IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2015-DR-01373-SCT

TIMOTHY ROBERT RONK, *Petitioner*

v.

STATE OF MISSISSIPPI, *Respondent*

PETITIONER'S REBUTTAL TO
STATE'S RESPONSE IN OPPOSITION TO
MOTION FOR LEAVE TO PROCEED IN THE TRIAL COURT
WITH A PETITION FOR POST-CONVICTION RELIEF

COMES NOW Petitioner, Timothy Robert Ronk, by and through counsel of record, and pursuant to the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; applicable portions of the Constitution of the State of Mississippi; Mississippi Code Sections 99-39-1 *et seq*.; Mississippi Rules of Appellate Procedure 22 and 27; the American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. 2003); and all other applicable state and federal law, files this his Petitioner's Rebuttal to State's Response in Opposition to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief. Mr. Ronk would show unto the Court the following in support of this Rebuttal:

I. The State's argument that Mr. Ronk was not denied the right to effective assistance of counsel is unsound.

The Argument section of the State's Response begins with its contention that Mr. Ronk was not "denied the right to effective assistance of counsel"[1] at trial. That argument is unsound.

[1] Response in Opposition to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief, *Timothy Robert Ronk v. State of Mississippi*, Miss. Supreme Ct. No. 2015-DR-01373-SCT (Feb. 14, 2018) [hereinafter "Response"], at 25.

A. Trial counsel failed to conduct a mitigation investigation.

As explained in detail in the Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief,[2] trial counsel was ineffective for several reasons. One is the failure to conduct any mitigation investigation whatsoever. The State appears to be under the mistaken impression that the legally mandatory mitigation investigation would have been merely "cumulative, expensive, and unnecessary."[3] This reflects a misunderstanding of what is required of defense counsel at the trial of a capital case, of the constitutional rights of a defendant. It is settled that defense counsel must pursue all reasonably available mitigation evidence and that such an investigation is mandatory.[4] The State's Response misses this point entirely.

The State asks this Court to endorse its mistaken notion that the pre-trial psychological evaluation of Mr. Ronk by Dr. Beverly Smallwood was equivalent to a mitigation investigation. It clearly was not.[5] In her report, Dr. Smallwood wrote, "The present examination is *not a mitigation study*, which is outside the scope of my current practice. . . . [A] mitigation study is recommended."[6] She was prudent to make that recommendation, and Mr. Geiss, lead trial

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[2] Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief, *Timothy Robert Ronk v. State of Mississippi*, Miss. Supreme Ct. No. 2015-DR-01373-SCT (Sept. 23, 2016) [hereinafter "Motion for Leave"].

[3] Response at 77.

[4] *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Ross v. State*, 954 So. 2d 968 (Miss. 2007); *Doss v. State*, 19 So. 3d 690 (Miss. 2009).

[5] *See, e.g.*, *Wiggins*, 539 U.S. 510.

[6] Psychological Evaluation by Dr. Beverly Smallwood, attached to petitioner's Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief (Sept. 23, 2016) as Ex. 8 [hereinafter "Smallwood report"], at 24–25 (emphasis added).

counsel for Mr. Ronk, rendered ineffective assistance of counsel in ignoring it. His failure to heed that recommendation requires that Mr. Ronk's sentence be vacated.[7]

The Response suggests that because the trial court's order of March 15, 2010,[8] contained the phrase "to prepare a mitigation study," then Dr. Smallwood must have prepared one. She did not, and her testimony shows that clearly.[9] Mr. Ronk's trial team did not do a mitigation investigation.

This Court is faced with the task of choosing whether to rely on the State's assertions or Mr. Ronk's on this issue. Both cannot be correct. And there are problems with the reliability of the State's averments. For example, the Response claims, "Just to clarify, Petitioner is not claiming trial counsel was ineffective for failing to secure an expert for mitigation. He had one of those."[10]

First of all, the State is not the author of Mr. Ronk's claims. Second, it is hard to see where the State got the idea that "Petitioner is not claiming trial counsel was ineffective for failing to secure an expert for mitigation." That is precisely what the petitioner is claiming, as should be clear from the Motion for Leave. Mr. Geiss was indeed ineffective for that exact failure. And Mr. Ronk certainly did not have "one of those."[11] Not Dr. Smallwood, who wrote that her "present examination is not a mitigation study, which is outside the scope of my current

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[7] *See, e.g.*, *Williams*, 529 U.S. 362; *Wiggins*, 539 U.S. 510; *Rompilla*, 545 U.S. 374; *Ross*, 954 So. 2d 968; *Doss*, 19 So. 3d 690.

[8] C.P. 92–93.

[9] Tr. at 678.

[10] Response at 77.

[11] *Id.* at 77.

practice. . . . [A] mitigation study is recommended."[12] Not anyone. The State's position is inconsistent with current law and with the reasonableness standards of capital-defense practice, such as those embodied in the American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[13] and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.[14]

The Response continues: "He is arguing trial counsel was ineffective for failing to secure another expert witness to conduct a comprehensive mitigation study and explain it in terms the jury could understand."[15] That is mostly correct—but it would, however, be more precise to use the term "a mitigation specialist" instead of "another expert witness," which might be taken to imply that another psychologist, etc., would be necessary. The law requires that such a mitigation investigation be conducted by someone who is qualified, and it further requires that the results of that investigation be explained to the jury.[16] But the last sentence in that paragraph—"This argument is unsupportable."[17]—is not correct.

The Response avoids discussing the real issue here, which is that trial counsel in a death-

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[12] Smallwood report at 24–25.

[13] American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. 2003) [hereinafter "ABA *Guidelines*"].

[14] *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 677–78 (2008).

[15] Response at 77.

[16] *Williams v. Taylor*, 529 U.S. 362, 399, 120 S. Ct. 1495, 1516, 146 L. Ed. 2d 389 (2000) (finding that there was "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence" (internal punctuation omitted)).

[17] Response at 77.

penalty case must pursue all available mitigation evidence in order to be effective. Instead the Response recasts the issue as whether the burden is on the petitioner to "show[that] trial counsel somehow failed in their duty to secure a second expert witness."[18] The issue is not whether a second expert is necessary; it is, rather, whether the defense conducted a constitutionally adequate mitigation investigation. And it certainly is not whether the petitioner "prove[s] that trial counsel would have been granted [a second expert by the trial court]."[19] The Response asserts that such a showing is among the petitioner's burdens, but there is no citation to authority for that proposition.[20] There is no support in the law for that.

Simply retaining a psychological expert or two does not discharge a capital defense attorney's duty to investigate, present, and explain all available mental-health claims or defenses. The fact that defense counsel relied on a psychological expert for one purpose, such as a competency evaluation, does not satisfy the constitutional mandate of investigating other "red flags" in a capital client's personal history. Likewise, the presence of a mental-health expert somewhere in the record does not end a court's inquiry into whether a capital defendant received effective assistance of counsel.[21] "[C]ounsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background."[22] "Because the evidence

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[18] *Id*. at 78.

[19] *Id*.

[20] *See id*. at 77–78.

[21] *See Summerlin v. Schriro*, 427 F.3d 623 631 (9th Cir. 2005) (finding deficient performance and prejudice where "development of a mental health defense was based solely on the limited information developed at [petitioner's] pre-trial competency examination, which was prepared for an entirely different purpose").

[22] *Wiggins*, 539 U.S. at 532.

presented at each phase of a trial serves a markedly different purpose, we analyze the reasonableness of counsel's efforts to prepare for trial and sentencing differently."[23] "Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an 'all-purpose' expert who may have insufficient knowledge or experience to testify persuasively."[24]

The State is also completely misinformed in its belief that "there is no constitutional right to expert assistance, much less a right to additional expert assistance."[25] That is incorrect. The U.S. Supreme Court recently held, in *McWilliams v. Dunn*—and on constitutional grounds—that "*Ake*[26] clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively assist in evaluation, preparation, and presentation of the defense."[27] In *McWilliams*, a death-penalty case, the defendant had been examined by a mental-health expert who had issued a report. But at the sentencing phase, defense counsel moved for the appointment of an additional expert to help them evaluate and understand the expert's report (stating that they were lay persons regarding medical matters). And while the *McWilliams* opinion did not engage specifically with the question of whether a person on trial for his life has a right to "additional

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[23] *Doe v. Ayers*, 782 F.3d 425, 441 (9th Cir. 2015) (citation omitted).

[24] ABA *Guideline* 10.11 cmt. (2003) *See also Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998) (not reasonable to rely at penalty phase on mental health material previously amassed for competency challenge); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995) (investigation of mental health evidence for guilt phase does not excuse failure to develop mental health evidence for penalty phase).

[25] *Id*. at 78.

[26] *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

[27] *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800, 198 L. Ed. 2d 341 (2017).

expert assistance,"[28] it is clear that it was defense counsel's request for such assistance that led to the case winding up before the Supreme Court.

In short, the State in its Response misstates the law regarding experts and the law regarding the requirement of a mitigation investigation. It invites this Court to buy into the notion that, despite the lack of the required mitigation investigation and the absence of an appropriate expert to conduct one—and to assist the defense in preparing and presenting to the jury the results of that investigation—Mr. Ronk's trial was fair. The Sixth Amendment requires this Court to decline that invitation.

B. Dr. Smallwood's work was not a mitigation investigation.

This Court should also be skeptical about the State's unsupported assertions about the "thoroughness" of Dr. Smallwood's testimony.[29] Her testimony was not thorough. It was quite brief. The direct examination occupies only seventeen of the 748 pages of the trial transcript.[30] The cross runs to another twelve and a half.[31] The redirect is, as Mr. Geiss promised at its outset, "very brief[]"—twenty-one *lines* in the transcript.[32]

More significant than its brevity, though, is what this testimony lacked. This is not to impugn Dr. Smallwood, who did what she could, and who made it clear what the limits of her contribution would be. But her testimony was far from effective for mitigation. There was no testimony about the results of—and of course no explanation of—a (nonexistent) mitigation

[28] Response at 77.

[29] *Id*. at 79.

[30] Tr. at 673–89.

[31] *Id*. at 690–702.

[32] *Id*. at 702–03.

investigation. There was, however, this: "I did state in my report that I did not do a full mitigation study. That's outside of the scope of my practice . . . ."[33]

And that was true. In her report of her evaluation of Mr. Ronk, Dr. Smallwood wrote, "The present examination is not a mitigation study, which is outside the scope of my current practice. . . . [A] mitigation study is recommended."[34] But Mr. Geiss and the other defense attorneys under his direction ignored that recommendation. The law requires a mitigation investigation,[35] which may be halted only upon the discovery that continuing it would harm the client's interests or that it has no reasonable possibility of bearing fruit. Either way, there must be some indication of why it was truncated.[36] Here, there was neither an investigation nor any indication of good cause to refrain from investigating. As a matter of law, the absence of any mitigation investigation was ineffective assistance of counsel, requiring reversal.

The Response at least implies, if not explicitly alleges, that the Motion for Leave argues that Dr. Smallwood's testimony was objectionable. The Motion for Leave does argue that Mr. Geiss was ineffective in allowing his client's case to be damaged by part of Dr. Smallwood's testimony. But that is not the same as saying that her testifying was per se objectionable. One would expect the psychologist appointed by the trial court to testify. Her testimony was entirely proper as far as it went.

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[33] *Id*. at 678.

[34] Smallwood report at 24–25.

[35] *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Ross v. State*, 954 So. 2d 968 (Miss. 2007); *Doss v. State*, 19 So. 3d 690 (Miss. 2009).

[36] *Id.*

C. The requirement of a mitigation specialist is well settled.

The State apparently fails to understand that Dr. Smallwood was not a mitigation specialist and that she did not do a mitigation investigation. Some of the language in the Response leads one to the conclusion that the State does not fully understand the concept of mitigation.[37] For example, the Response refers to "his hypothetical 'mitigation experts.'"[38] There is nothing hypothetical about a mitigation investigation or mitigation investigators. They have been part of the process of the adjudication of death-penalty cases for decades. The term "mitigation specialist" dates from at least the 1980s, and it has long been the law that these professionals are indispensable in capital cases. As U.S. District Court Judge Helen Berrigan, in a law review article titled *The Indispensable Role of the Mitigation Specialist in A Capital Case: A View from the Federal Bench*, explained:

> "With respect to mitigating evidence, the Supreme Court has specifically noted that [the] ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. The 1989 ABA Guidelines mentioned mitigation specialists in the commentary section, but the 2003 ABA Guidelines explicitly state that the capital defense team should consist of at least two attorneys, an investigator, and a mitigation specialist."[39]

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[37] It seems safe to say that unfamiliarity with the importance of, the role of, and even the existence of mitigation specialists is widespread. *See, e.g.*, Honorable Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in A Capital Case: A View from the Federal Bench*, 36 Hofstra L. Rev. 819, 821 (2008) (attached to this Rebuttal as Appendix) ("[In a] survey of capital defense attorneys and mitigation specialists, concern was expressed over, among other issues, inadequate court funding and judicial ignorance or outright hostility to the mitigation needs in death penalty cases. Considering that the term 'mitigation specialist' is a relatively recent coinage, some of this lack of judicial awareness and resulting caution is understandable. The primary purpose of this Article is to hopefully dispel judicial misgivings about the crucial importance of mitigation development in the trial of a capital case.").

[38] Response at 81.

[39] Berrigan, *supra* n.37, at 823–24.

Judge Berrigan showed that a mitigation investigation by someone with the expertise to do it is separate and distinct from the type of evaluation done by Dr. Smallwood in Mr. Ronk's case. First, "[a]s developing mitigation evidence is time-consuming, early appointment of the mitigation specialist is essential. It takes months to conduct the interviews and amass the information needed and cull it to a presentable form. Also, as noted, screening for mental health issues is a primary task of the mitigation specialist."[40] She points out:

> The mitigation specialist, after compiling the life history, can also help identify the appropriate experts that are needed, eliminate those that are not, and help frame the precise referral question to focus the expert in a cost-effective way. When the expert is selected, the mitigation specialist will have already prepared an organized and reliable life history for the expert's review.[41]

If that is not clear enough, consider that in the *Wiggins* case, defense counsel did arrange for a pre-trial psychological evaluation[42]—exactly as was done in Mr. Ronk's case by Dr. Smallwood. But Mr. Wiggins's attorneys failed to engage the services of a mitigation specialist.[43] It was not until the state post-conviction stage that Mr. Wiggins's counsel arranged for a mitigation specialist to work on the case.

> Counsel's decision not to expand their investigation beyond the PSI [presentence investigation] and the DSS [Department of Social Services] records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins'[s] trial included the preparation of a social history report. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker [read "mitigation specialist"], counsel chose not to commission such a report. Counsel's conduct similarly fell short of the standards

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[40] *Id*. at 827.

[41] *Id*. at 829.

[42] *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003).

[43] *Id*. at 524, 2536.

> for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. [citing ABA *Guidelines*] (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); [citing ABA *Standards for Criminal Justice*] ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . . Investigation is essential to fulfillment of these functions").[44]

II. The ABA *Guidelines* have long been accepted as guides to what is reasonable.

The Response attempts to discount the importance of the American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. It (correctly) states that the petitioner "believes that [*Williams v. Taylor*,[45] *Wiggins v. Smith*,[46] and *Rompilla v. Beard*[47]] all but expressly recognize the ABA Death Penalty Guidelines [*sic*] as the source that defines the standard of reasonableness for counsel's performance in capital murder cases."[48] In *Wiggins*, the U.S. Supreme Court called the ABA *Guidelines* "standards to which we long have referred as 'guides to determining what is reasonable.'"[49] While it is true that the ABA

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[44] *Id*. at 524–25, 2536–37 (emphasis in original) (most internal citations omitted).

[45] *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

[46] *Wiggins*, 539 U.S. 510, 123 S. Ct. 2527.

[47] *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).

[48] Response at 30.

[49] *Wiggins*, 539 U.S. at 524, 123 S. Ct. at 2537 (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984); *Williams*, 529 U.S. at 396, 120 S. Ct.

Guidelines do not have the force of law per se, it is firmly established that they are to be referred to as guides to determine the standard of reasonableness—and reasonableness is a crucial determinant in any ineffective assistance case. Indeed, this Court has relied on the *Guidelines* in ordering an evidentiary hearing in a capital case.[50]

Judge Berrigan discussed the ABA *Guidelines*, along with the ABA's other guidance on mitigation in capital cases,[51] at some length. An excerpt:

> Fortunately for trial judges and defense counsel, the American Bar Association has been a leader for nearly thirty years in promulgating appropriate standards for assuring adequate representation for defendants in capital cases. The ABA *Guidelines*, originally enacted in 1989, were expanded and made more explicit in 2003. The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* clarify the standards even further. The ABA Standards and Guidelines have been repeatedly cited by the United States Supreme Court as reflecting the prevailing norms of what is reasonable practice in capital cases. With respect to mitigating evidence, the Supreme Court has specifically noted that: "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"[52]

Judge Berrigan also explained that:

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at 1514).

[50] *Wilson v. State*, 81 So. 3d 1067, 1092 (Miss. 2012).

[51] *E.g.*, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 677–78 (2008) ("These *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* were developed in cooperation with the ABA Death Penalty Representation Project to assist its work and to reflect prevailing professional norms. They are the result of a two-year drafting and review process by experts in the field of death penalty litigation. These *Supplementary Guidelines* provide comprehensive, up-to-date guidance for all members of the defense team, and will provide useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists. Following the *Guidelines* will help ensure effective assistance of counsel for all persons charged with or convicted of capital crimes. These *Supplementary Guidelines* explain in greater detail the elements of the mitigation function of capital defense teams.").

[52] Berrigan, *supra* n.37, at 823.

> In 1998, the Judicial Conference of the United States likewise recognized the significance of mitigation specialists in federal capital cases, even encouraging Federal Defender Offices to have such specialists on staff as permanent salaried employees. The accompanying commentary described mitigation specialists as "part of the existing 'standard of care' in a federal death penalty case."[53]

III. The State's attempt to discredit Dr. Hersh's analysis of Mr. Geiss's medical records is unconvincing.

In preparing the Supplement to the Motion for Leave, post-conviction counsel for Mr. Ronk consulted Dr. Sheldon Hersh for an analysis of the medical records of Mr. Eric Geiss, Mr. Ronk's lead trial attorney. The State argues that Dr. Hersh's opinion is "flawed" because it "is based on what he believes counsel should do in order to provide high[-]quality legal representation . . . ."[54] The State has chosen to focus on Dr. Hersh's reading of the ABA *Guidelines* instead of on what Dr. Hersh reported about Mr. Geiss's many health problems, including his daily use of enormous quantities of opioid drugs. But the medical issues are the meat of Dr. Hersh's analysis. It is, of course, for this Court to decide whether that information about those illnesses and substance abuse, along with everything else the petitioner has put before it, supports a prima facie case of ineffective assistance of counsel. What Dr. Hersh did show, though, was how sick and incapacitated Mr. Geiss was. Nothing in the State's response effectively rebuts Dr. Hersh's findings on Mr. Geiss's medical conditions.

The State ignores the compelling indications that Mr. Geiss was quite ill and

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[53] *Id*. at 825 (citing Subcomm. on Fed. Death Penalty Cases, Judicial Conference of the U.S., Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation sec. II.7 (1998), available at http:/ www.uscourts.gov/dpenalty/1COVER.htm (this is an old URL that no longer works, and besides it contains a typo. The correct URL is http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf)).

[54] Response at 35.

incapacitated during the period of Mr. Ronk's trial in October 2010. For example, the medical records show that "[o]n August 22, 2010, Mr. Geiss had respiratory distress such that he was 'unable to speak.' He was 'lethargic' and fell asleep easily."[55] Then, "[o]n November 10, 2010, he was lethargic, had labored breathing, drowsiness, wheezing, and cyanosis, which indicated his oxygen level was low."[56] It would be hard to seriously argue that during the weeks between these two entries—during which the trial occurred—Mr. Geiss somehow rallied and became temporarily fit to effectively defend a capital case. Perhaps that explains why the State does not attempt to make such an argument in the Response.

Beginning on page 36 of the Response, the State says that it will show that "[t]here are serious concerns with Dr. Hersh's sworn statements" by "focus[ing] its discussion on Dr. Hersh's Opioid Use Disorder diagnosis . . . ."[57] The State then goes on at some length in an attempt to show that Dr. Hersh was wrong. The argument, to sum it up briefly, and, it is hoped, accurately, goes as follows: because Mr. Geiss was seeing a doctor, he could not have been abusing opioids. Also, the State goes through the diagnostic criteria of opioid use disorder, and—apparently without the help of any trained medical professional—arrives at its own diagnosis: no opioid use disorder. Among its proof is "Respondent's Exhibit 1," a color photocopy, it appears, of a fentanyl package.

There is no need here to hash out all the details of the State's argument, or all the details of Mr. Geiss's illnesses and substance abuse, which are before this Court in the Motion for Leave and the Supplement to it. Dr. Hersh's analysis speaks for itself, and it paints a sad picture of a

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[55] Aff. of Dr. Sheldon Hersh, M.D., Sept. 5, 2017, attached as Ex. A, at 9.

[56] *Id.*

[57] Response at 36.

very incapacitated man who should not have attempted to serve as lead counsel in any kind of litigation, much less a death-penalty case. The State's unsupported arguments do not diminish the force of Dr. Hersh's affidavit. At the very least, there is a factual determination at the heart of this claim that the defendant was denied effective assistance of counsel because of Mr. Geiss's condition and drug use. At the very least, remand for such a determination is necessary.

Mention should be made, though, of one final thing on this issue. After receiving the State's Response, undersigned counsel sent a copy to Dr. Hersh and asked for his thoughts about it. He executed a second affidavit, which is attached to this Rebuttal as Exhibit B. In it, he wrote that "[b]y focusing solely on Mr. Geiss'[s] opioid usage and disregarding the long list of Mr. Geiss'[s] medical problems and medications, the State seeks to minimize Mr. Geiss'[s] long and complicated medical history."[58] He summarized his affidavit as follows:

- Reviewing contemporaneous medical records is a well-accepted and useful method to examine a deceased person's medical problems.
- Mr. Geiss was taking too much opioid medication for his non-cancer pain; there was little documentation to justify this medication in the extensive medical records I reviewed.
- Just because a physician prescribes opioids, it does not mean that the opioids are appropriate or harmless.
- Mr. Geiss had multiple medical problems, which had a negative cumulative effect on his physical, neurologic, and cognitive abilities.[59]

[58] Second aff. of Sheldon Hersh, M.D., Mar. 27, 2018, attached as Ex. B, at 4.

[59] Not unlike the defense attorney in the capital case of *Nance v. Ozmint*, which was reversed because of ineffective assistance of trial counsel during post-conviction proceedings in the Supreme Court of South Carolina. "At the time he was appointed, defense counsel had either recently suffered from or was then suffering from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he was taking various prescription medications, including Valium, Lopressor, Isocet, and Tenormin. At the PCR hearing, Petitioner's experts testified that the side effects of those medications included impaired memory, lack of sleep, and sedation." *Nance v. Ozmint*, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006).

- Multiple medical providers stated that Mr. Geiss'[s] narcotics were worsening his impairments.[60]

IV. The State is correct that Mr. Geiss's ineffectiveness means that the whole trial defense team was ineffective.

Early in the subsection titled "Petitioner does not show counsel were deficient for failing to conduct an investigation of mitigation evidence,"[61] the State writes, "As an initial matter, the State would be remiss if it did not call the Court's attention to two[] important facts. The first is that Petitioner was represented by a team of four defense attorneys . . . ."[62] "This fact is particularly important because Petitioner's claim of ineffectiveness is largely predicated on allegations that only challenge [read "challenge only"] the performance of Eric Geiss, the attorney who served as lead counsel for the defense. Except in passing, Petitioner does not take issue with his other three attorneys' efforts."[63]

This is not accurate; the Motion for Leave did point out that the lead attorney's ineffective performance affected the rest of the defense team, in that the team lacked the necessary leadership.[64] Leadership is mandated by, for example, the ABA *Guidelines*.[65] Nonetheless, the State's argument appears to be that even though Mr. Geiss was impaired, the presence of three other attorneys on the case erased the harm. That is incorrect for at least two

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[60] Second aff. of Sheldon Hersh, M.D., Mar. 27, 2018, attached as Ex. B, at 4.

[61] Response at 29 *et seq.*

[62] *Id*. at 29–30.

[63] *Id*. at 30.

[64] Motion for Leave at 21–22.

[65] ABA *Guideline* 10.4 B.

reasons.

The first reason is provided by the State's Response. Apparently concerned about the damage to the State's case done by the affidavit of Matthew Busby, an attorney who volunteered to help to gain experience, the Response attempts to discredit him by the following:

> It is apparent from his affidavit that Mr. Busby believes that his allegations of [lead attorney Geiss's] ineffectiveness do not impute [to] him. He is mistaken. "[T]he lead attorney's performance is imputed to all attorneys involved in the case." *Jordan v. State*, 213 So.[ ]3d 40, 43 (¶ 12) (Miss. 2016) (citing *Archer v. State*, 986 So.[]2d 951, 956 (Miss. 2008)). The allegations of ineffectiveness that challenge Mr. Geiss's representation impute to Mr. Busby.[66]

The State is correct in its analysis that Mr. Geiss's ineffective assistance of counsel imputes to Mr. Busby. The petitioner would add to the State's concession: "*and to all other members of the defense team*."[67]

The second reason is that in a capital case, lead counsel bears the "overall responsibility for the performance of the defense team, and [he or she] should allocate, direct and supervise its work in accordance with these Guidelines and professional standards."[68] This issue is discussed on pages 21 through 22 of the Motion for Leave,[69] and there is no need to repeat it here.

V. The State's argument concerning lay witness testimony is unsupported and unsupportable.

The Response claims that "Petitioner also bears the burden of proving lay witnesses, such as Mrs. Ronk and Ms. Burrell, would have testified on his behalf." But nowhere in the Response

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[66] Response at 31.

[67] *Jordan v. State*, 213 So. 3d 40, 43 (Miss. 2016), *reh'g denied* (Mar. 9, 2017) ("the lead attorney's performance is imputed to all attorneys involved in the case").

[68] ABA *Guideline* 10.4 B.

[69] Motion for Leave at 21–22.

does any authority supporting this proposition appear. This Court has repeatedly held that it need not consider arguments unsupported by citation to authority.[70]

VI. The evidence provided by Dr. Garbarino to post-conviction counsel should be put before the trier of fact.

In criticizing the affidavit of Dr. James Garbarino, attached as an Exhibit 3 to the Motion for Leave, the State makes a noteworthy point. It wrote, "Had Dr. Garbarino's opinion been presented to the jury, it would, at best, have barely altered the sentencing verdict."[71] Here, the State provides a compelling reason why the sort of evidence that is in this affidavit should have been put before the jury, and why, since it was not, there is a reasonable probability that the result of the sentencing phase would have been different.

Since the sentence was death, what would have resulted if the "sentencing verdict" had been "barely altered"? Logically, it must be something less than death. There is no more severe punishment. There are no degrees of death. So any slight alteration of a death sentence must be something less than death, such as a term of life. And it would have required doubt in the mind of just one juror to effect that slight alteration.[72] The State's own characterization of Dr. Garbarino's affidavit effectively concedes that point.

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[70] *E.g., Dozier v. State*, 247 Miss. 850, 852, 157 So. 2d 798, 799 (1963) ("It is the duty of counsel to make more than an assertion; they should state reasons for their propositions, and cite authorities in their support.").

[71] Response at 84.

[72] *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S. Ct. 2527, 2543, 156 L. Ed. 2d 471 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S. Ct. 2456, 2469, 162 L. Ed. 2d 360 (2005) ("[A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability" (internal quotation marks omitted)).

Such an alteration, although apparently slight in the State's view, would actually be quite significant, to state the obvious. And if, as the State believes, Dr. Garbarino's evidence might have made such a difference, surely the interests of justice require that Mr. Ronk be permitted to bring it to the attention of the finder of fact in this case. This would certainly be in keeping with the guiding principle that "all doubts are to be resolved in favor of the accused."[73]

VII. Section VI of State's Response raises two important issues that this Court should address.

Section VI of the State's Response raises two issues that merit this Court's attention. They are:

(1) The State contends that access by experts (psychologists, psychiatrists, etc.) to capital post-conviction petitioners is "discovery" and subject to the discovery provisions of Mississippi Rule of Appellate Procedure 22. That is incorrect.

(2) The State contends that the provisions of Mississippi Rule of Appellate Procedure 22(c)(3) regarding litigation expenses apply to the cases of the Mississippi Office of Capital Post-Conviction Counsel (MOCPCC). That cannot be correct, if the rule is read in a way that makes sense.

A. Access to experts is not a matter of discovery; it is part of investigation and it is a matter of the petitioner's right to due process.

First, as to the discovery/access issue, the State's view is incorrect. Access to clients by experts is not a part of discovery. It is part of investigation. It is unclear why the State continues to argue that this part of the investigation of a client's case—arranging to have the client seen and evaluated by an expert—is somehow discovery. Undersigned counsel's best guess is that the State is confusing the term of art "discovery" (the mechanism whereby the parties obtain information from each other or from third parties) with the layperson's understanding of the

[73] *Chamberlin v. State*, 989 So. 2d 320, 330 (Miss. 2008) (citing *Lynch v. State*, 951 So. 2d 549, 555 (Miss. 2007)).

word "discovery" (which simply means the act of finding something out).

The circuit court judge tried to convince the State that it was incorrect during a hearing in this case.[74] The subject of the hearing was whether an expert hired by MOCPCC should have access to Mr. Ronk. The following exchange (with some portions omitted here for brevity) took place:

> Special Assistant Attorney General Smith: "[T]hey're asking specifically to be evaluated by a neuropsychiatrist. That is discovery. Information obtained in support of a petition for post-conviction relief, according to the Mississippi Supreme Court, is discovery. . . ."
>
> * * *
>
> The court: "Why do you feel it's discovery?"
>
> Mr. Smith: "Because they're trying to obtain information or conducting investigation that may or may not lead to supporting claims for post-conviction relief. And that's what the Mississippi Supreme Court has said is discovery. It was the reason they promulgated Rule 22. That's what they said in *Corrothers* here recently, 2013."
>
> The court: "They said access of an expert is discovery?"
>
> Mr. Smith: "No, Your Honor. They said Rule 22 is promulgated for the purpose of providing a PCR petitioner with a meaningful opportunity to meet the UPCCRA's burden of production. So what they're saying is enough information to overcome summary dismissal under 99-39-25."
>
> The court: "So let me ask you this. If Mr. Ronk had private counsel and plenty [of] money, he could hire whoever he wanted to hire to work on his case in terms of experts, et cetera. And if he were not in custody, would the state have a right to have any notice as to who he was talking to, who was evaluating him, and what access they had?"
>
> Mr. Smith: "You know, I believe if there were a motion for reciprocal discovery, possibly. But in this case, Rule 22 governs."
>
> The court: "Sir, wait a minute. You think that the state—"
>
> Mr. Smith: "No, Your Honor."

[74] Tr. of hearing, Harrison Co. Circ. Ct., 1st Jud. Dist., Jun. 7, 2016 (attached to Motion for Leave as Ex. 9).

The court: "—would have a right to know—"

Mr. Smith: "I do not believe that."

The court: "I am talking. You think the state would have a right to know who the defendant is talking to and what their position is going to be in the case based on reciprocal discovery?"

Mr. Smith: "No, Your Honor."

The court: "Correct. So why in this case does the state have a dog in this fight? Now, I'm going to talk about MDOC in a minute. But why does the state, being the attorney general's office who would defend the PCR, why would you have any standing, at all, to object to him seeing his own experts? . . . Why would that be discovery I guess is what I'm trying to find out."

Mr. Smith: "Well, I'm not asking for discovery. I'm asking for an opportunity to be heard to resist discovery. . . ."

* * *

The court: "It's not discovery. That's my point. And you haven't told me yet why it would be.

Mr. Smith: "Well, Your Honor. I'm—what I'm saying is discovery is not in the traditional sense, I'm exchanging information. Discovery is, I'm trying to investigate information to support a petition for post-conviction relief."

The court: "No, sir. That's investigation. Two different functions. Happens the same pretrial. Right. So let's say we're pretrial. Mr. Ronk's going to be evaluated by whoever he's going to be evaluated by. The state never has a right to know that unless he decides to use that information, true?

Mr. Smith: "Yes, ma'am."

The court: "All right. That's investigation, not discovery. Discovery is when he demands something from the state or . . . from a third party in which case it's up to the third party to then decide if they're going to give it up or resist which is what MDOC is in this case, true?"

Mr. Smith: "Well, Your Honor, I respectfully disagree."

The court: "Tell me why."

Mr. Smith: "Well, I'm basing it on precedence. I'm basing it on—"

The court: "What precedence?"

Mr. Smith: "*Howard v. State*."

The court: "That says what?"

Mr. Smith: "It says that the state is entitled to resist unwarranted discovery and litigation."

The court: "Okay. Mr. Smith, I don't know what you're not getting here. If it ain't discovery, you don't have a right to resist it. So none of the cases you cited would be applicable."[75]

* * *

At that point, counsel for the State got a rulebook and read aloud part of Mississippi Rule of Appellate Procedure 22(c)(4)(ii).[76]

* * *

The court: "My question to you though, and I don't think and perhaps because you don't—you don't do trial work, right?"

Mr. Smith: "No, Your Honor."

The court: "All right. If a defendant does investigation on their own, it is not discovery. It may become discovery once they've obtained it, and then they're required to give you notice and provide it to you. You understand?"

* * *

Mr. Smith: "Right. But I think what [Mr. Ronk's counsel is] arguing is that this is just access. But this is not just access. This is access to conduct discovery."

* * *

The court: "All right. First of all, it is this court's firm opinion that this is not discovery and does not constitute discovery with regard to the provisions specifically of Rule 22 as I have already noted."[77]

This Court, too, has ruled on this issue multiple times. For example, in an order in *Eric*

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[75] *Id.* at 7–13.

[76] *Id.* at 13.

[77] *Id.* at 38–52.

Moffett v. State of Mississippi, signed by Justice Randolph on August 31, 2012, this Court stated:

> The transcript of the circuit court's hearing on the Motion for Access and Motion to Invoke Discovery reveals that the State conflated the issues of access and discovery. . . . As a matter of due process, Moffett should be allowed access to his experts subject to the rules and regulations of MDOC.[78]

In 2013, this Court again weighed in on the issue of access for experts in capital post-conviction proceedings. In *Grayson v. State*, the Attorney General's office had once again opposed access:

> The State responds to Grayson's "Motion for Access" by arguing that Grayson is not entitled to the effective assistance of counsel in PCR proceedings. The State's argument has been rejected as discussed above. The State makes no other argument in opposition to the motion for access. Instead, the State responds: "[i]n the event the Court grants the motion, the respondent respectfully requests that the petitioner be required to comply with the Mississippi Department of Corrections rules and regulations concerning expert evaluations.[79]

This Court cited *Moffett* in support of allowing access: "As a matter of due process, [the petitioner] should be allowed access to his experts subject to the rules and regulations of the MDOC."[80] It then held that, "[a]s a matter of due process,"[81] "[p]risoners sentenced to death should be granted access to their experts so long as the access complies with the rules and regulations of the Mississippi Department of Corrections and so long as those rules and regulations do not violate petitioners' due-process rights."[82]

Despite all that, the State continues to argue that, when the MOCPCC arranges to have a

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[78] Order, *Moffett v. State*, Miss. Supreme Ct. No. 2011-DR-00028-SCT (Aug. 31, 2012).

[79] *Grayson v. State*, 118 So. 3d 118, 146–47 (Miss. 2013).

[80] *Id*. at 147.

[81] *Id*.

[82] *Id*.

client evaluated by an expert, it is somehow discovery.[83] It is actually long since settled that these clients have a due-process right to be seen by experts.[84] Counsel for Mr. Ronk respectfully suggests that this Court could take this opportunity to confirm, once and for all, petitioners' right of access. Doing so will not only protect the due process rights of Mr. Ronk and other petitioners, but it will also benefit all parties and the courts by expediting the proceedings, eliminating unnecessary litigation, and conserving judicial resources.

B. The provisions of Mississippi Rule of Appellate Procedure 22(c)(3) do not apply to cases in the Mississippi Office of Capital Post-Conviction Counsel.

Perhaps the confusion here stems from the term "appointed" counsel. Before the legislature created the MOCPCC in 2000, post-conviction petitioners were represented (if at all) by private attorneys, usually volunteers who did the work *pro bono*—typically in the evening and on weekends—and who were appointed on a case-by-case basis by the courts. They had to ask the courts for litigation expenses, which circuit judges had to either grant or deny, and, if the former, counties had to pay.

With a few exceptions, nowadays capital post-conviction petitioners are represented by the MOCPCC. As an independent state agency, the MOCPCC pays all litigation expenses from its own budget. It does not, and does not have to, request funding from the courts. If it did, then it might make sense for it to have to "present to the convicting court, with notice to the Attorney General and an opportunity for the Attorney General to be heard, a request estimating the amount

[83] Response at 121–24 ("As the State argued, the trial court's authority to grant Petitioner's motion for access derived entirely from the [discovery] provisions of M.R.A.P. 22(c)(4)(ii). . . . The State maintains that position.").

[84] Subject to reasonable regulations of the Mississippi Department of Corrections (MDOC), which have never been a problem; MDOC's regulations in this area are mostly sensible and fairly easily complied with.

of such expenses as will be necessary and appropriate in the matter . . . ."[85] It might make sense for the MOCPCC to have to "make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial."[86]

Considering, however, that the MOCPCC does not seek any funds from any court, it makes no sense to argue that these provisions should apply. What does make sense—the logical understanding of the rule—is that, when it was promulgated, its authors did not contemplate the role of the MOCPCC, or perhaps even its existence. Up until 2000, it was the private bar—appointed counsel—handling these cases, and members of the private bar needed to go to the courts for litigation expenses. But the MOCPCC does not.

The circuit court judge in this case seems to understand this perfectly well. During the June 7, 2016, hearing in the Circuit Court of Harrison County, counsel for the State brought up litigation expenses. The following exchange took place:

> Mr. Smith: "Your Honor, as I state in my response, I haven't been given notice or an opportunity to be heard on litigation expenses."
>
> The court: "And why would you be?"
>
> Mr. Smith: "The rule also provides, expressly provides the state with notice and an opportunity to be heard on that."
>
> The court: "No request has been made for litigation expenses."
>
> Mr. Smith: "Well, Your Honor, I mean, respectfully I see it as his burden to come forward with that, to have a hearing on that."
>
> The court: "If he's not asking for them, why would he come forward? And when he does and you want to object to it, then you can."

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[85] Miss. R. App. P. 22(c)(3).

[86] *Id.*

Mr. Smith: "Well, I'm objecting at this point."

The court: "Why? He hasn't filed a motion. You're not focusing on what the issue is here. The only issue today is whether or not this doctor should have access to Mr. Ronk to evaluate him. And, frankly, you don't have a dog in that fight."[87]

Like the discovery/access issue discussed in the preceding subsection of this Rebuttal, the State advances this argument in many capital post-conviction cases nowadays.[88] And again, counsel for Mr. Ronk respectfully suggests that that this Court could take this opportunity to clarify the applicability, *vel non*, of the rule in question. This, too, can benefit all parties and the courts by expediting the proceedings, eliminating unnecessary litigation, and conserving judicial resources.

Conclusion

The claims and evidence discussed in the Motion for Leave, the Supplement to the Motion for Leave, and this Rebuttal, along with the affidavits and records attached as exhibits, constitute the "substantial showing necessary to obtain an in-court opportunity so that testimony may be heard and weighed by a factfinder with the well-recognized need to observe witness testimony firsthand."[89] This Court also has authority to grant the relief requested—to reverse and render or to reverse and remand.[90] Mr. Ronk prays that this Court will grant him the requested

[87] Tr. of hearing, Harrison Co. Circ. Ct., 1st Jud. Dist., Jun. 7, 2016, at 15 (attached to Motion for Leave as Ex. 9).

[88] *E.g.*, Response at 122–24.

[89] *Crawford v. State*, 218 So. 3d 1142, 1169 (Miss. 2016), *reh'g denied* (Nov. 10, 2016), *cert. denied,* 137 S. Ct. 2160, 198 L. Ed. 2d 235 (2017) (Dickinson, J., concurring in part and dissenting in part).

[90] Miss. Code. Ann. § 99-39-27(7)(a).

relief, or alternatively will allow the filing of the motion in the trial court for further proceedings under the Mississippi Uniform Post-Conviction Collateral Relief Act.[91]

Respectfully Submitted:
Timothy Robert Ronk, Petitioner

By:
s/Alexander Kassoff
Alexander Kassoff (MSB # 103581)
Scott A. Johnson (MSB # 9592)
Attorneys for Petitioner

Office of Capital Post-Conviction Counsel
239 North Lamar Street, Suite 404
Jackson, MS 39201
Telephone: (601) 359-5733
Facsimile: (601) 359-5050
akassoff@pcc.state.ms.us
sjohnson@pcc.state.ms.us

[91] Miss. Code. Ann. § 99-39-27(7)(b).

CERTIFICATE OF SERVICE

I, Alexander Kassoff, hereby certify that on this day I electronically filed the foregoing Petitioner's Rebuttal to State's Response in Opposition to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief with the Clerk of the Court using the MEC system, which sent notification of such filing to the following:

Honorable Brad A. Smith
Honorable Jason L. Davis
Special Assistant Attorneys General
Post Office Box 220
Jackson, MS 39205-0220
bsmit@ago.state.ms.us
jdavi@ago.state.ms.us

I further certify that on this day I have caused to be sent via first-class U.S. mail, postage fully pre-paid, a copy of the foregoing Petitioner's Rebuttal to State's Response in Opposition to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief to the following:

Honorable Lisa P. Dodson
Circuit Court Judge
Post Office Box 1461
Gulfport, MS 39502

Mr. Timothy Robert Ronk
Unit 29-J
Mississippi State Penitentiary
Post Office Box 1057
Parchman, MS 38738

This the 1st day of June 2018.

s/Alexander Kassoff
Certifying Attorney