

Concerning the affidavit of Louise Lillis, a former congregant of Mr. Gardner's father's church, the state habeas court found that it "was not compelling and would not have affected the result of the proceeding." 2 SHCR 396 (Findings 77 & 78). This was because: (1) Lillis only heard, but did not see, a single instance of corporal punishment; (2) "Lillis's testimony would not have significantly corroborated or strengthened" Mr. Gardner's sister's testimony of childhood abuse at trial; and (3) Lillis would have been cross-examined with information that Mr. Gardner had a good relationship with his parents. 2 SHCR 396–97 (Finding 78).

The State habeas court also determined that Mr. Gardner's testifying mental health expert, Dr. Allen, "refused to testify after hearing the testimony of other witnesses and believed that [Mr. Gardner] was psychotic." 2 SHCR 397 (Finding 79). The court decided that Dr. Kessner's testimony regarding abandonment rage: (1) would not have been persuasive given the multiple inconsistencies found in the evidence supposedly supporting such diagnosis; (2) would have brought attention to the fact that Mr. Gardner "was consistently violent and incapable of ever forming normal, nonviolent relationships"; and (3) would have been of little persuasive force given Mr. Gardner's history of feigning mental health symptoms. 2 SHCR 397 (Finding 80). The court found that the remaining evidence proffered by Mr. Gardner—ostensible sex addiction—was not mitigating, and that, considering all of the new evidence offered by Mr. Gardner, the jury's decision on the special issues would not have been affected. 2 SHCR 397–98 (Findings 81 & 82).

**2. *Counsel's mitigation investigation was not deficient, and the State Court's decision on this point is reasonable.***

An ineffective assistance claim alleging a deficient mitigation investigation is governed by *Strickland v. Wright*, 556 U.S. 666, 686, 129 S. Ct. 2333, 2347 (2009). The standard requires that the litigant prove deficient performance—representation falling below an objective

standard of reasonableness—and prejudice—a reasonable probability that the proceeding would have been different but for counsel’s errors. *Id.* In the context of mitigation investigations, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. The inmate, in a postconviction proceeding, must present what background evidence should have been discovered but for counsel’s deficient investigation and prove that “there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigation circumstances did not warrant death.” *Id.* at 695, 2069.

Counsel performed adequately in their investigation and presentation of mitigating evidence. Counsel utilized an investigator, a mitigation specialist, a consulting mental health expert, a testifying mental health expert, and a risk assessment expert. 1 SHCR 112, 204; 2 SHCR 338–39, 342, 345. Among other areas, Counsel investigated the following: Mr. Garner’s prior childhood accidents and injuries, whether Mr. Gardner was physically abused, whether Mr. Gardner was sexually abused, whether Mr. Gardner or any member of his family had abused drugs or alcohol, whether any mental health treatment would have aided mitigation in the case, the cohesiveness of Mr. Gardner’s family, the family’s standard of living and living conditions, Mr. Gardner’s school records, Mr. Gardner’s social relationships with members of the opposite sex, any awards, honors, or special accomplishments Mr. Gardner received, any and all traumatic experiences Mr. Gardner experienced, Mr. Gardner’s memberships in religious, social, educational, and charitable organizations, and Mr. Gardner’s best and worst memories. *See* 23 RR 77–78. Counsel disclosed the lengths of their mitigation investigation to the trial court, notably before any allegations of ineffectiveness arose.

Mr. Gardner's own state habeas evidence confirms this investigation. Dr. Kessner explained in her affidavit to the State habeas court that she had reviewed: (1) "the interviews" that she conducted of Mr. Gardner and members of his family in preparation for trial (1 SHCR 111); (2) the voluntary statements of individuals who testified for and against Mr. Gardner at trial (1 SHCR 111); (3) the "Collin County Jail Medical Records" (1 SHCR 112); (4) the "State of Mississippi, Department of Corrections" records (1 SHCR 112); (5) the "Psychological Records from Kristi Compton, Ph.D., case consultant" (1 SHCR 112); and (6) the "Affidavit and Case Notes from Kate Allen, Ph.D. expert witness" (1 SHCR 112). These documents were generated during the investigation of Mr. Gardner's background, and in preparation of a mitigation case.

Mitigation specialist Toni Knox admitted that "much of the social history information that I used to compile the current psychosocial history was obtained from previous notes and interviews by the private investigator, consulting psychologist, and mitigation specialist." 1 SHCR 125 (footnote omitted). Knox also admitted that "someone . . . in the initial mitigation investigation" prepared a psychosocial history "but the dates were vague and the time line did not document what records the information was taken from." 1 SHCR 125. Knox stated that "a considerable amount of information concerning [Mr. Gardner's] social history [was obtained] through interviews and writings to the mitigation specialist" but was lacking because the mitigation specialist did not conduct a "diverse investigation and interviews of corroborating witnesses." 1 SHCR 125–26.

Counsel made a reasonable investigation into Mr. Gardner's background, which in turn, makes the State habeas court's denial of relief on this point reasonable. Knox stated that "much of the social history information" that Mr. Gardner presented to the State habeas court came from counsel's investigation into Mr. Gardner's background. 1 SHCR 125. Counsel employed an

investigator, a mitigation specialist, and mental health experts in accord with then-prevailing guidelines. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Revised Edition, 31 HOFSTRA L. REV. 913, 952 (2003) (guideline 4.1) (stating that the defense team should consist include at least two attorneys, an investigator, and a mitigation specialist). Counsel also repeatedly talked with Mr. Gardner and multiple witnesses and reviewed documents to discover Mr. Gardner's life history. This is also in agreement with then-applicable attorney-practice norms. *Id.* at 1015, 1022–27 (guideline 10.7 & commentary) (the defense team should explore medical history, family and social history, educational history, military service, employment, and prior incarcerations); *see also Wiggins*, 539 U.S. at 524, 123 S. Ct. at 2537.

As a result of that investigation, counsel called several witnesses during the punishment phase to testify on Mr. Gardner's behalf, including coworkers (employment and spiritual beliefs) and Mr. Gardner's sister (family and social history), and introduced records of his time in the Army (military service). The court finds that counsel's investigation was well within the then-prevailing standards of practice, and it is even more readily apparent when the results of counsel's investigation are compared with the evidence that Mr. Gardner provided to the State habeas court.

Mr. Gardner turned up five new witnesses during the State habeas proceeding, and all have minimal mitigating impact. The first, Sylvia Reeves, was Mr. Gardner's sister-in-law after Mr. Gardner married Westmoreland, his third wife. 1 SHCR 191. Sylvia discussed how she first met Mr. Gardner, and how her family came to enjoy Mr. Gardner's company. 1 SHCR 189. She stated that Mr. Gardner married Rhoda when he was twenty-six and Rhoda was seventeen, and asserted that Rhoda played emotional "games" with Mr. Gardner by continuing to contact her ex-husband after marrying Mr. Gardner. 1 SHCR 189–90. Sylvia also related that Mr. Gardner stole the

weapon that he shot Rhoda with from Sylvia's husband and that Mr. Gardner had made a full confession to her where he expressed remorse. 1 SHCR 190. Sylvia additionally thought that codeine-based "cough syrup might have contributed to [Mr. Gardner's] state of mind" when he shot Rhoda. 1 SHCR 190.

Further, Sylvia explained that Mr. Gardner eventually married her sister, Westmoreland, but "seemed to get increasingly unstable and treated [Westmoreland] like she was property." 1 SHCR 191. After hitting Westmoreland's daughter Becky in the head, Sylvia "did not want anymore to do with [Mr. Gardner.]" 1 SHCR 191. Sylvia also mentioned that Mr. Gardner had "impulse control and anger problems" and that he reacted violently on a number of occasions. 1 SHCR 191-92.

The second affidavit was provided by Sylvia's husband, Donald Reeves. 1 SHCR 195. He stated that Mr. Gardner "seemed like a nice guy," but "had these anger episodes" that he termed "flash-overs" or "spasms." 1 SHCR 195. Donald also expounded that Rhoda was "manipulative" and still in contact with her ex-husband despite marrying Mr. Gardner. 1 SHCR 195. He further averred that Mr. Gardner expressed remorse over shooting Rhoda. 1 SHCR 195. The third affidavit came from the son of Sylvia and Donald, Randy Reeves. 1 SHCR 198. Randy explained that he initially liked Mr. Gardner, but became "nervous" around Mr. Gardner because Mr. Gardner was "extremely jealous" of Rhoda, and had threatened to kill Randy for flirting with Rhoda. 1 SHCR 198-99. Randy also mentioned that he had heard that Mr. Gardner did not treat Randy's grandmother well and that Mr. Gardner hit Becky, Westmoreland's daughter, in the head. 1 SHCR 199-200.

The fourth undiscovered witness was Louise Lillis, a former congregant of Mr. Gardner's father's church. 1 SHCR 202. Lillis stated that Mr. Gardner "was a likeable boy" whose father

was “very strict.” 1 SHCR 202. She recalled an incident at church where she heard what sounded like “a particularly harsh whipping” of Mr. Gardner by his father. 1 SHCR 202.

The final affidavit was provided by William “Billy” Stone, a friend of Mr. Gardner’s while he was stationed in Hawaii on active duty with the Army. 1 SHCR 213. Stone recounted that Mr. Gardner “was popular with the women,” and that “he was constantly pursuing women and was totally focused on sex.” 1 SHCR 213. Stone explained that Mr. Gardner had sex with single and married women, including the wife of a good friend. 1 SHCR 213.

Mr. Gardner suggests that counsel should have presented: (1) three witnesses (the Reeves) who were initially fond of Mr. Gardner until he became violent towards his then-wife Rhoda—eventually shooting her—and thereafter married into the family and became violent with multiple relatives—Sylvia’s sister, Westmoreland, and Westmoreland’s daughter, Becky; (2) a witness (Lillis) who could have “corroborated” a session of corporal punishment inflicted on Mr. Gardner by his father on a single occasion, and (3) a former friend (Stone) who described Mr. Gardner as obsessed with sex regardless of the consequences. Pet. at pp. 109–13, 114–126. It is disingenuous to argue that this type of evidence would have been favorably received by any jury, much less create a mitigating impact on punishment.

Mr. Gardner also fails to explain how this additional background evidence made abandonment rage appealing to Mr. Gardner’s State habeas expert, Dr. Kessner. The State habeas mitigation investigation found so little “new” evidence of Mr. Gardner’s background that it indicates the pre-trial investigation was thorough.

It cannot be said that counsel was deficient for choosing not to present a mental health expert, Dr. Allen, who determined that Mr. Gardner “was psychotic.” 2 SHCR 345. This is a reasonable, strategic decision. *See, e.g., Dowthitt*, 230 F.3d at 747 (“[C]ounsel’s decision not to

put a witness on the stand who himself is not entirely favorable . . . is not objectively unreasonable.”).

Counsel cannot be faulted for failing to corroborate Mr. Gardner’s claims of abuse at his parents’ hands. Mr. Gardner’s sister, Elaine, testified that the abuse was hidden to the outside world. 23 RR 39 (“I don’t know if I can make y’all understand the way it was in our house. It was like two lives were led, the one in front of the public, and then the one behind closed doors.”) Mr. Gardner’s parents consistently denied the abuse when asked. 2 SHCR 345. This does not render counsel’s performance deficient. *See, e.g., Douthitt*, 230 F.3d at 749 (“[C]ounsel’s actions here would be characterized as reasonable trial strategy because they attempted to investigate [the petitioner’s] background and were thwarted by uncooperative potential witnesses.”); *cf. Mirzayance*, 556 U.S. at 125, 129 S. Ct. at 1421 (“Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded.”). Counsel also discovered Mr. Gardner’s participation in the gay and transgender community, but they could not develop any viable witnesses in that community through their investigator. This does not make the investigation deficient. *See, e.g., Douthitt*, 230 F.3d at 749. Accordingly, the State court’s decision that counsel were not deficient is objectively reasonable.

The State court’s alternative holding on deficiency is also reasonable. Counsel explained that had they been able to locate “China Blue,” they would not have presented testimony about Mr. Gardner’s sexual proclivities given the conservative attitudes of Collin County jurors. Counsel may reasonably take into account the prevailing beliefs of a particular locale in choosing to introduce certain evidence. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068. Mr. Gardner has not challenged counsel’s assertion that Collin County is a conservative county where

evidence of “alternate lifestyles” is not effective as mitigating evidence.

The same is true for Stone’s proposed testimony of Mr. Gardner’s sexual escapades with multiple women regardless of the woman’s relationship status. Promiscuity and infidelity can be considered “aggravating” in the realm of moral culpability. *See Bell v. Kelly*, 260 F. App’x 599, 606 (4th Cir. 2008) (affirming denial of federal habeas relief because, in part, the un-presented evidence would have “allowed the prosecution to emphasize multiple instances of [the petitioner’s] infidelity”); *cf. Rompilla*, 545 U.S. at 392, 125 S. Ct. 2468 (evidence that Rompilla’s father bragged about cheating on his wife was mitigating). The Reeves’ proposed testimony was similarly damaging because it would have reiterated the killing of Rhoda and the assaults of Westmoreland and Becky, and would have undermined abandonment rage by highlighting violent behavior unattached to real or perceived abandonment. Counsel is not ineffective for choosing to avoid such evidence. Accordingly, the State habeas court’s decision on deficiency is reasonable.

**3. *Counsel’s errors, if any, did not prejudice Mr. Gardner, and the State Court’s decision on this point is reasonable.***

Even if counsel’s performance was somehow deemed deficient, Mr. Gardner does not establish prejudice. The State court’s denial of relief on this point is undoubtedly reasonable. The beneficial elements of Mr. Gardner’s postconviction “mitigation” evidence can be summarized as: (1) the Reeves initially believed Mr. Gardner was likeable (1 SHCR 189, 195, 198); (2) Mr. Gardner’s second wife, Rhoda, played “games” with Mr. Gardner (1 SHCR 189–91, 195); (3) Mr. Gardner might have been on codeine based cough syrup when he shot Rhoda (1 SHCR 190); (4) Mr. Gardner expressed remorse over shooting Rhoda (1 SHCR 190, 195); (5) a single incident of corporal punishment by Mr. Gardner’s father was corroborated by Lillis (1 SHCR 202); (6) Mr. Gardner was friends with Stone while both were in the Army (1 SHCR 213–14); and (7)

Mr. Gardner's violence in relationships is explained by abandonment rage, which has a biological component (1 SHCR 112–18). The benefits realized from this evidence are greatly outweighed by the double edged nature of the evidence, and the State's "aggravating" evidence.

The Reeves' affidavits provide the following damaging information: (1) they reiterate that Mr. Gardner killed Rhoda, his second wife (1 SHCR 190, 195, 199); (2) they reiterate that Mr. Gardner abused Westmoreland and her daughter (1 SHCR 191, 199–200); (3) they conflict with Mr. Gardner's abandonment rage diagnosis because they point to periods of violence unrelated to abandonment (1 SHCR 191–92, 195, 198–99); (4) they opine that Mr. Gardner may have abused an elderly woman (1 SHCR 199–200); and (5) they conflict with Becky's testimony that Mr. Gardner lacked remorse over the killing of Rhoda (1 SHCR 190, 195). Evidence exposing prior acts of violence or conflicting with evidence at trial or counsel's strategy does not prove prejudice. *See, e.g., Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (evidence of good behavior "unlikely to have had a significant mitigating effect" because it would have exposed defendant's prior arson conviction, and arson was one of the manner and means of capital punishment alleged); *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999) (evidence of an abusive upbringing not prejudicial where it would have revealed instances of violent behavior unconnected to inebriation, which contradicted the defendant's argument at trial that he was only violent when intoxicated).

Further, it is likely that a defense of blaming the victim by discussing Rhoda's "game playing" would have backfired. *See United States v. King*, 604 F.3d 125, 142 (3d Cir. 2010) (describing as disturbing a defendant's attempt to blame a two-year-old sex abuse victim). It is extremely unlikely that evidence regarding Rhoda's faults would have justified Mr. Gardner's actions towards her, including shooting Rhoda, paralyzing her, and causing her to lose her unborn

child before dying of medical complications arising from her injuries. This evidence would have more likely repulsed the jurors and caused them to look more harshly at Mr. Gardner's moral culpability.

Lillis's hearing of a single incident of corporal punishment would not have made a difference in the case. As explained by Mr. Gardner's sister, Elaine, the abuse by Mr. Gardner's father was kept in-house. 23 RR 39 ("I don't know if I can make y'all understand the way it was in our house. It was like two lives were led, the one in front of the public, and then the one behind closed doors."). To the extent that Lillis's testimony would have corroborated Elaine's testimony of childhood abuse, it was minimal. The jury could have believed that the single instance of punishment described by Lillis was proper—not abusive—or it could have thought that an isolated incident of physical abuse was nominally probative in the scheme of Mr. Gardner's moral blameworthiness. *See Emery v. Johnson*, 139 F.3d 191, 197 (5th Cir. 1997) (no prejudice where the testimony "was duplicative of testimony given" at trial). Further, Lillis could have been cross-examined, as Elaine was at trial, regarding Mr. Gardner's letters to his parents where he thanked them for being "great parents" who made "life a lot easier for me." 23 RR 56. Mr. Gardner's recognition that his parents raised him with his best interests in mind minimizes any notions of abuse, and it would have minimized the cumulative and trivially corroborative aspect of Lillis's testimony.

It is not unreasonable to conclude that Stone's proposed testimony of Mr. Gardner's sexual history while in the military, or the proposed testimony of Mr. Gardner's deviant sexual history, would not have affected the jury's decision. The evidence of Mr. Gardner's promiscuity with married women, including women whose husbands were friends with Mr. Gardner, would have lessened his plea for mercy and evidence of "alternate lifestyles," including promiscuous behavior,