No. _____

In the Supreme Court of the United States

DUANE SHORT,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

As this Court has stated repeatedly through the years, the effective assistance of counsel is paramount in capital cases. That is why States, including Ohio, require additional experiential and educational requirements before counsel are permitted to represent a client in a capital trial. Here, Petitioner Short's trial counsel had neither the experience nor education, and it showed. Trial counsel twice convinced their client to forgo what would have resulted in sparing his life. First, trial counsel advised their capital client to forego a plea deal that would have saved his life; counsel then directed their client to waive the presentation of mitigation, despite first failing to complete a mitigation investigation. The result is that Short is now on sitting on Ohio's death row.

Petitioner Short's case raises a critical concern of national importance: whether and to what extent capital trial counsel can forgo following best practices and counsel their client against their client's best interest. Accordingly, Short presents the following two questions to this Court:

1. **Is a capital defendant's Sixth Amendment right to the effective assistance of counsel violated where, but for counsel's intervention and unfounded assurances, defendant would have accepted a plea and avoided the death penalty?**

2. **Is a capital defendant's Sixth Amendment right to effective counsel violated when his counsel advised him, after virtually no investigation into either his background or the applicable law, to waive his right to present mitigating evidence to the jury?**

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Duane Short respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The Montgomery County Court of Common Pleas' Findings of Fact and Conclusions of Law in *State v. Short*, Case No. 2004 CR 02635, is attached hereto as Appendix A. The Ohio Second District Court of Appeals' Opinion on the post-conviction appeal, *State v. Short*, 2d Dist. Montgomery No. 27399, 2018-Ohio-2429, is attached hereto as Appendix B. The Ohio Supreme Court's denial of jurisdiction, *State v. Short,* 2018-Ohio-4670, 154 Ohio St.3d 1430, 111 N.E.3d 1191 (2018), is attached hereto as Appendix C.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on November 21, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

B. Fourteenth Amendment, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 15, 2004, Duane Short came home from work to the devastating news that Rhonda, his wife of nearly fifteen years, had abruptly left him to parts unknown. Short not only lamented the loss of his wife, but the loss of his two youngest children, Tiffany and Jesse, whom she had taken with her. What started out as an ordinary day for Short turned into his worst nightmare.

Following Rhonda's departure, Short was thrown into an intense state of confusion, anxiety, and depression that ultimately precipitated a mental break-down and landed him in the hospital. Despite identifying Short as a suicide risk, the hospital, in a "glaring failure of medical treatment," swiftly discharged Short after diagnosing him with "adjustment disorder" and sent him home with Ativan and a prescription for Ambien. PC Ex. 21, ¶11 (c) xxviii.

The brief stay in the emergency room did nothing to alleviate Short's extreme depression and anxiety. For the next six days, he continued to deteriorate mentally and physically. Rhonda's sister and brother-in-law feared Short would attempt suicide. PC Ex. 1, ¶16. Short's sister, Tracy Watson, spent the majority of the week with him and described her brother as a "walking zombie" who refused to eat and was unable to sleep. *Id*.

While Short inched closer to his mental breaking point, others saw humor in his suffering. Justin, Short's oldest son, testified that while he stayed at the Middletown home with his father, Short received several insensitive phone calls. When the phone rang, Short prayed for the opportunity to speak with his wife and

children. What he got instead were the taunting sounds of a county music song, making Short wistful for his lost love. Tr. 2214. Short's worst fears were realized when Brandon Fletcher, an acquaintance from church, revealed to Short that he had seen some inappropriate activity between Rhonda and Donnie Sweeney that "wasn't right." Tr. 1881. Short was now forced to face the reality that his family would never be reunited.

Meanwhile, Rhonda Short had rented a home located at 5035 Pepper Drive in Huber Heights, Ohio. She did this with the help of Brenda Barrion, Donnie Sweeney's mother. On July 22, 2004, Short became aware that his wife was residing at the residence. Short drove with his son, Justin, to Huber Heights. Along the way, he purchased a shotgun from Dick's Sporting Goods. Tr. 1913.

Later that night, at around 10:30 p.m., Short approached the Pepper Drive residence where he encountered Donnie Sweeney in the backyard. Following a struggle over the shotgun, Short fired one fatal shot into Sweeney and then entered the house. Tiffany and Jesse Short both testified that their father entered the residence and walked right by them but did not appear to of their presence. Tr. 1733-1746, 1762-1770. Tiffany and Jesse ran out of the residence and called 911 from a neighbor's home. Short located Rhonda inside the residence and fired one fatal shot into her.

Realizing what he had done, Short went to a nearby UDF convenience store and pled for the attendant to call 911. Tr. 2178. Despite having left the scene, Short immediately returned to 5035 Pepper Drive where he made no attempt to hide,

instead leading Officer Graham to the back yard in an attempt to get Rhonda help. Tr. 2033, 2178. Though Detective Taylor and Officer Reaman would later testify that Short's demeanor after the shootings was "calm" and that he was not upset or crying, this directly conflicts with documents generated during Short's booking which described him as "suicidal" and "mentally ill." Tr. 1972, 2090. *See also* PC Ex. 13. Donnie Sweeney was pronounced dead at the scene. Rhonda died the following morning in the hospital.

By May of 2005, Short's court-appointed attorneys, Bobby Joe Cox and Michael Pentecost, had successfully negotiated a deal that was acceptable to all parties, including Petitioner Short, that would have resulted in a sentence sparing his life. Before the Court could convene the necessary three-judge panel, Attorney Patrick Mulligan intervened. Mulligan promised Short's family that he could achieve a better resolution if they paid him to go to trial. PC Exs. 1-A; 17-A. Desperate and clinging to that hope, Short's family retained him. Short withdrew his plea, and the case proceeded to jury trial with Patrick Mulligan and George Katchmer as trial counsel.

Prior to trial, Attorney Mulligan informed the trial court that they did not intend to present any psychological or medical testimony, nor did they intend to hire a mitigation expert. Tr. 272-273. Short's trial began on April 17, 2006. Although Short's guilt was a forgone conclusion, the State presented thirty-two (32) witnesses at the trial phase. Trial counsel called only one witness on Short's behalf. On May 5, 2006, the jury returned unanimous verdicts of guilty on all counts and specifications.

The mitigation phase began on May 8, 2006. In a complete departure from applicable state and federal law as well as prevailing professional norms, trial counsel advised Short that "the best route to take" was to waive the presentation of mitigation to a jury. Tr. 2548. *See also* PC Exs. 1-A; 5. Trial counsel directed their client in this way, despite the fact that they had admittedly failed to perform any meaningful mitigation investigation. Tr. 2548. Counsel's advice is all the more unreasonable in light of the fact that the empaneled jurors had all affirmatively stated that they would consider mitigation. They were thus primed to expect that the defense would present mitigating evidence. At least one juror specifically stated that "information about Duane Short's background along with testimony from experts would have been helpful to myself and other jurors in deciding on the sentence." PC Ex. 32, ¶3. Still, Short's counsel provided them nothing.

A wealth of mitigation regarding Short's character, history and background was available at the time of his capital trial. Had Short's jury been presented with the evidence that supported his petition for post-conviction relief, there is a reasonable probability that he would not have been sentenced to death. Instead, without any mitigation to weigh and consider, the jury deliberated quickly and on May 9, 2006, recommended that Short be sentenced to death.

Following the jury's death recommendation, Short's trial counsel moved for a sentencing hearing pursuant to O.R.C. § 2929.19(A)(1). Tr. 2544. Counsel then sought to introduce mitigating evidence to the trial court, since under Ohio law, a jury's verdict of death is a recommendation that can only be imposed, or overridden, by a

judge. Tr. 2547. Counsel's argument to present mitigating evidence at this juncture was unsupported by law, so the trial court refused to allow any additional testimony. Tr. 2556-2558, 2580. On June 7, 2006, the trial court filed its sentencing opinion pursuant to O.R.C. § 2929.03(F) and imposed a sentence of death upon Short. In its sentencing opinion, the trial court stated that, "there is very little evidence in the record regarding the history, character and background of the defendant." Sentencing Opinion, p.8. The trial court's sentencing opinion illustrates the absence of mitigating evidence presented on Short's behalf.

Short filed his original post-conviction petition on June 11, 2007. He filed amended petitions on June 15, 2007; June 25, 2007; June 27, 2007; July 27, 2007; November 30, 2011; January 23, 2012; May 21, 2012; August 27, 2012; and February 26, 2014. On July 27, 2007, Short also filed a *Motion for Appropriation of Funds for an Advanced Magnetic Resonance Imaging Procedure and Positron Emission Tomography Scan*, and a *Motion for Funding for a Neuropsychologist*. On November 30, 2011, Short also filed a *Motion for Discovery* and *Motion for Funding for a Substance Abuse Expert*. On December 6, 2016, the trial court issued its findings of fact and conclusions of law and denied all of Short's claims for relief, granted the State's motion for summary judgment, and overruled all of Short's motions. *See* Appendix A.

Short timely appealed to the Second District Court of Appeals, presenting four assignments of error. On June 22, 2018, that Court affirmed the trial court's entry. *See* Appendix B.

The Supreme Court of Ohio denied Short's Memorandum in Support of Jurisdiction in a decision entered on November 21, 2018. *See* Appendix C. Short now respectfully petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Short suffered serious constitutional violations throughout his capital trial, most notably the ineffective assistance of his counsel. Ohio's courts failed to follow this Court's clear guidance. Because of this, the state courts affirmed Short's death sentence that resulted from Short's reliance on his counsel's incompetent advice and misrepresentations of the law. Unless this Court corrects these errors, Short will pay for these mistakes with his life.

I. A capital defendant's Sixth Amendment right to the effective assistance of counsel is violated where, but for counsel's intervention and unfounded assurances, defendant would have accepted a plea and avoided the death penalty.

This Court has been clear: Defendants are entitled to effective assistance of competent counsel during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). To demonstrate deficient performance in the context of plea negotiations, a defendant must demonstrate that counsel was "deficient when he advised [the defendant] to reject the plea offer." *Lafler*, 566 U.S. at 163. To establish prejudice, a defendant must show the outcome of the plea process would have been different with competent advice. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012). *See also Id.* at 163. (Where a defendant rejects a plea bargain upon erroneous advice of counsel and is convicted at trial, the defendant must show that but for the ineffective advice of counsel there is a reasonable probability

that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.). Short has satisfied this burden.

Short's trial counsel were deficient when they recommended that Short reject a plea offer that would have resulted in a sentence of life without the possibility of parole. In counseling their client to reject this offer that would have spared his life, they utterly failed to adhere to the prevailing professional norms of what constitutes effective representation. With regards to plea negotiations, the ABA guidelines state that "Counsel …. have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition." ABA Guidelines for the Appointment and Performance of Counsel in Death Cases 10.9.1, (2003); *see also Id*. at commentary, p. 1043 ("the entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptable and reasonable resolution."). Further, "Counsel's role is to ensure that the choice is as well considered as possible." *Id.* at 10.9.2, commentary p. 1046. Here, counsel not only failed to advise Short to accept the plea and resolve the case, sparing his life; they actually advised Short ***not*** to accept the offered deal.

Short's trial counsel's ineffective advice also caused Short prejudice. Not only was there a reasonable probability that the negotiated plea offer would have been presented to the trial court, the record in this case affirmatively demonstrate that it was. Prior to engaging his retained counsel, Short's court-appointed counsel had worked out a deal that was acceptable to all parties that would have spared his life:

> Upon acceptance by the three-judge panel of Duane Short's guilty pleas to all counts and specifications in the Indictment, and in consideration of those pleas, the Prosecuting Attorney in the sentencing phase of the trial—excuse me, of the plea proceedings, will stipulate that the aggravating circumstances in Counts 2, 4, and 5 do not outweigh the mitigating factors beyond a reasonable doubt, thus precluding the death penalty.

May 19, 2005, Plea Agreement; Tr. 81. All parties, including the trial court, were amenable to this agreement, but before a three-judge panel could be convened (a three-judge panel is required in Ohio to accept a guilty plea in a capital case, *see* O.R.C. 2929.04 (B)), in a desperate maneuver, Short's family decided to retain new counsel.

Attorney Patrick Mulligan promised the family that he could get a better result than life without parole by taking Short's case to trial. PC Exs. 1-A; 17-A. Notably, Mulligan had no experience defending capital cases and made these assurances without understanding even some of the most basic tenets of capital law. But for the intervention of Mulligan's lofty and unfulfilled promises, Short would have proceeded with the plea hearing before a three-judge panel and would have received a sentence of life without parole. Instead, Short relied on counsel's misrepresentations and incompetent advice and is now paying for these mistakes with his life.

The Ohio courts gave little consideration to the evidence Short presented in support of his claim. In affirming the lower court's decision, the Second District Court of Appeals faulted Short for not mentioning the rejection of his plea agreement in his sworn affidavit. *See Short*, 2018-Ohio-2429 at ¶85. Yet, a few pages earlier, that same court found his affidavit self-serving and lacking credibility, suggesting that the court would not have even considered it if he had. *Id.* at ¶70. Short demonstrated that but for his trial counsel's ineffective advice, he would have accepted a plea deal that would have spared his life. The Ohio courts ignored this clear error. This Court should grant the writ in this case.

II. A capital defendant's Sixth Amendment right to effective counsel is violated when his counsel advises him, after virtually no investigation into either his background or the applicable law, to waive his right to present mitigating evidence to the jury.

This Court has found repeatedly that trial counsel bears an affirmative duty to investigate mitigating evidence in capital cases. *Rompilla v. Beard*, 545 U.S. 374 (2005). Only after a full and adequate investigation can counsel make an informed, tactical decision about what to present in their client's case. *State v. Johnson,* 24 Ohio St.3d 87, 90 (1987). Thus, while "the decision to forgo the presentation of additional mitigating evidence does not itself constitute proof of ineffective assistance of counsel," *State v. Keith*, 79 Ohio St.3d 514, 536 (2007), a strategic decision with regards to the presentation of mitigating evidence to a sentencing jury *must* be based on a reasonable investigation into the defendant's character, background, and history. *See, e.g., Rompilla*, 545 U.S. 375; *Wiggins*, 539 U.S. 510 (emphasis added).

While there is a general presumption that counsel's actions are based on strategy, ineffective assistance is rendered when counsel adopts a strategy that is not based on researched knowledge of the law and is completely outside the professional norms of practice. This Court has stated that when defense counsel fails to present mitigating evidence, it cannot be dismissed as reasonable trial strategy; it is not a tactical decision and cannot survive the standard of *Strickland*. *See Porter v. McCollum*, 558 U.S. 30, 30 (2009); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor,* 529 U.S. 362, 391 (2000).

Here, Short's counsel did not understand, and did not attempt to understand, the applicable constitutional and statutory law. *See* PC Exs. 8-9. Counsel derived a "plan" to convince Short to waive the presentation of mitigation to his jury and then introduce mitigating evidence to the trial court at sentencing. As Short recalled:

> Mr. Mulligan and Mr. Katchmer told me that they had a strategy about presenting mitigating evidence. They told me to tell the judge that I would not present mitigating evidence to the jury. They told me that they would present mitigating evidence to the judge instead of the jury to keep me from getting the death penalty.

PC Ex. 5, ¶6. *See also Id*. at ¶¶6-10. As such, trial counsel told Short that "the best route to take" was to waive the presentation of mitigation to his jury. Tr. 2548.

Trial counsel both concocted this "plan" and advised their client to waive the presentation of mitigation to his jury without any investigation in the what mitigating evidence even existed. Short's trial counsel made no efforts to comply with this Court's established standards and neglected to investigate Short's history and background. In fact, counsel confirmed on the record that they intended to proceed

without any investigation on behalf of Short. "Your Honor, as far as any reports, etcetera, we do not have them. We do not anticipate having any psychological reports, medical reports * * * I can represent that that is not going to happen. * * * We have no intention of hiring a mitigation expert." Tr. 272. *See also* Tr. 2570-71. This was substandard performance.

Without first conducting a competent investigation, trial counsel proceeded with their ill-advised "plan," allowed their client to waive mitigation in open court, and then made a request, in the form of a motion, to the trial court to present mitigating evidence not to Short's jury, but directly to the trial court at sentencing. Tr. 2544. *See also* PC Ex. 6. The request, and their "plan," was unsupported in practice and relied on law that was both "incomplete and invalid." PC Ex. 7. Many of the statutory provisions counsel cited were ruled unconstitutional and had been excised by Ohio sentencing laws even before the motion was filed. *Id*. *See also State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Counsel's argument also ignored established precedent. *State v. Roe*, 41 Ohio St.3d 18, 35, 535 N.E.2d 1351, 1361; ("R.C.2929.03(D)(1) provides that all mitigating evidence must be presented to the jury, if the offender was tried by a jury…. A defendant may not wait for an unfavorable jury recommendation before presenting all relevant evidence in mitigating of sentence.").

Because counsel's "plan" was wholly "unsupported by law," the trial court was not required to afford Short any further opportunity to present evidence after he waived, on advice of his counsel, his mitigation presentation to the jury. *Id*.; *see also*

State v. Williams, 23, Ohio.St.3d 16, 23, 490 N.E.2d 906 (1986). Trial counsel's "plan" backfired. The trial court refused to allow additional testimony and subsequently sentenced Short to death. Tr. 2556-2558, 2580.

Counsel's oversight was patently unreasonable and underscored their deficient understanding of even the most basic tenets of Ohio's death penalty statute. Despite their lack of any prior capital experience, neither Attorneys Katchmer nor Mulligan made any effort to attend any death penalty trainings to learn the nuances of capital law. *See* PC Ex. 9. Critically, neither Attorneys Katchmer nor Mulligan have ever been qualified under Sup.R.20[1] due to their lack of requisite skills and experience. They could not have been appointed by the court to represent a capital defendant. Instead, they were retained by Short's family to represent him only after Attorney Mulligan made the unrealistic and self-serving promise that he could obtain a better result than life without parole. *See* Reasons for Granting the Writ I., *supra.*

Counsel's errors were all the more unreasonable and prejudicial in light of the questions promulgated to the empaneled jury. Short's jurors were specifically screened during voir dire to assure that they would give weight to the mitigating

[1] Due to the complexity of capital litigation, the Ohio Supreme Court promulgated Sup. R. 20, requiring attorneys seeking appointment in capital cases to be certified by dint of experience and training. While the failure to be Sup.R. 20 certified does not in and of itself demonstrate that counsel was ineffective, it seems clear that for counsel to be competent, effective advocates for a capital defendant, they would have to have many, if not all, of the required skills, experience, and training, required by Sup.R. 20. Since Short's case, Sup.R. 20 has been replaced by the Ohio Supreme Court Rules for Appointment of Counsel in Capital Cases, which shares the same requirements and intended purpose to "promote the effective administration of justice in the appointment of attorneys as counsel for indigent defendants in capital cases." *See* Appt. Coun. R. 1.02, effective Feb. 1, 2015.

factors in Short's case. From the outset, the jurors were primed to expect that mitigation would be presented if the trial proceeded to the penalty phase. Had trial counsel been even remotely cognizant of Ohio's death penalty statute, compelling mitigation—including evidence worthy of great weight and effect—would have been presented to Short's sentencing jury. Instead, counsel failed to present to the jurors *any* mitigating evidence on Short's behalf at the penalty phase, despite knowing that the jury would consider the evidence. Given the life and death circumstances that Short was facing, the magnitude of trial counsel's misunderstanding cannot go unnoticed or be deemed a common mistake—prejudice must be presumed. *United States v. Cronic*, 466 U.S. 648 (1984).

Assuming in the alternative that prejudice is not presumed, Short has demonstrated prejudice. Had counsel represented him competently, the jury would have been presented with compelling mitigation pertaining to his background, particularly his history of mental illness. *See* PC Exs. 1, 3, 5, 12, 15-21, 25-25, 29, 33-37, 41-43, 46. Throughout his life, Short had been diagnosed with Anxiety, Major Depressive Disorder, Bipolar disorder, Developed Drug Dependence, Borderline Personality Disorder, and Adjustment Disorder. PC Ex. 21. Based on his diagnoses, Short was likely to be *extremely* sensitive to anything that could be construed as rejection and he was likely to "make frantic efforts to avoid real or imagined abandonment…the perception of impending separation or rejection, or the loss of external structure" and such separation or abandonment was likely to "lead to profound changes in self-image, affect, cognition, and behavior" *Id*. at ¶xliv. At least

one juror stated that "if [she] had heard the mitigation evidence that was available, it could have changed [her] vote." PC Ex. 32, ¶4. Short demonstrated prejudice where trial counsel advised him, after little to no investigation, to waive his right to present mitigation to the jury. There is a reasonable probability that, had the jury been able to consider available mitigation, that the outcome of the penalty phase would have been different.

In dismissing Short's post-conviction petition, the trial court disregarded affidavits submitted by fourteen people, including some from Short's closest family and friends, containing valuable information which could have humanized him to the jury and given insights into his background when it mistakenly concluded that "Defense counsel conducted [a] reasonable investigation into the law and facts surrounding this area." *Short*, Case No. 2004 CR 02635 at p. 61. None of these fourteen lay witnesses were contacted by trial counsel for mitigation purposes. In support of its decision, the trial court cited "[t]he numerous mitigation-related motions and arguments presented by counsel" as "evidence [of] counsel's keen understanding of death-penalty procedures and the importance of mitigation." *Id.* at 60. However, nearly all of the cited motions are publicly available through the Office of the Ohio Public Defender's Motions Manual and were an available resource to counsel.[2] Thus, as counsel did not prepare the motions themselves, the fact that they filed a few form motions does not somehow impute knowledge upon them.

[2] Accessible at: http://opd.ohio.gov/Appellate-Services/Death-Penalty-Department/Motions-Manual

In affirming the trial court's decision, the Second District Court of Appeals found that rather than demonstrating their ineptitude, counsel's attempt to argue mitigation to the trial court was "a last-ditch effort to overcome Short's decision." *Short*, 2018-Ohio-2429 at ¶74. The appellate court's interpretation of the facts was contrary to the established facts in the record and ignored the evidence submitted, *dehors* the record, that counsel advised their client in a manner inconsistent with the law. PC Ex. 5, ¶6. It cannot constitute strategy where counsel failed to understand even the most basic tenets of capital law. Trial counsel made clear on the record they intended to conduct no investigation, which is inherently unreasonable in itself; and then, through their own actions and advice demonstrated a complete lack of knowledge of capital law.

The trial court also erroneously gave weight to the fact that prior to retaining Attorneys Katchmer and Mulligan, Short was appointed counsel by the court, both of whom were Sup.R. 20 certified. This should not enter the equation and the appellate court failed to address this blatant violation of this Court's precedent. Short's constitutional right to the effective assistance of counsel is no less deserving of protection where he chose to hire private counsel. *Cuyler v. Sullivan*, 446 U.S. 342-345 (1980) ("we see no basis for drawing a distinction between retained and appointed counsel"). In fact, since he was not compensating his attorneys himself, this Court should be even more alert to deficient performance stemming from the "inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party." *Wood v. Georgia*, 450 U.S. 261, 268-69 (1981). The appellate

court, in affirming the lower court's decision, mistakenly found that "nothing establishes that either Katchmer or Mulligan lacked the qualifications set forth for death-penalty certification. Thus, we find this argument lacks merit." *See Short*, 2018-Ohio-2429 at ¶73. The state court's finding completely ignores the letter from the Secretary of the Committee at the Ohio Supreme Court that governs the attorney certification, stating that there were "no records that indicate that George Katchmer, (#5032) and L. Patrick Mulligan (#16118) have ever been certified under Sup.R. 20." PC. Ex. 8. Further, that court's decision is also inconsistent with the continuing legal education transcripts that Short submitted showing that in advance of his capital trial, neither Attorneys Katchmer nor Mulligan made any effort to attend any death penalty trainings to learn the nuances of capital law. *See* PC Ex. 9. Lastly, that court's decision is also inconsistent with the affidavit of Greg Hoover, on behalf of Patrick Mulligan, stating that he had never before nor since tried a death penalty case. PC Ex. 38, ¶2.

Trial counsel failed to investigate all available and relevant mitigating evidence. They also failed to even attempt to understand the relevant law. Thus, trial counsel were ineffective to Short's prejudice when they advised him, after virtually no investigation into either his background or the applicable law, to waive his right to present mitigating evidence to the jury. *Strickland*, 466 U.S. 668. This Court should grant the writ in this case.

CONCLUSION

Short suffered serious constitutional violations throughout his capital trial, most notably the ineffective assistance of his counsel. The reviewing courts completely ignored trial counsel's constitutionally deficient assistance. Short relied on his counsel's misrepresentations and incompetent advice and is now paying for these mistakes with his life.

This Court should grant Short's petition to assure that capital defendants are not deprived their constitutional rights to effective representation and due process based on the errors of counsel.

Respectfully submitted,

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