No. 18-8057

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

PETITIONER'S REPLY BRIEF

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REPLY

The State argues that "this Court's further review of the state court's factual determination is unwarranted." State's Brief in Opposition at 10. The State reasons that the state court record demonstrates that the fault that Short lays upon his trial counsel was actually the result of Short's own choices. *Id*. at 11. This is an incorrect summation of both the facts and the law of this case. The state court record shows that Short's trial counsel were responsible for the fatal decisions that plagued this case. Unless this Court corrects the errors raised in Short's petition, Short will pay for his trial counsels' mistakes with his life. This Court should grant the writ.

1. First Reason to Grant the Writ - Plea Agreement:

The State first focuses on that fact that Short—prior to trial and prior to obtaining his retained trial counsel—thought about pleading guilty to the death

indictment as originally charged. However, thinking about taking a certain action and taking that action based on the incompetent advice of counsel are clearly inherently different.

The record demonstrates the following facts that the State is now trying to dispute: Short's original trial counsel, Attorneys Bobby Jo Cox and Michael Pentecost, spent time, and built the necessary rapport, with Short. PC Exs. 30, 31. As such, they earned his trust and respect. *Id*. Due, at least in large part, to that strong attorney-client relationship, Short agreed to accept a negotiated plea deal for life without the possibility of parole. *Id*. However, before Short had the opportunity to accept the agreed upon plea offer in open-court, in a last-ditch effort to save his only son from life in prison, Short's father, Sam, contacted Attorney Patrick Mulligan. Mulligan, a well-known attorney in Dayton, Ohio, promised Sam that he could get a better result than life without parole by taking Short's case to trial. PC Exs. 1-A; 17-A. Based on that lofty promise, Sam retained Attorney Mulligan to represent his son. *Id*. Sam was unaware that Attorney Mulligan had never represented anyone in a capital case, let alone a capital trial. Sam was also unaware that Attorney Mulligan had never attended a training specific to death penalty defense or that he lacked the prerequisite certification to be appointed to represent defendants in a capital cases. *Id*. Due to Short's father's misguided, but well-intentioned actions for his only son, Attorney Mulligan took over the case, advised Short to reject the plea offer on the table, and, instead, took the case—without sufficient preparation—to trial. *Id*.; *see also* PC Exs. 30, 31. This was deficient performance.

The State next focuses on that fact that Short did not tell the trial court or state in his affidavit that he rejected the plea offer based upon Attorney Mulligan's faulty advice. Brief in Opposition at 11-12. In making this allegation, the State completely ignores two truths: (1) if Short had made this explicit statement, the State would have found his affidavit self-serving and lacking credibility just as it does in Short's Second Reason for Granting the Writ, and (2) the record amply demonstrates that this decision was based on his counsel's deficient advice. Short's father, Sam, and Short's sister, Tracy, specifically stated in their affidavits that Attorney Mulligan "was promising us the sun and the moon and everything else. He was saying that he could do way better than Mr. Pentecost and Mr. Cox. He said that he could get Duane something with parole." PC Ex. 1-A; *see also* PC Ex. 17-A. The State further ignores the affidavits of both Bobby Jo Cox and Michael Pentecost where they each discuss Attorney Mulligan's lack of knowledge of capital defense and how Sam—prior to Short's conviction and sentence—told them that he only hired Attorney Mulligan because of his lofty promises. PC. Exs. 30, 31.

This case is a clear-cut example of the unconstitutional error that this Court found in *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012). Here, counsel not only failed to advise Short to accept the plea offer and resolve the case, sparing his life; they affirmatively advised Short ***not*** to accept the offered deal. But for the intervention of Attorney Mulligan, 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. Because these facts demonstrate a clear violation of *Lafler*, this Court should grant the writ.

2. Second Reason for Granting the Writ - Waiver of Mitigation:

The State confuses Short's arguments by claiming that "This Court has never suggested that courts or counsel are constitutionally required to force unwilling defendants to present mitigating evidence." Brief in Opposition at 13. But, Short has never argued that his trial counsel should have forced him to present mitigation. Rather, his argument is that the record shows that he was willing to present mitigation and would have done so had his trial counsel understood the law, done the necessary investigation, and counselled him to present mitigation to the jury during the mitigation phase of his capital trial. P.C. Ex. 5.

Next, the State focuses on Short's statements as to the waiver in the record before the trial court. However, the State again ignores evidence attached to Short's post-conviction petition. Specifically, the State disregards Short's affidavit where he details why he told the trial court he wished to waive the presentation of mitigation to the jury. PC Ex. 5. Short explained: "Mr. Mulligan and Mr. Katchmer told me that they had a strategy for 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." *Id.* As Short argues above in the First Reason for Granting the Writ, according to the State, no matter what Short does—if he makes certain

statements it in his affidavit or if he does not—he cannot win. Either Short's affidavit counts as credible evidence, or it does not; the State cannot have it both ways. And, Short's statements were not made in a vacuum. Trial counsel confirmed that their "strategy" was to present mitigation to the judge, not the jury, when they filed a motion requesting to do just that. Tr. 2544. *See also* PC Ex. 6.

The State next argues that Short makes these claims "[d]espite his counsels' representations that they made a throughout investigation in preparation for the mitigation phase …" State's Brief in Opposition at 14. However, the record belies trial counsels' representations that their investigation was constitutionally adequate. Trial counsel further rebuked that statement when they stated on the record, "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. Although this Court has not found that failing to retain a mitigation specialist is per-se infective assistance of counsel, this Court has stressed that all investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigation evidence." *See Wiggins v. Smith*, 539 US. 510, 524 (2003) (emphasis in original). Although the term "mitigation specialist" was not employed, this Court also acknowledged the importance of the nonlawyer who had conducted the through post-conviction investigation in Wiggins' case. *Id.* at 516. Here, just as in *Wiggins*, the trial court offered counsel the assistance of mitigation specialist, but trial counsel rejected that offer. *Compare Id.* at 517 *with* Tr. 272. And,

just as in *Wiggins*, there was a host of mitigation available, yet not presented. *See* Petition at 15-16; PC Exs. 1, 3, 5, 12, 15-21, 25-25, 29, 32, 33-37, 41-43, 46. Thus, Short also demonstrates prejudice.

The State next claims that Short's arguments are a "mischaracterization of the evidence that the Supreme Court of Ohio rejected as part of Short's direct appeal in 2011." State's Brief in Opposition at 15-17. The State's argument misses the mark. Short's argument does not rise or fall on the whether the waiver in mitigation was a complete waiver versus a partial waiver. What matters is this: even though there was mitigating evidence available to present, Short's trial counsel failed to present ***any*** evidence during the mitigation phase of Short's capital trial. Further, Short has sworn in an affidavit that he was willing to present mitigation, and, in fact, he has presented it in these post-conviction proceedings.

Moreover, the State's argument unwittingly backs itself into a corner. If the waiver was not a compete waiver of the presentation of mitigation, then trial counsel did not have an "unwilling defendant." As such, they had even greater duty to ensure (1) that a full investigation into available mitigating evidence was conducted, (2) that they understood the relevant law in order to give Short competent advice on whether to present that available mitigation, and (3) that they built a sufficient rapport with their client and the family prior to and during trial to ensure the presentation of available mitigation. They failed in all regards. This Court should grant the writ in this case.

CONCLUSION

Trial counsel twice convinced their client to forgo actions which would have resulted in sparing his life. This Court should not condone this egregious ineffective assistance of counsel. This Court should grant the writ.

Respectfully submitted,

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