No. 18-8057
Capital Case

In the Supreme Court of the United States

DUANE SHORT, Petitioner

v.

STATE OF OHIO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

MATHIAS H. HECK, JR.
Montgomery County Prosecuting Attorney

ANDREW T. FRENCH
Assistant Prosecuting Attorney
Counsel of Record

Montgomery County Prosecutor's Office
301 West Third Street, Suite 500
P.O. Box 972
Dayton, OH 45422
(937) 225-4117
frencha@mcohio.org

Counsel for Respondent, the State of Ohio

This is a Capital Case

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

RESTATEMENT OF THE CASE 1-9

REASONS FOR DENYING THE PETITION 10-17

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Schriro v. Landgrigan, 550 U.S. 465 (2007) 13

State v. Roberts, 850 N.E.2d 1168 (Ohio 2006) 13

State v. Short, 952 N.E.2d 1121 (Ohio 2011) 8, 9, 16

Strickland v. Washington, 466 U.S. 668 (1984) 10

RESTATEMENT OF THE CASE

After his wife left him, Petitioner Duane Short became so enraged that he tracked her down in a town two counties away, borrowed his boss's truck and put on a disguise, enlisted his teenage son's help in sawing the barrel off a shotgun, then went to his estranged wife's newly-rented home and shot her male friend before busting down the bathroom door and shooting his wife in the chest. After the jury found him guilty, Short informed the judge who presided over his capital murder trial that wanted to waive the presentation of further mitigating evidence and accept his fate. His request was granted and Short was eventually sentenced to death. But after a year on Ohio's death row Short petitioned the trial court to vacate his conviction and accused his trial counsel of providing ineffective assistance for persuading him to reject a plea offer that the prosecution had made. He also alleged that it was not his choice to waive the presentation of mitigating evidence, but was instead the idea of his counsel for which he simply went along. Both the trial court and the Ohio Second District Court of Appeals, in lengthy and detailed decisions, found no merit to his claims. Short now asks this Court to intervene.

I. Indictment and competency: On September 20, 2004, Duane Short was indicted by the Montgomery County Ohio Grand Jury on three counts of aggravated murder with capital specifications, along with counts of breaking and entering, aggravated burglary, unlawful possession of a dangerous ordinance, and six firearm specifications. The trial court appointed attorneys Bobby Joe Cox and Michael

Pentecost, who accepted discovery, filed a motion to suppress, and suggested that Short was incompetent to stand trial. Short was evaluated by a psychologist, a report was submitted and, at a hearing held January 13, 2005, the trial court found Short competent to stand trial. App. 109b.

II. Short announces he wants to waive mitigation and plead guilty: After the trial court announced that it had found him competent to stand trial, Short told the court that, while he respected his attorneys' strong advice against it, he had given it a great deal of thought and wanted to withdraw his motion to suppress, enter guilty pleas to all charges, and offer nothing in mitigation. He made it clear that this was his decision and his decision alone, and that if his counsel filed motions against his will he would represent himself and discharge them from all duties except to act as advisory counsel. He assured the court that he was competent and fully aware of the consequences of what he was doing. Defense counsel informed the court that they had spent a great deal of time trying to dissuade Short from the path he was taking, but that he would not be deterred. App. 109-112b.

At a hearing the next day, Short told the court that despite his counsels' "prodding," he had not changed his mind. The judge reminded him that his decision must be voluntary and that he could change his mind at any time and withdraw his request to plead guilty and waive mitigation. The judge also ordered a second evaluation, this one focusing on Short's competence to plead guilty and waive all mitigation. On February 21, 2005, a forensic psychologist submitted a report

finding Short competent to waive mitigation. The court set a hearing on the matter for March 16, 2005. App. 112-117b.

There was no hearing, however, because Short and the State were in plea negotiations, and so the court was asked to continue the hearing. When the parties returned to court the next week, Short had changed his mind: he no longer wished to enter a plea, but instead wished to proceed on his motion to suppress and then go to trial. The court set a date for the suppression hearing and, at Short's request, continued the hearing on his competency to waive mitigation until that same day. App. 117b.

III. Short agrees to accept the state's plea offer: The parties were back in court on May 19, 2005. Short had decided to accept the terms of a negotiated plea offer, wherein he would plead guilty to all charges and specifications, and in return the state would stipulate that the aggravating circumstances did not outweigh the mitigating factors. The trial court also agreed to sentence Short to two consecutive terms of life in prison without parole, consecutive to seven years. App. 117b.

The judge reviewed each charge in the indictment with Short in the presence of his attorneys, as well as each specification, and every aspect of the plea agreement. She also discussed the procedure that would be used in taking his pleas and imposing sentence, the rights he would give up by doing so, and confirmed that he had discussed the agreement with counsel. She asked him to explain the terms of the agreement to her, and he did. Short acknowledged that he was aware that under the terms of the agreement he would remain in prison for the rest of his life.

The court set June 6 and 7, 2005, for the three-judge panel to convene to take Short's plea, receive the stipulations, and impose sentence. App. 117b.

IV. Short wants to go to trial: On June 3, 2005, Short renounced the plea agreement. He informed the court that it was his desire that Mr. Cox and Mr. Pentecost withdraw as his counsel, and that he wished to withdraw the plea agreement and proceed to trial with newly-retained counsel, Patrick Mulligan, as his lawyer. Co-counsel, George Katchmer, later entered an appearance as well. Mulligan entered a plea of not guilty by reason of insanity on Short's behalf. Over the next few months, Mulligan and Katchmer filed more than 70 motions on Short's behalf, many relating to the sentencing phase of trial, including the presentation of mitigation evidence. After two psychologists found him to be sane at the time of the offense, Short withdrew his insanity plea. App. 117b.

V. Pretrial conferences: In the weeks leading up to trial, the trial court held many conferences with counsel for the state and defense. Pending motions were discussed and argued, deadlines were set, and the trial procedure was discussed at length. At one hearing in particular, the court was advised that defense counsel did not intend to retain the services of a mitigation expert. The trial court addressed Short personally, made certain that his counsel had discussed the presentation of mitigation evidence and other trial strategies with him, and was assured by Short that he had fully discussed these matters with counsel and was satisfied with their advice. App. 118-120b.

VI. Short is found guilty: Trial began on April 17, 2006. Short was advised of his right to testify in his own defense, but chose not to do so. The jury returned guilty verdicts on all indicted counts and specifications. Following the announcement of the jury's verdict, the trial court reminded Short of the procedure that was to follow in the mitigation phase of the trial, including his right to a pre-sentence investigation as well as a psychological evaluation. Short stated that he understood the procedure and his rights regarding the presentation of evidence in mitigation. App. 23a

VII. Short chooses to waive further mitigation: Before the sentencing phase of the trial began, counsel advised the court that Short did not wish to introduce any additional evidence in mitigation, other than that which had already been presented during the trial phase. Counsel confirmed that they had done a thorough mitigation investigation in preparation for this phase of the trial, including interviewing members of Short's family, but that Short wanted no additional evidence given to the jury. App. 24a

The trial court conducted a detailed inquiry with Short to determine if he understood what he was doing–particularly whether he understood the purpose of mitigation evidence and the consequences of not presenting any mitigation to the jury. Short told the court that his counsel had fully explained to him what mitigation is and what it means, he understood the importance of presenting mitigation evidence, and he understood the implications of his decision–specifically,

that without presenting mitigation evidence it would likely be difficult for the jury to recommend a sentence other than death. App. 120-123b.

When asked whether he understood the difference between the choice of life or death, Short explained: "That's a choice I have to make a decision on my own today whether - what you're questioning me about - about the mitigating phase of this trial is it could very well cost me my life if I don't put on any mitigation. I understand that fully." App. 123b. And when asked by the court if he'd had an adequate period of time to discuss his decision to forego presenting mitigation evidence with his lawyers, his family, and to seek spiritual guidance, Short reassured the judge that he had:

> Yes, I have had adequate opportunity to do that prior before obtaining Mr. Mulligan when I had [former counsel] Mr. Cox, I gave it a lot of thought then and the last day that we were in court you told me that, you know, that it was my choice to do that again and since the weekend has passed, I've dwelled and thought upon it very seriously and I still have come thinking this is the course and it's the route that I would like to go.

App. 123-125b.

After additional questioning from the court about his decision, Short reiterated that "[my attorneys] have stressed their views and their point about putting on mitigation to me, and it's a decision that I would - I'd like to do without mitigation." App. 125-127b. After full consideration and a review of applicable law, the trial court found Short competent to waive the presentation of additional mitigating evidence.

VIII. The jury recommends death: Prior to the mitigation phase, the court granted in part the defense motions in limine designed to limit the State's evidence and arguments to the jury. During the mitigation phase of the trial, the defense moved to have all mitigation evidence that was presented during the trial phase admitted into evidence in the mitigation phase, which the court allowed. In closing argument, defense counsel asked the jury to consider how hurt Short was when his wife left him and to remember that his crimes were confined to seven hours of his 36 years on Earth, during which time he was a husband who loved his wife, a father who worked hard to take care of his family, and a good employee. Trial Tr. 2502-2510. Nevertheless, the jury recommended a sentence of death on all three counts of aggravated murder.

IX. Sentence imposed: Short appeared for sentencing on May 30, 2006, at which he delivered a long allocution. During his statement, he commented on his decision not to present additional evidence to the jury in mitigation:

> One thing I would like to make known in open court today is [on the day the mitigation phase was scheduled to begin] the jurors were not present, but on the record with the prosecution and myself and my counsel present, you Judge Huffman asked me, Mr. Short, is there any particular reason why you don't want to put on mitigation?
>
> My response to you was yes, but I don't know if I should say it on the record. So you Judge Huffman asked me to console [sic] with my counsel before I said anything. After consoling [sic] with my counsel, I said nothing in response at that time. But today, in this courtroom I would like to make known what I said to my counsel and the reason I personally didn't want to put on mitigation, and that reason was that I felt like the little mitigation I had was insignificant compared to the aggravating circumstances and it would not bear much weight for the consideration of the jurors' recommendation for sentencing. And, I - and I just wanted everything over with.

App. 128-129b. Short concluded by telling the court that, other than perhaps not making an unsworn statement before the jury, "I don't regret anything concerning the rights and opportunities that has [sic] been giving - given me during this portion or any other portion of my trial." Trial Tr. 2571.

The trial court adopted the jury's recommendation and sentenced Short to death.

X. The direct appeal: On direct appeal to the Supreme Court of Ohio, Short's conviction and death sentence was affirmed. *State v. Short*, 952 N.E.2d 1121 (Ohio 2011). The court rejected any suggestion that Short had waived *all* mitigation, specifically finding that he had only waived the introduction of additional mitigation evidence at the penalty phase of the trial: "Using both the State's evidence and the testimony elicited by defense cross-examination, the defense argued that Short was 'not a cold blooded person,' but was 'a mess,' was 'torn apart,' and had 'lost the battle with his demons,' when he killed [his wife] Rhonda and [her friend] Sweeney." *Id.* at 1134. "[C]ounsel did elicit mitigating evidence in the guilt phase by cross-examining the State's witnesses. Moreover, counsel used that evidence in the penalty phase to argue that Short did not deserve death." *Id.* The Ohio Supreme Court likewise found that the record did not bear out Short's assertion that counsel failed to investigate mitigation: "In fact, defense counsel advised the trial court that they had 'made a thorough investigation of mitigating evidence * * * including inquiries of family members and other persons.' " *Id.* at

1142. And the court found that Short had not demonstrated prejudice simply because he had decided not to engage a mitigation specialist. *Id.*

Short moved to reopen his direct appeal, arguing ineffective assistance of appellate counsel in nine propositions of law that he asserted his appellate counsel had a constitutional duty to raise–several relating to Short's decision to waive the presentation of mitigation evidence. The Supreme Court of Ohio summarily denied his application to reopen on March 13, 2011.

XI. Short files for post-conviction relief: On June 11, 2007, while his direct appeal was pending, Short filed with the trial court a petition for post-conviction relief, which he later amended nine times over the course of the next six-and-a-half years. On December 6, 2016, the trial issued a 98-page decision overruling Short's petition. App. A.

Short appealed the trial court's denial of his post-conviction petition and other motions to Ohio's Second District Court of Appeals alleging, among other things, that the trial court failed to give proper consideration to the evidence he produced in support of his petition and erred in finding no merit to his specific claims of ineffective assistance of counsel. The court of appeals found each of Short's four assignments of error not well-taken and affirmed the trial court's decision. *See* App. B. The Ohio Supreme Court declined to accept jurisdiction over Short's appeal of the court of appeals' decision. App. 168a.

Short's petition for writ of certiorari is now before this Court for consideration.

REASONS FOR DENYING THE PETITION

Duane Short seeks a writ of certiorari because he blames his trial counsel for not doing more to prevent him from receiving a death sentence following his conviction for the aggravated murder of his estranged wife and her friend. Specifically, Short contends that his Sixth Amendment right to the effective assistance of counsel was violated when his lawyers advised him to reject the state's plea offer of life in prison without parole. He further contends that after he was found guilty by the jury, he received ineffective assistance of counsel because his lawyers failed to investigate and present evidence in mitigation of the death penalty. Both of his contentions, however, are founded upon factual claims that both the trial court and Ohio Second District Court of Appeals concluded were unfounded and belied by the record from Short's trial. This Court's further review of the state courts' factual determinations is unwarranted.

The two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668 (1984), is the appropriate standard to assess whether a criminal defendant has raised a genuine issue of ineffectiveness of counsel. Thus, to prevail on his claims that his counsel were ineffective for persuading him to reject the prosecution's plea offer and for waiving mitigation in the penalty-phase of his capital trial, Short must demonstrate that his counsels' representation was constitutionally deficient and that in the absence of counsels' unprofessional mistakes there is a reasonable probability that the outcome of the trial and/or his sentence would have been different.

But as both the trial court and appellate court found, the problem with Short's arguments is that he failed to present sufficient evidence to substantiate his claim that the actions he wishes to attribute to his counsel were the fault of counsel rather than Short's own knowingly, intelligent, and voluntary choices. And more importantly, the evidence Short did present was in direct conflict with statements Short made during his trial.

1. Plea Agreement: Early on in the case after Short informed the trial court that he wished to waive the presentation of mitigating evidence and enter a guilty plea, his court-appointed counsel negotiated a plea agreement with the prosecutor under terms that would have allowed Short to plead guilty to all counts in exchange for a sentence of life in prison without parole. App. 109-117b. But before the plea could be entered, Short told the trial court that he had retained new counsel and now wished to go to trial rather than enter a plea. App. 117-118b. He got his wish, which resulted in his aggravated-murder conviction and death sentence.

Short now wants to blame his counsel for advising him to reject the plea offer that had been negotiated by his former counsel. But in rejecting his argument below, the appellate court found that the affidavit Short filed in support of his petition for post-conviction relief "does not mention the rejection of the plea agreement let alone that the rejection was the result of promises made by [his counsel]." App.151b. The court of appeals found no merit to Short's claim of ineffective assistance of counsel, therefore, because "there are no operative facts in

the petition that would permit a finding that Short rejected the plea agreement because [counsel] promised that he would obtain a better outcome [at trial]." *Id.*

The trial court's explanation for finding no merit to Short's argument was more explicit:

> [Short] has failed to produce evidence that his voluntary decision to reject the plea agreement negotiated by his original counsel was other than his knowing, intelligent and voluntary decision. The ABA Model Rules of Professional Conduct 1.2(a) [which Short cited to repeatedly in his state-court filings as the example against which he wished his counsels' conduct to be judged] requires that the client make all decisions on fundamental matters and requires the attorney to abide by those decisions. . . . Nothing in Short's affidavit suggests that the decision to reject the plea offer was other than his choice [and] [t]he court made a detailed inquiry of him, in court [during trial], regarding his decision.

App. 91a.

The record below fully supports the state courts' conclusions that Short's decision to reject the prosecution's plea offer and instead proceed to trial was his decision and his decision alone. Even after the jury found him guilty and recommended he be sentenced to death, Short offered no regrets about dismissing his court-appointed lawyers, retaining new counsel, and proceeding to trial rather than accept a plea. He instead told the trial court that his only regret was perhaps not making an unsworn statement before the jury, and beyond that "I don't regret anything concerning the rights and opportunities that [have] been giving – given me during this portion or any other portion of my trial." Tr. 2571.

Because the trial court's and appellate court's decisions finding no merit to Short's ineffective-assistance-of-counsel claim relating to his decision to reject a the

plea offer and proceed to trial were supported by both fact and law, further review by this Court is unwarranted. His petition for writ of certiorari on this issue should be denied.

2. Waiver of Mitigation: This Court has never suggested that courts or counsel are constitutionally required to force unwilling defendants to present mitigating evidence at the sentencing phase of a capital trial. *State v. Roberts*, 850 N.E.2d 1168, 1185 (Ohio 2006). On the contrary, in a case that reversed a Ninth Circuit decision granting an evidentiary hearing on the question of whether a defendant knowingly and voluntarily waived his right to present evidence in mitigation of the death penalty, this Court noted that the defendant's behavior and statements during the trial indicated that it was his decision not to present mitigating evidence. *Schriro v. Landgrigan*, 550 U.S. 465, 479-80 (2007). As this Court explained, "it is not objectively unreasonable . . . to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice on his counsel's failure to investigate further possible mitigating evidence." *Id.* at 478.

That is precisely what happened here. The trial court record is replete with instances where Short made it clear that it was he, and not his lawyers, who had decided not to present additional mitigating evidence to the jury. The court below noted that even before Short retained the attorneys that he now wishes to blame for waiving mitigation, Short had informed the trial court that he wanted to plead guilty and waive the presentation of mitigating evidence. App. 109-112b. Under

direct questioning from the judge, Short made it clear that he was making the decision to waive mitigation of his own free choice and over the strenuous objection of his counsel. *Id.* When he appeared again before the judge the next day, Short stated that he had not changed his mind, it was still his wish to plead guilty without mitigation, and that he would discharge his counsel if they continued to "prod" him about changing his mind. App. 112-116b.

Short's appointed attorneys were eventually discharged and he proceeded to trial with retained counsel he now accuses of error. But after the jury found him guilty, Short again advised the judge that he had decided not to present the jury with additional mitigating evidence. App. 120-127b. Despite his counsels' representations that they had made a thorough investigation in preparation for the mitigation phase of trial and Short's own acknowledgment that he had discussed mitigation with his counsel and was aware of its importance, Short told the trial court that he had nevertheless come to the conclusion that waiving the presentation of additional mitigation was what he wanted to do and that he understood it was his right to do it. *Id.* Even after the jury returned its recommendation of death and Short appeared before the court for sentencing, he expressed no regret for having waived the presentation of mitigation evidence, telling the judge that

> the reason I personally didn't want to put on mitigation . . . was that I felt like what little mitigation I had was insignificant compared to the aggravating circumstances and it would not bear much weight for the consideration of the jurors' recommendation for sentencing. And, I - and I just wanted everything over with.

App. 129b.

Thus, in addressing the issue below, the appellate court held that "after reviewing the transcript of proceedings, we agree with the trial court that Short affirmatively, knowingly, and voluntarily waived the presentation of additional mitigating evidence thereby rendering his claim of ineffective assistance of counsel baseless. App.142b.

Moreover, despite Short's constant claim that his counsel failed to present evidence in mitigation of the death penalty, the Supreme Court of Ohio determined that not all mitigation was waived. Rather, in its decision affirming Short's conviction on direct appeal, the court found that Short merely elected to forego his right to present additional mitigating evidence beyond that which was presented to the jury in the trial phase:

> During the guilt phase, the defense had introduced mitigating evidence, to which counsel referred during the penalty phase. Specifically, the defense had attempted to show that Short was deeply emotionally distressed because Rhonda [the estranged wife he shot and killed] left him. Mike Rosenbalm, a Monroe, Ohio police officer and the sole witness in the defense case-in-chief, testified that he was dispatched to Short's house on July 16, and that Short was "very emotional [and] crying."
>
> In cross-examining prosecution witnesses, the defense elicited further testimony to support its claim of emotional distress. Justin Short [Short and Rhonda's son] testified on cross-examination that the police had come to the house one night after Rhonda's departure and had confiscated Short's gun, and that Short "went to a hospital." Justin further testified that his father had received disturbing phone calls, during which someone had played songs that upset him. Short's boss, Robert Thomas, testified on cross-examination that on the Monday or Tuesday before the murders, Short was "tearful," appeared "run down," said he "just wanted to die," and was unable to work.
>
> During the cross-examination of Brandon Fletcher [a friend from church], the defense elicited that Fletcher had told Short about

Sweeney [the other person Short shot and killed] and Rhonda "hugging" at church in a manner he considered inappropriate and that this news had upset Short. In cross-examining Short's cousin . . . concerning Short's July 21 visit to the Abundant Life Tabernacle, the defense stressed that Short was not a member of the congregation, but had attended the service and had gone up to the altar for prayer, implying that Short was taking unusual actions in an attempt to deal with strong emotions. Similarly, the defense elicited testimony from Justin that Short had attended services at four churches other than his own from July 15 to 22, and that the congregation at each one offered special prayers for him.

Short's emotional distress over Rhonda formed the principal theme of the defense penalty-phase closing argument. The defense argument juxtaposed Justin's testimony with Officer Rosenbalm's to imply that Short had been suicidal. During closing arguments, the defense reminded the jury: "First day, Justin says, how did your dad seem very sad, very sad. Officer Rosenbalm is called out, he comes to the house. What did you find, Officer? * * * He was crying, he was depressed, I confiscated a gun."

Defense counsel argued that Short had gone to several churches during the week before the murders because he "was crying for help the only way he knows. He goes to church. * * * [H]e's going from church to church to church trying to get some sort of help, trying to stop this stuff that he's been carrying around for two months. His life is gone, his wife is gone, the kids are gone, he has nothing, he goes to church."

Using both the state's evidence and the testimony elicited by defense cross-examination, the defense argued that Short was "not a cold-blooded person," but was "a mess," was "torn apart," and had "lost the battle with his demons" when he killed Rhonda and Sweeney.

* * *

Here, although Short did not make an unsworn penalty-phase statement, his counsel did elicit mitigating evidence in the guilt phase by cross-examining the state's witnesses. Moreover, counsel used that evidence in the penalty phase to argue that Short did not deserve death.

* * * Short did not forego the presentation of all mitigating evidence.

Short, 952 N.E.2d at 1133-1134.

What the Supreme Court of Ohio's analysis of the issue suggests is that, despite Short's decision to forego the presentation of additional mitigating evidence during the penalty phase, his counsel did the best they could with what they had in attempting to dissuade the jury from recommending a sentence of death. Short's contention, then, that there is no justification for his counsels' decision not to present any mitigation is a mischaracterization of the evidence that the Supreme Court of Ohio rejected as part of Short's direct appeal in 2011, and which the trial court and appellate here, in finding no merit to the same contentions made in Short's post-conviction petition, did not err in coming to the same conclusion. Further review by this Court is not warranted.

CONCLUSION

In view of the foregoing law and argument, Duane Short's petition for writ of certiorari should be denied.

Respectfully submitted,

MATHIAS H. HECK, JR.
Montgomery County Prosecuting Attorney

/s/ Andrew T. French
ANDREW T. FRENCH
Assistant Prosecuting Attorney
Counsel of Record
Montgomery County Prosecutor's Office
301 West Third Street, Suite 500
P.O. Box 972
Dayton, OH 45422
(937) 225-4117
frencha@mcohio.org

Counsel for Respondent, the State of Ohio