCR Tr., at 73.)

For instance, Carrie Everson, Defendant's paternal grandmother, was one of those persons who Zena spoke with prior to sentencing but decided she would not have been beneficial to their mitigation presentation: "***Tom Zena told me that it was not necessary for me to testify because there wasn't anything I could say***." (Emphasis added.) (C. Everson Affidavit, PCR Petition, App., Exhibit No. 7, at ¶ 8.)

Deborah Herring, Defendant's mother, also confirmed trial counsel's strategy in her affidavit: "The attorneys didn't want to talk to me much on the stand because it ***would set the prosecutors up to talk about Willie's juvenile record.***" (Emphasis added.) (D. Herring Affidavit, PCR Petition, App., Exhibit No. 14, at ¶ 4.)

Trial counsel also employed Dr. Douglas Darnell, a clinical psychologist, to evaluate Defendant prior to sentencing. Van Brocklin, however, testified that Dr. Darnell's report was not beneficial: "[w]e had a psychologist who gave us a report that didn't work well, or was not very definitive." (PCR Tr., at 37.)

Furthermore, trial counsel planned to argue Defendant behaved himself while he awaited trial in the Mahoning County Justice Center and was conducive to a structured environment. Counsel, however, was forced to abandon this theory after they learned that Defendant had either gotten into a fight or threatened to kill someone while incarcerated, which counsel found to be "extremely negative." (PCR Tr., at 38.).

Thus, trial counsel clearly sought out and spoke to Defendant's family members, friends, and a clinical psychologist who provided an ample amount of negative information before they made a reasonable, informed decision to keep Defendant's negative family background and criminal record from the jury.

Van Brocklin explained that the decision to avoid Defendant's negative history and present only positive mitigation evidence was based on the lack of viable theories available to them and the jury's makeup. (PCR Tr., at 36-37.) Van Brocklin stated that the second set of jurors were "far more conservative" than the first, and negative mitigation evidence would not have worked well. (PCR Tr., at 45.)

Van Brocklin emphasized that their strategy was to avoid Defendant's criminal history, because they "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***." (Emphasis added.) (PCR Tr., at 47.) 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 Willie on this. This was mayhem in a bar where people wound up dead, people wound 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.

(PCR Tr., at 78.) Like Van Brocklin, Zena believed that putting on negative mitigation would not have been helpful, but would have buried Defendant further. (PCR Tr., at 79-80.) The record is clear that trial counsel made an informed decision to completely avoid any reference to Defendant's criminal history and negative family background, and rather focus solely on the positive—the little amount that existed. And Everson and Herring's affidavits establish why trial counsel presented limited family testimony at the sentencing hearing.

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."

State v. Herring, 7th Dist. No. 03 MA 12, 2004 Ohio 5357, ¶ 169 (Vukovich, J., dissenting).

Here, the Seventh District clearly ignored the fact that when a capital defendant presents evidence of a difficult childhood and upbringing, Ohio law allows the prosecution to place that evidence into context. *See State v. McKnight*, 4th Dist. No. 07 CA 665, 2008 Ohio 2435, ¶ 77 ("[H]ad counsel chosen to present evidence regarding McKnight's background as a child * * * counsel would have opened the door to evidence regarding his prior juvenile murder adjudication."). Moreover, a juvenile delinquency is admissible to rebut evidence of character offered by a defendant. *See State v. Robinson*, 98 Ohio App.3d 560, 570 (8th Dist. 1994); *see also State v. Marinski*, 139 Ohio St.3d 559, 560-561 (1942); *State v. Hale*, 21 Ohio App.2d 207 (10th Dist. 1069).

Further, trial counsel had to be mindful that the State could have rebut any evidence of Defendant's good character.

For instance, in *State v. Jackson*, this Court held that the girlfriend's testimony, at the penalty phase, that the defendant was "sweet, gentle, and non-violent" allowed the prosecution to introduce evidence that Jackson had previously assaulted four different women. *See State v. Jackson* 57 Ohio St.3d 29, 39 (1991); *see also State v. Jalowiec*, 91 Ohio St. 3d 220, 231-233 (2001) (concluding that the defendant opened the door during his unsworn statement to the state's rebuttal after he "brought out a character trait, that '[h]e is a great guy,' that could be rebutted under Evid.R. 404(A)(1), in particular with evidence of prior crimes of violence."); *State v. McNeil*, 83 Ohio St.3d 438, 446 (1998) (concluding that the defendant opened the door to rebuttal evidence after he "offered mitigating testimony of a broad nature: that he 'brings a lot of joy. He brought a lot of joy to * * * people around.' McNeill thus opened the door to 'other evidence' in rebuttal—evidence showing that McNeill did not bring joy to others.").

Thus, trial counsel was well within its strategic decision-making ability to limit mitigation testimony to a few family members to avoid "opening the door" to Defendant's extensive criminal record. *See Wong v. Belmontes,* 130 S.Ct. 383, 390-391 (2009) (concluding that trial counsel's decision to avoid presenting the defendant's character evidence, because under state law, it may have opened the door to defendant's previous murder conviction); *see also Durr v. Mitchell*, 487 F.3d 483 (6th Cir., 2007); *Carter v. Mitchell*, 443 F.3d 517, 532 (6th Cir, 2006); *Clark v. Mitchell*, 425 F.3d 270, 286 (6th Cir., 2005).

Here, like the multiple cases cited above, trial counsel had a reasonable and credible reason to keep Defendant's extensive criminal record from the jury.

Trial counsel's decision followed their discovery of "***a lot of negative information***" despite having no knowledge that Thomas Hrdy failed to complete his investigation. Further, counsel's decision to focus on positive mitigating factors was developed after counsel learned that Defendant refused to discuss his negative family background, and additional information was difficult to find.

More importantly, counsel's mitigation strategy sought to keep Defendant's negative family background and criminal record from the jury, because "***<u>any kind of information</u> that you would give the second jury panel that <u>Mr. Herring had been involved in a life of crime</u> would simply be <u>more ammunition for them to find a death verdict</u>***." (Emphasis added.) (PCR Tr., at 47.)

Therefore, trial counsel's actions fell within the wide range of professionally acceptable conduct where trial counsel reasonably believed that Thomas Hrdy had completed his mitigation investigation prior to sentencing, and counsel nevertheless presented a reasonable and competent mitigation theory that sought to keep Defendant's negative family history and criminal record

from the jury. *See Owens*, 549 F.3d at 406, citing *Wiggins*, 539 U.S. at 525 (stating, "A limited investigation is reasonable if counsel could reasonably have concluded that additional investigation would be of little use.").

Accordingly, this Court must find that trial counsel's performance was constitutionally effective, because their decisions were reasonable in light of prevailing professional standards, and afforded Defendant the effective assistance of counsel during mitigation guaranteed to him by the U.S. and Ohio Constitutions.

Appellant-State of Ohio's first proposition of law is meritorious, and the Seventh District must be reversed.

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.

Appellant-State of Ohio will rely upon its arguments regarding its second proposition of law set forth in its Merit Brief.

Appellant-State of Ohio's second proposition of law is meritorious, and the Seventh District must be reversed.

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 COUNSEL'S 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 without properly determining whether Defendant suffered actual prejudice as a result of trial counsel's performance. Here, the Seventh District concluded that Defendant was entitled to a new sentencing hearing without a thorough analysis of the mitigating factors that trial counsel presented at trial in comparison to those that were asserted in Defendant's postconviction petition.

Appellant-State of Ohio will rely upon its arguments regarding its thhird proposition of law set forth in its Merit Brief.

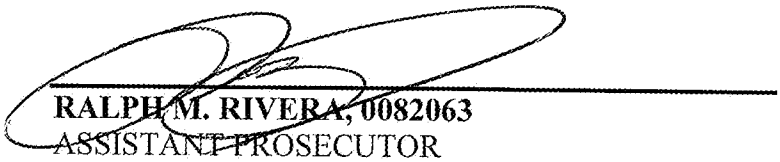
Appellant-State of Ohio's third proposition of law is meritorious, and the Seventh District must be reversed.

Conclusion

WHEREFORE, Appellant-State of Ohio hereby requests this Honorable Court to find that its propositions of law are meritorious and Vacate the Seventh District's decision, in which it concluded that trial counsel's mitigation investigation and presentation was constitutionally ineffective. Thus, allowing Defendant-Appellee Willie Herring's conviction and death sentence to stand.

Respectfully Submitted,

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR BY:



RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov
Counsel for Appellant-State of Ohio