No. ______

In the Supreme Court of the United States

PHILLIP JONES,
Petitioner,

v.

STATE OF OHIO,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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CAPITAL CASE

QUESTION PRESENTED

Whether, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, trial counsel is ineffective in a capital case when counsel conducts their mitigation investigation after the trial begins, does not allow their experts enough time to fully investigate their client's background, and, as a result, fails to discover their client's childhood sexual abuse. U.S. Const. amend. VI, VIII, XIV.

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.

RELATED PROCEEDINGS

All cases related to these proceedings are listed below:

1. Ohio Supreme Court Direct Appeal Opinion: *State of Ohio v. Phillip L. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677
2. Court of Appeals Postconviction Opinion reinstating Post-conviction Petition: *State of Ohio v. Phillip L. Jones*, 9th Dist. C.A. No. 25254, 2010-Ohio-3850.
3. Trial Court Postconviction Opinion: *State of Ohio v. Phillip L. Jones*, Case No. CR 2007 04 1294, Summit County Common Pleas Court, Journal Entry, Filed October 25, 2010.
4. Court of Appeals Post-conviction Opinion: *State of Ohio v. Phillip L. Jones*, 9th Dist. C.A. No. 25695, 2011-Ohio-6063.
5. Ohio Supreme Court denial of jurisdiction: *State of Ohio v. Phillip L. Jones*, Entry, Ohio Supreme Court Case No. 2012-0036.
6. Trial Court Postconviction Opinion (after remand): *State of Ohio v. Phillip L. Jones*, Case No. CR 2007 04 1294, Summit County Common Pleas Court, Journal Entry, Filed November 30, 2015.
7. Court of Appeals Postconviction Opinion (after remand): *State of Ohio v. Phillip L. Jones*, 9th Dist. C.A. No. 28063, 2019-Ohio-289.
8. Ohio Supreme Court denial of jurisdiction (after remand): *State of Ohio v. Phillip L. Jones*, Entry, Ohio Supreme Court Case No. 2019-0381.

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In the Supreme Court of the United States

PHILLIP JONES,
Petitioner,

v.

STATE OF OHIO,
Respondent.

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

Phillip Jones respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The Journal Entry of the Supreme Court of Ohio, *State of Ohio v. Phillip Jones*, Ohio Supreme Court Case No. 2019-0381 (jurisdiction denied on June 26, 2019), is attached hereto as Appendix A. The Opinion of the Ohio Court of Appeals, *State of Ohio v. Phillip L. Jones*, 9th Dist. C.A. No. 28063, 2019-Ohio-289, is attached hereto as Appendix B. The Summit County Court of Common Pleas Journal Entry, *State of Ohio v. Phillip L. Jones*, Case No. CR 2007 04 1294, Summit County Common Pleas Court, Journal Entry, Filed November 30, 2015, is attached hereto as Appendix C.

JURISDICTION

The Supreme Court of Ohio rendered its opinion on June 26, 2019. 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 defence.

B. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

C. 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 December 17, 2007, a jury found Phillip Jones guilty of Aggravated Murder with a single death specification: that he caused the death of Susan Yates while committing, attempting to commit, or while fleeing immediately after committing or attempting to commit rape. He was sentenced to death on February 4, 2008.

On March 23, 2009, Jones filed his postconviction petition along with a motion for discovery and a motion for appropriation of funds for neurological testing. On September 30, 2009, the State opposed the motions and requested the petition be dismissed. On January 20, 2010, the trial court dismissed the petition as premature because the trial court had not properly advised Jones of his post-release control obligations. After Jones had been so advised, he renewed all his requests on April 14, 2010. The Ninth District reversed and remanded the trial court's dismissal and reinstated his original petition on August 18, 2010. *State of Ohio v. Phillip L. Jones*, 9th Dist. C.A. No. 25254, 2010-Ohio-3850.

On October 25, 2010, the trial court dismissed Jones's postconviction petition and denied his motions for funding and discovery. *State of Ohio v. Phillip L. Jones*, Case No. CR 2007 04 1294, Summit County Common Pleas Court, Journal Entry, Filed October 25, 2010. Jones never received a hearing. Jones timely appealed to the Ninth District Court of Appeals.

On Nov. 23, 2011, The Court of Appeals affirmed in part the decision of the trial court but reversed and remanded for further proceedings on the issue of ineffective assistance of counsel during the mitigation phase. *State of Ohio v. Phillip*

L. Jones, 9th Dist. C.A. No. 25695, 2011-Ohio-6063 [hereinafter *Jones 1*], attached at Appendix E. The Court found that a hearing in the trial court was required "to determine whether [Jones's] lawyers began their mitigation phase investigation early enough and whether they allowed Dr. Siddall and Hrdy enough time to do a complete investigation into Mr. Jones's family life." *Id.* at ¶ 66.

Jones appealed to the Ohio Supreme Court the denial of his trial phase issues as well as the denial of discovery and funding for experts. That court declined to hear his appeal. Ohio Supreme Court Case No. 2012-0036 (jurisdiction declined May 22, 2013).

The mandated evidentiary hearing was held between Nov. 18-25, 2013. Prior to the hearing, the trial court issued a journal entry denying Jones's request to admit the affidavit of his deceased mother, Henrietta Jones. *See* Case No. CR 2007 04 1294, Summit County Common Pleas Court, Journal Entry, Filed July 24, 2013 [hereinafter 6/24/13 JE], attached at Appendix D.

On Nov. 30, 2015, the trial court issued its opinion granting the State's Motion to Dismiss. *See State of Ohio v. Phillip L. Jones*, Case No. CR 2007 04 1294, Summit County Common Pleas Court, Journal Entry, Filed November 30, 2015 [hereinafter 11/30/15 JE], attached at Appendix C. The Court of Appeals affirmed that denial of relief on January 30, 2019. *State of Ohio v. Phillip L. Jones*, 9th Dist. C.A. No. 28063, 2019-Ohio-289 [hereinafter *Jones 2*], attached at Appendix B.

Jones filed his timely jurisdictional appeal in the Ohio Supreme Court. That Court denied jurisdiction to hear his appeal. Ohio Supreme Court Case No. 2019-0381

(jurisdiction declined June 26, 2019), attached at Appendix A. Jones now seeks a writ of certiorari from this Court.

STATEMENT OF FACTS

On Dec. 20, 2007, three days after Phillip Jones was found guilty, mitigation specialist Thomas Hrdy held his first meeting with Jones's family. (Pet. Ex. 21.) The second meeting with Jones's family was held on Dec. 23, 2007, at Henrietta Jones's house. (*Id.*) According to Hrdy, this meeting consisted mostly of him interviewing members of the Jones family as a group, while watching a Cleveland Browns game. (Transcript page [hereinafter Tr.] 893-97.) Not only did Hrdy fail to prepare written summaries from that interview, but he also described his handwritten notes from that interview as "cryptic" and "pretty bad." (Tr. 900, 919; Respondent's Exhibit [Res. Ex.] A.) The final Jones family meeting was held at attorney O'Brien's office, where family and friends were interviewed in a group, and only pulled aside for individual interviews lasting about fifteen minutes each. (Tr. 900, 919.)

Trial counsel retained Dr. James Siddall to perform a psychological evaluation of Jones and testify at his mitigation hearing. Dr. Siddall interviewed Jones on Nov. 21, 2007 and Dec. 12, 2007. (Pet. Ex. 15.) Those two interviews took less than eight hours combined, and half of that time was spent administering psychological tests rather than interviewing Jones. (*Id.*; Tr. 984.) The results of those psychological tests were not known until Dec. 19, 2007, which was two days after the jury found Jones guilty of capital murder. (Pet. Ex. 15.) Dr. Siddall's bill reflects that he did not begin reviewing records or preparing his report until Dec. 27, 2007. (*Id.*) Trial counsel did

not receive his report until Jan. 8, 2008; just two days before the mitigation hearing began in Jones's case. (Tr. 1099.) Jones's trial counsel did not complete a mitigation investigation before they chose a capital jury in this case. Trial counsel did not conduct a mitigation investigation until after the trial phase of Jones's capital trial was already underway, and most of that investigation occurred after Jones had already been found guilty.

REASON FOR GRANTING THE WRIT

Trial counsel in a capital case must make efforts to discover all reasonably available mitigating evidence.

I. Introduction.

This Court has repeatedly stated that effective counsel in a capital case must do a thorough investigation into the available mitigation evidence, and present appropriate mitigation evidence to the jury, to ensure that the jury reserves capital punishment for the worst of the worst offenders. *Wiggins v. Smith*, 539 U.S. 513, 524 (2003); *see also Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010). Despite this clear direction from the Court, Ohio and other states continue to tolerate trial counsel who ignore this Court's admonitions and who shirk their constitutional duty to conduct meaningful mitigation investigation. This case allows the Court to send a clear message to Ohio and to other states with capital punishment that the Constitution demands effective trial representation, and, by definition,

effective trial representation in a capital case requires an effective mitigation investigation and presentation.

Here, mitigating evidence about Jones's childhood abuse was reasonably available. Because the severity of the abuse undermines confidence in the outcome of the mitigation phase, Jones can demonstrate ineffective assistance of counsel in violation of his Sixth Amendment rights. The Court should grant certiorari, vacate the death sentence, and remand this case to the trial court for a new sentencing hearing.

II. Relevant Law.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As this Court has repeatedly stated, ineffective assistance of counsel has two components: (1) deficient performance and (2) prejudice. *Id.* at 687. To satisfy the performance prong, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. In a capital case, investigations into mitigating evidence "should comprise efforts to discover **all reasonably available** mitigating evidence." *Wiggins*, 539 U.S. 513, 524 (emphasis added) (quoting ABA Guideline 11.4.1(C) (1989)). These are "well defined norms." *Id.*; *see also Williams*, 529 U.S. 362;

Rompilla, 545 U.S. 374; *Porter*, 558 U.S. 30; *Sears*, 561 U.S. 945; *State v. Herring*, 142 Ohio St.3d 165, 2014-Ohio-5228.

If deficient performance is established, a defendant must then demonstrate prejudice. This requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

III. Relevant Facts.

Postconviction counsel discovered that the dysfunction in Jones's family was far worse than trial counsel knew. Jones's sister, Rhonda, testified at the Nov. 2013, hearing that the childhood they endured was "a living hell for all of us." (Tr. 392.) Psychologist Dr. Bob Stinson testified at the hearing that, out of thousands of social histories that he has reviewed, "this ranks as one of the worst that I have seen in terms of the trauma and the abuse and the dysfunction." (*Id.* at 570.)

Jones was the youngest child in a family where physical, emotional, and sexual abuse were all rampant. Jones was neglected from the time he was an infant, because of his parents' drug and alcohol problems. (Tr. 468.) Jones often did not have access to food or other basic necessities. His sisters Yolanda and Rhonda testified that Jones and his siblings would have to steal food, because there was none at home. (*Id.* at 367-69 464-66.) Jones's parents would often fail to pay utility bills, causing the family to be without necessities like heat during the winter. (*Id.* at 465.) Jones's

parents would spend money on drugs and prostitutes, while their children's needs went unmet. (*Id.* at 367-69, 474, 486, 508).

Jones's parents also subjected him to severe emotional abuse as a child. His parents regularly told him that they wished he had never been born, or that he had been aborted. (Tr. 466, 200.) Jones's mother called her kids "stupid bitches," and "retarded mother fuckers." (*Id.* at 466.) Jones's father told him that he wished Jones had "never come from his scrotal sack." (*Id.* at 200.) Further, Jones was mercilessly teased by his siblings and classmates due to his lazy eye, and contrary to the testimony at trial, the corrective surgery did not take place until Jones was age 17. (*Id.* at 592-93.)

Jones was repeatedly sexually abused as a child. Jones's sister, Yolanda, testified that she walked in on Jones's older cousin orally raping him during a bath. (*Id.* at 487.) Jones was also repeatedly orally and anally raped by his older brothers. (*Id.* at 167-71; *see also* Pet. Ex. 3.) Billy, a boy who lived across the street, had sex with Jones when he was very young. (*Id.* at 495.) When Jones's parents found out about this, Jones was beaten and called a "faggot." (*Id.* at 199, 495.) In 1995, Jones reported to ODRC staff that he had been sexually abused by his father. (*Id.* at 184; Pet. Ex. 11 at 1142.) An officer made this information available to other inmates on Jones's prison block and Jones was denigrated for "having been 'fucked by [his]father.'" (*Id.*)

Sexual abuse was rampant throughout Jones's family. His sisters testified that they slept with knives under their pillows, so they could protect themselves from

their father's repeated attempts to sexually assault them. (Tr. 385-86.) Yolanda recalled waking up one day to find her father "standing over [her] with his pants down to his ankles with his penis hanging in my face, and he grabbed [her] and tried to attack [her]." (*Id.* at 482.) Yolanda was also physically and sexually abused by her and Jones's older brother, Theo, one of the same brothers that had sexually abused Jones. (*Id.* at 486.) Jones's other sister, Rhonda, recalled an incident where their naked father burst through her barricaded door to molest her. (*Id.* at 377.) Yolanda's daughter, Sh'torie, testified that when she was 11, Jones's brother Marvin sexually molested her. (*Id.* at 407.) Christie Coffee, Jones's partner and mother of his daughter, reported that Jones's brother Danny had raped her. (*Id.* at 543.)

Jones's family was highly dysfunctional and without boundaries. Family members were often either in sexual relationships with each other's partners, or violent towards them. Jones's partner Christie had a son named Shain with Jones's brother Marvin. (Tr. 454.) Shain grew up not knowing who his father was; he assumed it was Jones because Jones treated him like a son and was the father of one of his siblings. (*Id.* at 453-54.) While in prison, Jones learned that his son, Phillip Jones Jr., was not his biological son. (Tr. 543.) Jones Jr.'s father was actually Jones's other brother Danny, and he was conceived when Danny raped Christie. (*Id.*) Jones's sister Yolanda recounted one incident where her father came home and found her mother in bed with another man. (*Id.* at 472.) Jones's father became enraged and began to swing an axe. (*Id.*) Yolanda also recounted an incident where their sister Arlena set her mother's bed on fire because her mother was cheating on their father.

(*Id.* at 473.) Rhonda testified to an incident where her brother Marvin had cut her leg severely with a straight razor over an argument regarding some Church's chicken. (*Id.* at 375.) Jones observed these incidents as a young child; he could not do anything but "just go in the corner and cry." (*Id.*)

Dr. Fradkin opined that Jones is a survivor of sexual abuse. (Tr. 192.) He also added "It is my belief that what Phil reported to me was credible and very believable." (*Id.* 207.) He based that opinion upon his expertise in working with thousands of victims of sexual abuse, his interactions with Jones, and his review of pertinent documentation. (*Id.* at 150, 192, 207.) Similarly, Dr. Stinson noted "Sadly[,] when you look back at the records, school records, previous psychological evaluations, hospital records, it becomes rather apparent, even obvious, that there were serious problems and the problems that were noted in the records were very consistent with a person in a family unit where there is sexually inappropriate behavior, sexual abuse going on." (Tr. 579-80).

Dr. Stinson also testified that Dr. Siddall did not have enough time to adequately review Jones's psychological background. Dr. Stinson reviewed two full banker's boxes of records on Jones's psychological and social history and noted that there were thousands of pages of records. (Tr. 569.) Dr. Stinson noted that reviewing those records took over 50 hours. (*Id.*) However, before trial, Dr. Siddall spent under five hours reviewing records. (*See* Petitioner's exhibit 15.) Dr. Stinson testified that there was no way that anyone could have reviewed the two banker's boxes on Jones's

psychological and social history records in any meaningful way in under five hours. (Tr. 675.)

The above descriptions lie in stark contrast to what was presented at trial. At trial, Jones's mother testified that Jones was always "taken care of physically," "always provided food," and provided with a "stable home, at least in terms of support and … care for them." (Tr. 2436, 2439.) The trial court found Jones's family members' testimony to be incredible because "there was no documentary evidence to support the contentions." (11/30/15 JE p. 43.) But that begs the question — what documents would back-up these assertions? Jones's family members were the sole witnesses to the extreme abuse and neglect that Jones experienced. Further, both of Jones's siblings that testified were extremely consistent as to the "hell" in which they were raised. (*See*, *e.g.*, Tr. 392, 496-98.)

IV. Argument: Jones's trial counsel were ineffective to Jones's prejudice.

Jones's trial counsel did not complete a mitigation investigation before they chose a capital jury in this case. In fact, trial counsel did not conduct a mitigation investigation until after the trial phase of Jones's capital trial was already underway; and, most of that investigation occurred after Jones had already been found guilty. Trial counsel's deficient investigation left their psychological expert without the benefit of all necessary records and without the time to do a sufficient review of the records he had. Trial counsel also failed to discover that their client had been sexually abused as a child. Had trial counsel conducted an adequate mitigation investigation, they would have discovered the rampant sexual abuse in Jones's childhood home, that

Jones witnessed that sexual abuse, and that Jones personally suffered sexual abuse as a child. They would have also presented a cohesive picture of the severe mental illness from which their client suffered.

A. Deficient performance: Mr. Jones's attorneys did not conduct a reasonable investigation into Mr. Jones's background.

1. Trial counsel conducted most of their investigation after the commencement of Mr. Jones's capital trial.

If a capital trial is scheduled to begin, and defense counsel have not yet conducted their mitigation investigation, then they must request a continuance. "Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented." *Commentary*, ABA Guidelines (Feb. 2003), Guideline 10.10.2—Voir Dire and Jury Selection; *M'Min v. Virginia*, 500 US 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.").

But when Jones's attorneys were selecting the jury for his capital trial, they had yet to retain their mitigation specialist, Tom Hrdy. Psychologist James Siddall had met with Jones once, but had not completed interviewing or testing Jones, and had not yet diagnosed Jones. Further, one of Jones's trial attorneys agreed that "Dr. Siddall's work couldn't have really been completed in any meaningful way until Hrdy was involved in doing his role." (Tr. 1054-55.) Indeed, they had done almost no

mitigation investigation when the trial started, and thus, trial counsel could not have formed an appropriate trial or mitigation theory.

The evidentiary hearing held in state court confirmed that Dr. Siddall and Hrdy did not have enough time. Dr. Siddall and Hrdy's exact amount of work before trial is known through looking at their e-mail correspondence. Three days **after** jury selection began, Hrdy e-mailed the following to Dr. Siddall:

> I have recently been appointed yesterday to represent Phillip Jones as Mitigation Specialist. Do you have any information available as **I have been appointed rather late in the game**? Please email me anything you have that might be of use or mail it or whatever is easiest.

(Pet. Ex. 19, e-mail sent Dec. 6, 2007 (emphasis added).) Dr. Siddall replied "Tom, I have seen him once in jail and read a psych. report on him." (*Id.*, e-mail sent Dec. 6, 2007.) Thus, Jones's lawyers could not have formed an appropriate trial or mitigation theory if they didn't do much mitigation investigation before trial started, and the evidentiary hearing confirmed that almost nothing was done before trial began.

The Ohio state courts excused trial counsels' failure to conduct their mitigation investigation before voir dire on the grounds that they were not required to ask about mitigation at voir dire and may have had a strategy for not doing so. *Jones 2* at ¶¶ 17-22; (11/30/15 JE, p. 38). This is incorrect on many levels. First and foremost, as this Court has found, "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." *Strickland*, 466 U.S. at 691. Trial counsel could not have made reasonable or strategic decisions because the investigation had barely begun.

Regarding voir dire, the trial court stated that "any attempt by trial counsel to limit questions focusing on the death penalty may be a tactical decision." (11/30/15 JE, 40.) That court suggested that defense counsel had a strategy of not asking prospective jurors about mitigation because they would be contesting guilt. This is pure speculation. Although they testified at the evidentiary hearing, trial counsel never claimed that they had a strategy that involved not questioning prospective jurors about punishment. Defense counsel were instructed that attorney client privilege was waived as it related to the mitigation phase, and defense counsel were free to discuss strategy.

Although this Court has not set forth a strict requirement that trial counsel question the jurors about mitigation, any strategic decision not to do so cannot be made without a complete investigation. Further, trial counsel did ask jurors about mitigation. (*See* Tr. 267, 558, 667, 720, 892.) However, without having actually conducted their investigation, they could only ask questions in the most general of terms:

> [Defense Counsel:] Mitigation, lessening factors that would work against the death penalty, you think those are legitimate or just a bunch of baloney?
> * * *
> If we get to the second phase of this trial, and Mr. Hicks and I are presenting what we call mitigating evidence, or factors that weigh against the death penalty, and more in favor of life in prison, do you think that's just a bunch of baloney and just somebody making excuses?
> * * *
> Mitigating factors which lessen a person's involvement, may be because of a bad childhood or low IQ or something along those lines * * * * Do you think those mitigating factors are just poor excuses on someone's conduct or do you think they are legitimate in some cases and carry some weight?

(Trial Tr. 267, 558, 892.) The questions about mitigation during voir dire are exactly what one would expect from attorneys who had not yet conducted any investigation. Had trial counsel conducted a full investigation before impaneling the jury, there is a reasonable probability that they would have selected the one necessary juror whose vote would have saved Jones's life.

2. The total amount of time spent on the mitigation investigation was simply inadequate.

a. Hrdy began his investigation "late in the game" and spent under ten hours interviewing Jones's family.

Even if, hypothetically, counsel had completed their mitigation investigation before voir dire, their investigation was still woefully inadequate. Jones's family has a history of severe and pervasive dysfunction, but it was not discovered, because Hrdy spent fewer than 10 hours interviewing Jones's family and conducted some of those interviews while the family was gathered to watch football. (Tr. 383, 893-96, 11/30/15 JE, p. 22.) (Petitioner's exhibit 21.)

Mitigation specialist Dorian Hall testified at the Nov. 2013 evidentiary hearing as an expert in mitigation investigation. (Tr. 754.) Hall testified that a proper mitigation investigation should begin at least three months before jury selection. (*Id.* at 762-64.) She added that a capital trial is a time of great stress for the client and his family, and they have limited time and energy to participate in a mitigation investigation. (*Id.* at 775.) Similarly, Hall testified based upon her extensive experience that trial attorneys are fully engaged in the trial or first phase of the capital trial, and generally, are not available for purposes of the mitigation

investigation. (*Id.* at 803.) Further, Hall added that a mitigation investigation should not be conducted after a defendant is found guilty, as this is obviously a difficult time for a defendant's family when their loved one has been found guilty of capital murder, and the family may be surprised by the verdict or resent the attorneys. (*Id.* at 763.) Ultimately, Hall concluded that there was not enough time allowed for Hrdy to conduct a thorough mitigation investigation or to uncover the incestuous sexual abuse in the Jones family. (Tr. 783, 797.) Trial counsel did not allow enough time for Hrdy to be able to gain a command of thousands of pages of documents and go out and interview Jones's family. (*Id.* at 797.) Hrdy simply did not have enough time to do an adequate investigation.

Despite what was proven at the hearing, the trial court concluded that ten hours interviewing Jones's family was adequate. The trial court found it "very compelling" that Hrdy testified in a different case that he lacked the time to do an appropriate job, but in the instant case, he testified that he did have enough time. (11/30/15 JE, p. 39 citing to *Herring*, 142 Ohio St.3d 165.) Yet, the trial court's reliance on *Herring* is misplaced, as the facts of *Herring* are strikingly similar to the instant case. Furthermore, Hrdy's subjective belief should not be the determining factor. His actual investigation should be. In *Herring*, Hrdy spent roughly 30 hours conducting mitigation investigation. *Herring*, 142 Ohio St.3d 165 at ¶ 58. In the instant case, excluding drive time, he spent significantly less time than that. He spent no more than ten hours interviewing the family as a group, and three hours interviewing Jones.

The Ohio state courts also found that Hrdy's investigation was adequate in large part because of the "amount and type of mitigating evidence that was produced during Petitioner's trial." *Jones 2* at ¶¶ 25, 52; (11/30/15 JE, p. 39.) However, this is not the test. *See Johnson v. Bagley*, 544 F.3d 592, 602-03, 2008 U.S. App. LEXIS 21200, 2008 FED App. 0369P (6th Cir. 2008) ("[A]n unreasonably truncated mitigation investigation is not cured simply because some steps were taken prior to the penalty-phase hearing and because some evidence was placed before the jury. *See Rompilla*, 545 U.S. at 382-83.").

b. Dr. Siddall relied on Hrdy for critical information and spent less than five hours reviewing thousands of pages of documents.

Similarly, the extent of Jones's severe mental illness, which is documented by thousands of pages of mental health records, was not discovered. This was in large part because Dr. Siddall had neither the time nor the information necessary to do a complete psychological evaluation for purposes of the mitigation hearing.

Dr. Siddall did not have all necessary records; as to the records he did have, he spent less than five hours reviewing those records. (*See* Pet. Ex. 15. Tr. 1010-11.) The court of appeals, in *Jones 1*, found that

> it is troubling that [Dr. Siddall] spent less than eight hours conduct interviews and tests before Mr. Jones's trial began. It is more troubling that Mr. Hrdy, the social worker who Dr. Siddall said was responsible for interviewing Mr. Jones's family members, did not begin any work in his case until a week into the trial.

Jones, 2011 Ohio 6063, at ¶ 47. This troubling picture was confirmed at the state court evidentiary hearing. When trial began, Dr. Siddall had done nothing more than

meet with Jones once and read one psychological report. (Pet. Ex. 19, e-mail sent Dec. 6, 2007.) Hrdy was responsible for obtaining records for Dr. Siddall to review. (Tr. 1020.) Dr. Siddall said that the records came in "late" in this case and added that he generally gets records before capital jury trials "as a rule." (*Id.*; Tr. 1011, 1019.)

Postconviction counsel retained Dr. Stinson to do a forensic evaluation during postconviction proceedings and to testify at the evidentiary hearing. Dr. Stinson is a board-certified forensic psychologist, a subspecialty of psychology that "interface(s) between psychology and the law." (Tr. 560; Pet. Ex. 1.) Dr. Stinson testified that he "spent over fifty hours just reviewing the records" in this case. (Tr. 569; see also 688.) In contrast, Dr. Siddall's bill reflects that he spent 4.75 hours reviewing Jones's records. (Pet. Ex. 15.) Dr. Stinson testified "there is absolutely no way you can get through (the records) in any meaningful way in under five hours. There is no way. I don't think you can do it in under fifteen hours. So it tells me at the very least he didn't have all the records that were relevant." (Tr. 675.) Dr. Stinson further testified that a full review of the records is necessary to understand the full picture of Jones's psychological problems. Dr. Siddall completed a short report dated Dec. 27, 2007, which was received by trial counsel two days before the mitigation hearing started. (*See* Pet. Ex. 14.) Without all the relevant records, Dr. Siddall "didn't have the full picture." (Tr. 672).

3. Having "some" information as to Jones's background and history before trial began did not fulfill counsels' obligations.

The trial court found that at the time that Jones's capital specification was added (10/22/07), and by the time voir dire began (12/3/07), "defense counsel had already learned information about their client . . . They received the results of psychological testing and their client's diagnosis. They would have had the benefit of having already received the information and points of view of two psychologists." (JE p. 33-34.) The court of appeals rubber-stamped that finding. *Jones 2* at ¶ 18. First, some information is not the same as complete information. Further, the assertion that defense counsel "had the benefit of having already received the information and points of view of two psychologists" is not borne out by the record. One of these two psychologists referenced was Dr. Stafford of the Psycho-Diagnostic Clinic. The trial court appointed her specifically to evaluate Jones's sanity and competency to stand trial. (Court Exhibit 2; 6/8/07 JE.) The other was Dr. Byrnes, who was also appointed to evaluated Jones's sanity and competency.

Contrary to the trial court's assumptions, all objective indications on the record demonstrate that Dr. Byrnes never actually produced a report in this case. Dr. Byrnes was appointed after defense counsel stipulated to Jones's competency, and the record does not reflect that he ever received payment. Shortly after the court granted funding for Dr. Byrnes, Jones was capitally indicted (10/22/07 Supplemental Indictment) and Dr. Siddall was appointed two days later for "mitigation purposes." (10/24/07 JE). Dr. Siddall's report does not list a report by Byrnes as something he

received, reviewed, or relied upon in writing that report and diagnosing Jones. (Pet. Ex. 14.) Moreover, the reports were created for the purposes of evaluating Jones's "sanity and competency" not as the basis upon which to build a mitigation theory. (9/27/07 JE.)

Moreover, the information that defense counsel did have prior to voir dire should have put them on notice of Jones's mental illness and the need to delve deeper for mitigation purposes. Dr. Stafford produced a report listing mental health records she reviewed, and defense counsel was provided with that report on Aug. 17, 2007. (8/17/07 JE.) Though on notice that a wealth of relevant mental health records was available to them in a case where they had entered an NGRI plea on behalf of their client, defense counsel inexplicably failed to request those records until after Jones had been found guilty. (12/19/07 Order; 12/26/07 JE.) Further, also based at least in part on a review of Jones's voluminous records, trial counsel was on notice that a mental health evaluation of Jones would likely take longer than normal. (See July 18, 2007 Status Conf., Trial Tr. 2 ("Psychodiagnostic [sic], due to the complexity and seriousness of this case, their assessment will take a little longer than normal, so they won't have the report to me until [August] sixth. . . . ").)

4. Because Dr. Siddall did not have an accurate nor complete picture of Jones and his history and background, Dr. Siddall's resultant diagnoses were flawed.

Dr. Siddall's diagnosis of Jones was superficial, and barely scratched the surface of his true underlying mental illness. Dr. Siddall got basic facts about Jones's mental health history incorrect and relied upon that inaccurate information in

formulating his opinion. He stated in his report that Mr. Jones's "modal diagnoses have included: Bipolar Mood Disorder, Alcohol and Cannabis Abuse and Mixed Personality Disorder." (Pet. Ex. 14). This is factually inaccurate. A modal diagnosis is the diagnosis which is most frequently given to a patient. (*See* Tr. 671.) Based upon all the records which were available at the time of trial, Jones's modal diagnosis is schizoaffective disorder, bipolar type. (Tr. 671.)

Based on his review of the record, Dr. Stinson testified at the evidentiary hearing that Jones indeed suffers from schizoaffective disorder, a severe mental illness. (Tr. 635.) He described it as a combination of a thought and mood disorder and "probably one of the most debilitating mental illnesses that a person can have. . . [it] is schizophrenia plus some problems. . . it would be considered a chronic, severe, persistent mental illness." (*Id.* at 637-38.) Dr. Stinson explained that Jones's severe mental illness could be overlooked by a mental health professional who did not have that full picture. (*Id.* at 649-50.) Mental illness, particularly a psychotic disorder, ebbs and flows. Someone who is psychotic does not present as actively psychotic one hundred percent of the time. So, "unless you either see the records or happen to find him on a day where he was psychotic, you may not know it. . . trained professionals without the benefit of records or seeing it firsthand might misdiagnose" Jones. (*Id.* at 649-50.)

Dr. Madden, a neuropsychologist, reviewed the same mental health records and reached the same conclusion: "The [mental illness diagnosis] that was most consistently given, and one that I think the record fully supports, would be

schizoaffective disorder, bipolar type." (Tr. 27.) Dr. Madden also found that Jones's profile was that "of someone who had a serious mental illness, a thought disorder, of which schizoaffective disorder, bipolar type is one." (Tr. 32.) In the end, Dr. Siddall's findings cannot be looked at with confidence "because he is missing a lot of information, the testing was not appropriate, and . . . the amount of time spent to gather information from Phil himself is inadequate." (Tr. 670).

Dr. Siddall's report contains troubling additional factual inaccuracies and mischaracterizations that make his report and resulting opinions unreliable. Dr. Siddall stated in his report that the "consensus of professional opinion contained in [Jones's] records, suggest that these psychotic symptoms were consciously exaggerated." (Pet. Ex. 14). As Dr. Beven, Jones's primary treating psychiatrist at SOCF for nearly a decade, explained, characterizing Jones's ODRC records as indicating a consensus of professional opinion that his symptoms were consciously exaggerated "would be a mischaracterization of eight years of intensive treatment . . . within that prison setting." (Tr. 335.) "In fact, my interpretation of the records is that there were some occasions in which people did note that he appeared to be exaggerating, but when you read from end to end, the consistency of the treatment provided and the symptoms, I believe, are far more predominant than the periodic intentional exaggeration that you often see in an inmate, especially somebody you have known for almost ten years." (Tr. 339; see also 343, 346.) Dr. Beven further testified that he "[did] not believe Mr. Jones was predominantly malingering during

[his] eight years of treatment of him." (Tr. 360.) There was no professional consensus that Jones as feigning his mental illness.

Dr. Siddall also relied upon an inappropriate testing instrument in this case, the result of which allowed Jones's history of malingering to be negatively and inaccurately highlighted in front of Jones's jury. As Dr. Siddall recognized during the evidentiary hearing: "I think I did point out that there was malingering in the record, in the test record. . . And in my testing." (Tr. 1002-03). As Dr. Stinson clarified in his testimony at the evidentiary hearing, Dr. Siddall "misdiagnosed malingering based on an instrument that is designed to over-detect malingering. . ." (Tr. 672.)

On cross-examination at trial, the State was able to thoroughly dismantle the superficial mitigation case put on by Jones's defense team. (*See*, *e.g.*, Trial Tr. 2384-2386; 2388-90; 2395; 2409; 2416-17). The State — through Dr. Siddall — was able to paint Jones as a malingering psychopath. Had Dr. Siddall been thoroughly familiar with the ODRC records, he would have easily refuted points raised by the prosecution with the hundreds of pages Dr. Beven created chronicling Jones's legitimate psychotic symptoms over the course of nearly a decade.

Because of trial counsels' failure to adequately review the records, as well as ensure that their expert did the same, the jury and trial court took Dr. Siddall's inaccurate diagnosis of Jones seriously. The trial court mistakenly found that Jones did not suffer from mental illness. (1/30/08 Opinion, p. 5 ("[Jones] is not considered to be mentally ill or mentally retarded. Throughout his history, he has been diagnosed

as an Antisocial Personality Disorder with Mood Disorder NOS, and history of Alcohol and Cannabis Abuse.”).)

With everything now in the record, this finding is just wrong. (*See*, *e.g.*, 11/30/15 JE p. 43.) As Dr. Stinson testified, Jones has suffered from severe mental illness throughout his life. And Jones's trial attorneys should have known this at the time of trial. The trial court should have been made aware this. Most importantly, the jury should have known the truth about Jones's long and complicated struggle with severe mental illness.

5. Seven witnesses, including two pastors, made sworn statements that they would have disclosed knowledge of sexual abuse to trial counsel.

Had Jones's lawyers conducted an adequate investigation, they would have learned of rampant sexual abuse in Jones's family. At the evidentiary hearing, six witnesses (Yolanda Jones, Rhonda Jones, David Hargrave, Keith Fuller, Sh'torie Jones, and Christie Coffe) testified under oath that they had knowledge of sexual abuse within the Jones family, and that they would have made Jones's trial team aware of it had they been asked. (Tr. 87, 382-84, 412-13, 437-41, 506-08, 548.) Jones's mother, Henrietta, submitted an affidavit in postconviction that she would have made the team aware of sexual abuse, but the trial court refused, over objection, to consider the affidavit. Henrietta was deceased by the time of the postconviction hearing.

Despite the seven witnesses who stated under oath that they would have disclosed sexual abuse in the Jones family, the trial court was not persuaded. The

trial court placed heavy reliance on the fact that Jones himself did not disclose the abuse. (11/30/15 JE, p. 64-66.) The court of appeals did the same. *Jones 2* at ¶¶ 51, 53. But this argument is flawed because Jones's attorneys could have learned of the abuse from seven other witnesses, or by doing a complete review of Jones's mental health records.

The trial court found that Jones's sisters, Yolanda and Rhonda, were not credible witnesses, and the court of appeals relied upon that finding. (11/30/15 JE, p. 34-36); *Jones 2* at ¶¶ 29, 33. However, even without the sister's revelations, the trial court found pastors Keith Fuller and David Hargrave to be credible. *Id.* at 34. Both witnesses had knowledge of possible sexual abuse within the family and would have disclosed it had they been asked. (Tr. 87, 90 109, 431-32, 441.) Regarding Sh'torie's disclosure that Jones's brother raped her, all the trial court said is that it would not have been helpful in mitigation. (Tr. 56.) While that conclusion is debatable, it misses the point. Sh'torie is another witness that would have made trial counsel aware that sexual abuse in the Jones family was a topic they needed to further explore. Similarly, Christy Coffee's account of being raped by Jones's brother would have made trial counsel aware that they needed to further explore the issue.

By most accounts, neither trial counsel nor Hrdy even asked about sexual abuse. Rhonda Jones, David Hargrave, Keith Fuller, Christy Coffee, and Sh'torie Jones all testified that they had knowledge of sexual abuse in the family but were never asked. (Tr. 87, 382-84, 412-13, 437-41, 548). Yolanda Jones testified that she did not remember if she had been asked about sexual abuse, but that she would have

told Jones's trial team if she had been asked. (Tr. 507.) At other times, she suggested she had been asked but could not discuss it with family present. (Tr. 536.) Further, Hrdy himself testified that he did not ask the family about sexual abuse. (Tr. 916.) He only asked open ended questions about abuse generally. (*Id.*)

6. Other abuse and neglect were also not fully investigated, nor presented, to Jones's jury for their consideration.

Jones was the youngest child in a family where not only sexual abuse ran rampant but neglect, physical abuse, and emotional abuse were also a daily occurrence. Jones's parents neglected him from the time he was an infant, because of his parents' drug and alcohol problems. (Tr. 468.) Jones often did not have access to food, or other necessities. His sisters, Yolanda and Rhonda, testified that Jones and his siblings would have to steal food, because there was none at home. (*Id.* at 367-69 464-66.) Jones was also subject to severe emotional abuse as a child. For instance, his parents regularly told him that they wished he had never been born, or that he had been aborted. (Tr. 466, 200.)

The above descriptions lie in stark contrast to what was presented at trial. At trial, Jones's mother testified that Jones was always "taken care of physically," "always provided food," and provided with a "stable home, at least in terms of support and … care for them." (Tr. 2436, 2439.) The trial court, as stated above, found Jones's family members' testimony to be incredible because "there was no documentary evidence to support the contentions." (11/30/15 JE p. 43.) But that begs the question — what documents would back-up these assertions? Jones's family members were the sole witnesses to the extreme abuse and neglect that Jones experienced. Further,

both of Jones's siblings that testified were extremely consistent as to the "hell" in which they were raised. (*See*, *e.g.*, Tr. 392, 496-98.) It was unfair of the state courts to totally discount these descriptions. Moreover, it was Jones's jury who should have been able to make these credibility determinations, not the trial court.

B. Jones was prejudiced by his counsels' failures.

Jones's lead trial attorney testified at the evidentiary hearing that had he learned of the sexual abuse and incest in the Jones family he would have presented, or at least considered using, it at Jones's mitigation hearing. (*See* Tr. 1088-89.) Simply put, there can be no confidence in the outcome of Jones's trial. The jury never learned about Jones nightmarish childhood, which included physical, mental, and sexual abuse. They did not learn that Jones suffered from severe mental illness. Had the jury known about Jones's background, which included being sexual abused by his own family, there is a reasonable probability that one juror would not have found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Accordingly, Jones was prejudiced by his attorneys' failure to conduct an adequate investigation.

V. Conclusion.

Due to the foregoing, this Court should grant certiorari in this case.

Respectfully submitted,

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