IN THE SUPREME COURT OF MISSISSIPPI
Case No. 2015-DR-01373-SCT

TIMOTHY ROBERT RONK, ***Petitioner***

v.

STATE OF MISSISSIPPI, ***Respondent***

MOTION FOR LEAVE TO PROCEED IN THE TRIAL COURT WITH A PETITION FOR POST-CONVICTION RELIEF

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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 99-39-101 *et seq*.; Mississippi Rules of Appellate Procedure 22 and 27; the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. Feb. 2003); and all other applicable state and federal law, files this his 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 motion:

I. Introduction

Timothy Ronk was sentenced to death at the end of a trial during which his lead defense counsel was often incapacitated by serious illness. This illness led to his retirement seven months after the trial and, sadly, to his death not long after that.[1] Unfortunately, the attorney, an Assistant Public Defender, while undoubtedly well meaning, could barely function at times. In fact, sometimes he could not function at all, because he was hospitalized. The trial transcript contains numerous indications that his illness impeded his functioning, and of his stumbles and

[1] *See* Death Certificate of Gordon Eric Geiss, attached as Ex. 1.

admissions that he was confused. Other attorneys from the public defender's office filled in for him sometimes, causing confusion by filing duplicative motions, among other problems. Because of the lead attorney's illness, his performance fell far short of anything that could be considered constitutionally effective assistance.

At the sentencing phase, trial counsel did not put before the jury any results of a constitutionally adequate mitigation investigation *because he had failed to have one done*—despite the urgings of the one expert involved in the case, Dr. Beverly Smallwood, a court-appointed psychologist who advised him that she was not qualified to do such an investigation. She was appointed by the court to evaluate Mr. Ronk for limited purposes. She even testified at the trial that she did not do a mitigation investigation: "I did state in my report that I did not do a full mitigation study. That's outside of the scope of my practice, but some of the things that were uncovered are relevant to this phase."[2] Mr. Ronk was denied fundamental constitutional rights by this failure, which resulted in the jury not hearing potentially outcome-changing mitigation evidence. The law and professional standards, as established by the U.S. Supreme Court[3] and by this Court,[4] require such a mitigation investigation. This was a clear-cut, egregious instance of ineffective assistance of counsel that requires reversal.

There was one attorney who went out of his way to help Mr. Ronk. Matthew Busby was an attorney in private practice who aspired to represent defendants in capital cases and who, to gain experience, volunteered to join the trial team without pay. He was limited by these

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[2] Trial transcript [hereinafter "Tr."] at 678.

[3] *See 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); and *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), which will be explored *infra*.

[4] *See, e.g., Ross v. State*, 954 So. 2d 968 (Miss. 2007); *Doss v. State*, 19 So. 3d 690 (Miss. 2009).

circumstances in what he was able to do. Nonetheless, as his affidavit (attached to this motion) shows, he obtained potential mitigating evidence—voluminous mental-health records—at his own expense. Mr. Ronk's lead counsel, apparently already overwhelmed by the effort of trying to handle a capital-murder trial while seriously ill, "pushed the records to the side. They were not made use of in the trial . . . ."[5] Those records, along with others and recent psychological and psychiatric evaluations, show a long history of trauma and serious mental-health problems that, if they had only been put before the jury, would have had a reasonable probability of resulting in a different outcome.

If trial counsel had done a mitigation investigation, he could have uncovered and presented to the jury the kind of mitigation evidence that experts at the post-conviction stage have found. He could have told the story of Mr. Ronk's adoption and troubled childhood and adolescence—of his conception out of wedlock as the result of a what he believed was a rape; of his traumatic experiences of feeling rejection, of coming to believe that he was not wanted by either his biological or his adoptive parents; of his mental illnesses, and how they exacerbated the effects of trauma; of repeated, failed attempts at treatment—the kind of mitigation evidence that one expert stated "constitute significant mitigating factors in any informed sentencing decisions in Tim Ronk's case, and should have been considered in his original sentencing."[6]

Lead counsel's illness and its effects are corroborated by the affidavit of Ramiro Orozco,[7] a former Assistant Public Defender in Harrison County who served during the time that lead counsel was there.

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[5] Affidavit of Matthew Busby, attached as Ex. 2.

[6] Affidavit of James Gabarino, Ph.D., attached as Ex. 3.

[7] Affidavit of Ramiro Orozco, attached as Ex. 6.

Other instances of ineffective assistance of counsel will be explained in this petition. Other claims in addition to ineffective assistance of counsel will also be asserted.

At this stage in these post-conviction proceedings, Mr. Ronk is not required to prove that the outcome of his trial would have been different if his counsel's performance had been constitutionally effective. All he needs to do at this point is make a "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."[8] As Justice Dickinson explained in a case handed down recently, "I pause here to emphasize that the matter before us today is not whether [trial] counsel was or was not ineffective. The only matter before us is whether [the petitioner] should be heard on the matter."[9] In this case, the evidence of trial counsel's ineffectiveness is certainly sufficient to warrant a hearing.

II. Statement of the case

Mr. Ronk was convicted of capital murder on October 7, 2010, and sentenced to death on October 8, 2010. This Court affirmed his conviction on May 7, 2015.[10] Rehearing was denied on September 17, 2015. The mandate issued on September 24, 2015.[11]

On September 29, 2015, the Mississippi Supreme Court issued an Order requiring the Office of Capital Post-Conviction Counsel (the "Office") to select counsel to represent Mr. Ronk

[8] *Crawford v. State*, No. 2013-DR-02147-SCT, 2016 WL 4141748, at *23 (Miss. Aug. 4, 2016) (Dickinson, J., concurring in part and dissenting in part).

[9] *Id.* at *22.

[10] *Ronk v. State*, 172 So. 3d 1112 (Miss. 2015).

[11] Mandate, attached as Ex. 25.

in his post-conviction proceedings upon a finding of indigence.[12] On November 9, 2015, the Circuit Court of Harrison County, First Judicial District, found Mr. Ronk to be indigent and appointed the Office as his post-conviction counsel.[13]

III. Standard of review

This Court has often held that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."[14] Because "death undeniably is different," it recognizes that "procedural niceties give way to the search for substantial justice."[15] "What may be harmless error in a case with less at stake [may become] reversible error when the penalty is death."[16] Under this Court's heightened standard of review in death penalty cases, "all doubts are to be resolved in favor of the accused."[17]

This Court "adhere[s] to the principle that a post-conviction relief petition which meets basic pleading requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[18] To comply with these basic pleading requirements for a claim of

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[12] Order, attached as Ex. 26.

[13] Order, attached as Ex. 27.

[14] *Pruett v. State*, 574 So. 2d 1342, 1345 (Miss.1990) (quoting *Jackson v. State*, 337 So. 2d 1242, 1252 (Miss.1976)).

[15] *Hansen v. State*, 592 So. 2d 114, 142 (Miss.1991).

[16] *Flowers v. State*, 158 So. 3d 1009, 1026 (Miss. 2014) (quoting *Fulgham v. State*, 46 So. 3d 315, 322 (Miss. 2010)).

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

[18] *Robertson v. State*, 669 So. 2d 11, 13 (Miss. 1996) (quoting *Harveston v. State*, 597 So. 2d 641, 643 (Miss. 1992).

ineffective assistance of counsel, a petitioner must "state a claim prima facie in his application to the Court," which means that the petitioner "must allege . . . with specificity and detail that his counsel's performance was defective and that the deficient performance prejudiced the defense."[19] The Fifth Circuit and this Court have defined prima facie as "[evidence] [s]uch as will suffice until contradicted and overcome by other evidence . . . [a] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded."[20]

Moreover, it is well-settled that this Court must "accept[] the well-pleaded allegations in the petition as true"[21] and resolve all doubts in favor of the petitioner.[22] If the petitioner files a motion that "meets these pleading requirements and presents a procedurally alive claim 'substantial[ly] showing denial of a state or federal right,' the petitioner is entitled to an in-court opportunity to prove his claims."[23]

IV. Mr. Ronk was denied his constitutional right to effective assistance of counsel.

Mr. Ronk's constitutional right to effective assistance of trial counsel[24] was violated,

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[19] *Hymes v. State*, 703 So. 2d 258, 261 (Miss. 1997) (quoting *Brooks v. State*, 573 So. 2d 1350, 1353 (Miss. 1990)) (internal quotations and citations omitted).

[20] *Hewes v. Langston*, 853 So. 2d 1237, 1270 (Miss. 2003) (quoting *In re Internal Sys. & Controls*, 693 F.2d 1235, 1242 (5th Cir. 1982) (quoting Black's Law Dictionary (4th ed. 1968))).

[21] *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003).

[22] *Grayson v. State*, 118 So. 3d 118, 125 (Miss. 2013).

[23] *Billiot v. State*, 515 So. 2d 1234, 1237 (Miss. 1987) (quoting Miss. Code Ann. § 99-39-27(5)).

[24] *See, e.g., Read v. State*, 430 So. 2d 832, 837 (Miss. 1983) ("We begin with an elementary proposition: one charged with an offense against the criminal laws of a state has a right to the effective assistance of counsel in making his or her defense. This is a right of

necessitating reversal and a new trial or least a new sentencing hearing. This issue was argued by direct appeal counsel and addressed by this Court on direct appeal. In its direct-appeal opinion, this Court stated, regarding the ineffective-assistance-of-counsel claims,

> We find that these claims are not based on facts fully apparent from the record, and it would be inappropriate for this Court to attempt to dispose of them on direct appeal. Accordingly, we dismiss this claim of error without prejudice to Ronk's ability to raise it properly in a post-conviction relief proceeding.[25]

Therefore, this issue has not been waived; Mr. Ronk meets his burden under Mississippi Code Section 99-39-21 "to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section."[26]

A. Trial counsel's failure to conduct a constitutionally adequate mitigation investigation deprived Mr. Ronk of his right to effective assistance of counsel.

1. The requirement for a constitutionally adequate mitigation investigation is firmly established by U.S. Supreme Court caselaw.

The U.S. Supreme Court decided *Williams v. Taylor* in 2000.[27] There the petitioner contended that "he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury." The Court decided that "[t]hat question is easily answered because the merits of his claim are squarely governed by our holding in *Strickland v. Washington*, 466 U.S.

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constitutional dimensions. It is secured by the Sixth and Fourteenth Amendments to the Constitution of the United States.").

[25] *Ronk v. State*, 172 So. 3d 1112, 1131 (Miss. 2015), *reh'g denied* (Sept. 17, 2015), *cert. denied*, 136 S. Ct. 1657, 194 L. Ed. 2d 773 (2016).

[26] Miss. Code. Ann. § 99-39-21.

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

668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."[28]

> We explained in *Strickland* that a violation of the right on which Williams relies has two components:
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> > "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S. Ct. 2052.
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> To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688, 104 S. Ct. 2052. To establish prejudice he "must 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." *Id.*, at 694, 104 S.Ct. 2052.[29]

The Mississippi Supreme Court "has applied the *Strickland* standard numerous times and has further said, 'an attorney's lapse must be viewed in light of the nature and seriousness of the charges and the potential penalty.'"[30] In Mr. Ronk's case, of course, both the charge and the penalty are the most serious of all.

In *Williams*, the Court wrote, "In the instant case, it is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer."[31] The "representation during the sentencing phase fell short of professional standards" in large part because counsel

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[28] *Id.* at 390.

[29] *Id.* at 390–91.

[30] *Doss v. State*, 19 So. 3d 690, 695 (Miss. 2009) (citing *Ross v. State,* 954 So. 2d 968, 1004 (Miss. 2007)).

[31] *Williams*, 529 U.S. at 393.

had "failed to conduct an investigation that would have uncovered extensive records" of the petitioner's troubled past.[32] This was "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned" of significant mitigating evidence.[33]

The Court went on, "Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed.1980)."[34] "[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised 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."[35] This was the first U.S. Supreme Court Sixth-Amendment case "to appreciate the central role that explanatory mitigation plays in capital sentencing proceedings."[36]

Next in the line of U.S. Supreme Court cases on the duty of trial counsel to conduct a constitutionally sufficient mitigation investigation is *Wiggins v. Smith*.[37] The Court cited *Williams*: "[C]ounsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams'[s] voluntary

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[32] *Id.* at 395.

[33] *Id*.

[34] *Id*. at 396.

[35] *Id.* at 399 (emphasis added) (internal quotation marks omitted).

[36] Christopher Seeds, *Strategery's Refuge*, 99 J. Crim. L. & Criminology 987, 1002 (2009).

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

confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'"[38] And the Court once again relied on the ABA Standards: "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."[39]

Importantly for Mr. Ronk's case, in *Wiggins*, trial counsel had arranged for a psychologist to test the defendant.[40] (Although in Mr. Ronk's case, trial counsel did not arrange for such testing; the psychologist was appointed by the circuit court, and for limited purposes.[41] Rather than arrange for his own expert, counsel simply called Dr. Smallwood as his sole witness during the sentencing phase.) The U.S. Supreme Court held that trial counsel's reliance on only this evaluation by a psychologist was insufficient for purposes of developing mitigation evidence. "These reports revealed nothing, however, of petitioner's life history."[42] The Court found this truncated effort at mitigation lacking and reversed because that inadequate investigation by counsel prejudiced petitioner:

> Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Counsel's conduct similarly fell short of the standards 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

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[38] *Id.* at 522.

[39] *Id.* (ellipsis in original) (internal quotation marks omitted).

[40] *Id.* at 523.

[41] Tr. at 675–76 (testimony of Beverly Smallwood, Ph.D.) ("I was ordered by the Court to conduct an evaluation of him **to determine three things**; one was his competency to stand trial, a second was his mental status at the time of the now documented offense, and whether or not he had the ability at that point to distinguish right from wrong based on any kind of mental disorder, and the third was to assess his intellectual ability." (emphasis added)).

[42] *Wiggins*, 539 U.S. at 523.

> 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.[43]

This is very similar to Mr. Ronk's case, where counsel did no mitigation investigation, relying instead on the court-ordered pre-trial psychological evaluation. And as in Mr. Ronk's case, in *Wiggins* that "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment,"[44] and, as a result, "counsel put on a halfhearted mitigation case."[45]

The Court stated, "As we established in *Strickland*, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'"[46]

In 2005, the U.S. Supreme Court further emphasized the constitutional requirement for a thorough mitigation investigation in *Rompilla v. Beard*.[47] The petitioner's trial attorneys did not look at his school records,[48] "records of Rompilla's juvenile and adult incarcerations,"[49] or "evidence of a history of dependence on alcohol that might have extenuating significance."[50]

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[43] *Id.* at 524 (citing *Strickland*, 466 U.S. at 688; *Williams*, 529 U.S. at 396; ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)) (emphasis in original) (internal quotation marks omitted).

[44] *Id.* at 526.

[45] *Id.*

[46] *Id.* at 528 (citing *Strickland*, 466 U.S. at 690–91).

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

[48] *Id.* at 382.

[49] *Id.*

[50] *Id.*

And "the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction."[51]

Again the Court stated that "we long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'"[52]

The Court wrote,

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although 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, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.[53]

These three U.S. Supreme Court cases—*Williams* (2000), *Wiggins* (2003), and *Rompilla* (2005)—

> mark the Court's recognition that capital attorneys throughout the 1980s and 1990s were often judged at a standard of performance lower, sometimes much lower, than prevailing professional norms and, similarly, that the prejudicial impact of counsel's failures on sentencing proceedings were often underestimated. In each of these cases, the Court determined that representation that likely would have passed the bar in the late 1970s no longer did. In doing so, the Court named the ABA Death Penalty Guidelines as the yardstick.[54]

> The decisions—which explicitly adhere to *Strickland*—do not change the law, but they do show the Court finally taking note that the performance bar has been raised and that standards of capital representation have evolved. Reinvigorating a doctrine that slept for many years, they impose a duty upon counsel to conduct a comprehensive life history investigation along the lines set forth in the Death

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[51] *Id.* at 383.

[52] *Id.* at 387.

[53] *Id.* at 393 (citing *Wiggins*, 539 U.S. at 538; *Strickland,* 466 U.S. at 694) (internal quotation marks omitted).

[54] Christopher Seeds, *Strategery's Refuge*, 99 J. Crim. L. & Criminology 987, 1002 (2009).

Penalty Guidelines.[55]

In each case, "the Court found representation deficient that it would have accepted years earlier. In each case, the Court reiterated that prevailing performance standards should guide assessments and stressed the need for thorough life history investigation as a precursor to any strategic decision-making."[56]

Although there is some debate about just what *Williams*, *Wiggins*, and *Rompilla* require when trial counsel did some investigation and then decided to stop investigating for strategic reasons—i.e., because it became apparent that turning up further information would do more harm than good—one thing is beyond dispute: defense counsel may not neglect doing *some* mitigation investigation. In Mr. Ronk's case, counsel did no mitigation investigation.[57] This despite Dr. Smallwood's recommendation to trial counsel that one be done—and her informing him that she was not qualified to do it.[58] Counsel did not procure the records necessary for a mitigation study.[59] Counsel engaged the services of no other psychologist, no mitigation specialist, no one at all. No one in the public defender's office made the effort.

The only person associated with the defense who tried was Matthew Busby, who was not an employee of the public defender; he was an unpaid volunteer who obtained some potentially

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[55] *Id.* at 1006–07.

[56] *Id.* at 989.

[57] Affidavit of Matthew Busby, attached as Ex. 2, at ¶ 16; affidavit of Susan Ronk, attached as Ex. 4, at ¶ 19; *see also* Smallwood report, attached as Ex. 8, at 24–25 ("However, as noted, a mitigation study is recommended.").

[58] Smallwood report, attached as Ex. 8, at 24 ("The present examination is not a mitigation study, which is outside the scope of my current practice.").

[59] *See id.* at 24 ("However, I do not have the benefit of those records.") Counsel never did obtain them.

mitigating evidence that lead defense counsel did not want to see, let alone use.

> I took it upon myself to obtain, at my own expense, voluminous records from these institutions. . . . After I obtained and reviewed these records, I showed them to Mr. Geiss. Mr. Geiss was not interested in the records. He just pushed the records to the side. They were not made use of in the trial—neither at the culpability phase nor at the penalty phase.[60]

In light of Mr. Busby's affidavit, it appears that the most likely reason for this failure was that lead counsel was too ill do deal with it.

Trial counsel did not interview Mr. Ronk's adoptive parents about potential mitigating information.[61] He did not try to get in touch with any of the mental-health professionals from whom Mr. Ronk and his family received counseling, beginning when Mr. Ronk was in fifth grade.[62] (Post-conviction counsel located three of them and were able to interview two, Tom Burklow and James Long.) He did not obtain information about Mr. Ronk's family and how to get in touch with family members.[63] His conversations with the parents—by long-distance phone calls—were for the sole purpose of trying to get them to convince Mr. Ronk to accept a plea deal.[64] He did not seek out Mr. Ronk's biological mother, who would have been easy to find because she has lived at the same address since 1999 and her contact information is readily available.[65] (Post-conviction counsel had no trouble locating and interviewing her.) He did not attempt to learn anything about Mr. Ronk's biological father (also located and interviewed by

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[60] Affidavit of Matthew Busby, attached as Ex. 2, at ¶¶ 19–21.

[61] Affidavit of Susan Ronk, attached as Ex. 4, at ¶ 9–11.

[62] *Id.* at ¶¶ 7, 8.

[63] *Id.* at ¶ 9.

[64] *Id.* at ¶ 11.

[65] Affidavit of Jackie Burrell, attached as Ex. 5, at ¶ 2.

post-conviction counsel), or any other members of his birth family, who may have been able to provide valuable information in the course of the kind of reasonable mitigation investigation required under *Williams*, *Wiggins*, and *Rompilla*.

The U.S. Supreme Court has made it clear that "[t]he Constitution *requires* States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall."[66] In Mr. Ronk's case, the barrier was trial counsel's illness and resultant failure to conduct a mitigation investigation.

2. The requirement for a constitutionally adequate mitigation investigation is firmly established by Mississippi Supreme Court caselaw.

In a 2007 case, *Ross v. State*,[67] this Court observed that "[o]ur state case law has not extensively addressed what constitutes adequate investigation into mitigating circumstances."[68] It did cite several state cases, though, including *Brown v. State*, wherein it held that the defendant was entitled to a hearing on ineffective assistance because his trial counsel had a psychological evaluation administered but failed to submit a mitigation report on the evaluation.[69] The Court then discussed the failure of Ross's trial counsel to conduct an investigation in preparation for the sentencing hearing. It concluded that "[g]iven the severity of the charge against Ross, defense counsel's failure to investigate Ross['s] psychological problems and his disciplinary record in prison substantially undermines our faith in Ross'[s] sentence, and therefore constitutes

[66] *McKoy v. North Carolina*, 494 U.S. 433, 442, 110 S. Ct. 1227, 1233, 108 L. Ed. 2d 369 (1990) (emphasis in original).

[67] *Ross v. State*, 954 So. 2d 968 (Miss. 2007).

[68] *Id.* at 1005.

[69] *Id.* (citing *Brown v. State*, 749 So. 2d 82, 90–91 (Miss. 1999)).

ineffective assistance of counsel for the sentencing phase of the trial."[70]

Then, in 2009, this Court decided *Doss v. State*.[71] The majority opinion discussed at length the failure of trial counsel to conduct an adequate mitigation investigation. The Court held that this failure constituted ineffective assistance of counsel. In short, trial counsel had reviewed some records, but had not followed up adequately.

The dissent to this part of the opinion argued that trial counsel "did perform a reasonable investigation for mitigation evidence."[72] But even if one considers that attorney's investigation adequate, contrast it with the facts of Mr. Ronk's case: his counsel did not even hire an expert. The court-appointed psychologist, who had done a limited pre-trial evaluation, advised trial counsel to have a mitigation study done—explicitly stating that that was outside the scope of her practice[73]—but he ignored that advice. He did not even talk with his client's parents about potentially mitigating evidence.[74]

B. Lead counsel's illness and its effects

Unfortunately, Gordon Eric Geiss, Mr. Ronk's lead counsel, suffered from numerous chronic maladies. His death certificate states "coronary artery disease" as the cause of death.[75] It also lists "renal disease, chronic obstructive pulmonary disease, congestive heart failure, and

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[70] *Id.* at 1006 (citing *Davis v. State*, 897 So. 2d 960, 967 (Miss. 2004); *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990)).

[71] *Doss v. State*, 19 So. 3d 690 (Miss. 2009).

[72] *Id.* at 720.

[73] Smallwood report, attached as Ex. 8, at 24.

[74] Affidavit of Susan Ronk, attached as Ex. 4, at ¶ 9.

[75] Death Certificate of Gordon Eric Geiss, attached as Ex. 1.

diabetes" as "other significant conditions . . . contributing to death."[76]

1. Evidence in the trial record of lead counsel's illness and its effects

The trial record contains much evidence of Mr. Geiss's illness, how debilitating it was, and how it contributed to his ineffectiveness.

In the trial and supplemental transcripts:

- Trial transcript at page 6: The arraignment was handled by otherwise nonparticipating counsel due to lead counsel's need to recover from a recent hospitalization.
- Trial transcript at page 20: Lead counsel has physical difficulties during motion hearing argument due to side effects of medication.
- Trial transcript at pages 24–25: There is a discussion of the signing of motions by third parties and duplicative filings as a result of confusion during lead counsel's hospitalization.
- Trial transcript at page 200–01 and supplemental transcript at pages 56–57: Lead counsel was absent during record reconstruction proceedings during voir dire due to illness. (THE COURT: "Mr. Stewart, I know you were not at the bench. Mr. Geiss has been excused for a personal reason.")
- Trial transcript at pages 243–44: Shortness of breath affected lead counsel's performance during voir dire examination.
- Trial transcript at pages 567 and 570: Lead counsel admitted that he had neglected to make a directed verdict motion at the close of the evidence because "I'm really not having a good day."

[76] *Id.*

- Trial transcript at page 615: Lead counsel admitted to being "terribly confused" and unable to answer court inquiry during jury-instruction conference.
- Trial transcript at page 646: During closing argument at culpability phase, Mr. Geiss, obviously struggling, said, "Remember on the stand, and excuse me I'm short of breath . . . ."
- Trial transcript at page 705: Penalty phase jury-instructions conference was handled by second chair counsel, despite no other participation in penalty phase by that counsel.
- Trial transcript at page 751: Lead counsel was absent from hearing on motion for new trial due to illness ("THE COURT: All right. Mr. Stewart, and for the record Mr. Geiss was trial counsel, correct? MR. STEWART: Yes, ma'am. THE COURT: He is ill and unable to be here, correct? MR. STEWART: That is correct.").
- Supplemental transcript at pages 13–14: The trial judge noted on the record that lead trial counsel had been "ill for many years" and that he had retired.
- Supplemental transcript at page 51 (trial judge discussing events during voir dire): "Mr. Geiss [had] been excused for a personal reason."
- Supplemental transcript at pages 56–57: "THE COURT: I do know during this time period that Mr. Geiss was on some medication, I believe, that required him to drink water and go to the rest room."

The Clerk's Papers back up the trial court's findings regarding duplicative motions prepared and/or signed by non-participating counsel for lead or second-chair counsel:

- Clerk's Papers pages 31–42: omnibus multi-part motion filed February 25, 2010,

signed by nonparticipating counsel for second-chair counsel

- Clerk's Papers pages 78–80: motion for psychological evaluation signed with name of lead counsel with initials of nonparticipating counsel
- Clerk's Papers pages 52–59, 66–77, 81–83, 86–87: motions filed March 1 that were duplicative of motions filed on February 25, also signed with name of lead counsel with initials of nonparticipating counsel

2. Other evidence of lead counsel's illness and its effects

Other evidence of lead counsel's illness is provided by the affidavit of Matthew Busby.[77] Mr. Busby was an attorney in private practice in Harrison County at the time of the trial. He was building a criminal-defense practice and wanted to get experience with capital-murder cases, so he volunteered to help with Mr. Ronk's trial.

In his affidavit, Mr. Busby states that

> Throughout the pre-trial proceedings and during the trial itself, Mr. Geiss was in extremely poor health. . . . During the trial, Mr. Geiss's health declined precipitously. He was often red-faced and winded, huffing and puffing. He had fluid on his lungs and a heavy cough. He was a big, heavy-set man. He often sat in a chair with his hands resting on a cane.[78]

Mr. Busby notes that Mr. Geiss's health problems had a negative impact on his representation of clients, including Mr. Ronk:

> In my opinion, there was no fully functional leader with respect to Mr. Ronk's defense team. No one was calling the shots or directing defense team members what to do.
>
> Mr. Geiss was poorly prepared, in contrast to the thorough preparation by the District Attorney's office. I believe that Mr. Geiss's lack of adequate preparation was in a large measure because of his poor health.

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[77] Affidavit of Matthew Busby, attached as Ex. 2.

[78] *Id.* at ¶ 9, 12.

> It was difficult for Mr. Geiss to visit clients at the Harrison County Adult Detention Center due to his health. (Jail visits were somewhat arduous even for those of us in good health.) When he did visit Mr. Ronk, the meetings were not long.
>
> His health declined visibly, and I would not have been surprised if he had passed away anytime during his last two years at the Public Defender's Office. He was in and out of the hospital several times. Toward the end of that time, I believe that Mr. Geiss was doing only routine, low-stress tasks such as preparing preliminary files so that he could get enough time in for disability retirement. He spent a significant amount of time in the office watching movies on DVDs.
>
> I believe that Mr. Geiss would have been a good defense attorney if he had been healthy, but I never understood why Mr. Geiss got assigned Mr. Ronk's capital-murder case in his condition, especially considering that Lisa Collums of the PD's office had recently gotten a directed verdict on a capital murder case. I thought that she should have been lead counsel on Mr. Ronk's case.[79]

These assessments of Mr. Geiss's health and performance are corroborated by the affidavit of Ramiro Orozco, a former Harrison County Assistant Public Defender who worked with Mr. Geiss.

> Mr. Geiss was always ill. I believe it was a serious, chronic illness, or illnesses. I do not know the exact nature of his maladies, but I do know he was under the treatment of a physician for heart related matters and was deteriorating at the time of my leaving the Public Defender's office in 2008. I was aware that Mr. Geiss began to be hospitalized frequently after my departure.
>
> A few weeks after I began working at the Public Defender's office, I was assigned as second chair on a murder trial. Mr. Geiss was first chair.
>
> I was able to observe Mr. Geiss and his poor health was apparent, to the point that on the first day of trial he showed up to the wrong court room.
>
> Mr. Geiss did not meet with the client until the Friday before the Monday start of the trial and now that I have been practicing for several years I am of the opinion that his performance was substandard.
>
> On the first morning of the trial, at about 9:15, Mr. Geiss still had not appeared in the courtroom, keeping everyone waiting. I went to look for him. I found him sitting in an empty courtroom. No one else was in that room. He did not seem to realize that he was in the wrong room. He looked ill.

[79] *Id.* at ¶ 11, 14, 15, 10, 13.

> Mr. Geiss called no witnesses, he failed to make objections and made inappropriate comments during his closing argument.
>
> I believe that Mr. Geiss['s] health issues had a detrimental effect in his ability to effectively prepare, present and defend matters for trial. His lack of awareness, stamina and mental clarity were always at issue.[80]

These affidavits, along with the other evidence, show that the failure to do a mitigation investigation was not a strategic decision—and that counsel's health was likely the explanation. He did not do enough investigating to know what strategy would be effective. As the U.S. Supreme Court held in *Wiggins*, "As we established in *Strickland*, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'"[81] No such reasonable judgment was possible here, since there was no investigation.

It is apparent, rather, that the failure to investigate was due to counsel's illness and its effects. It is also possible that counsel did not fully understand the requirement that he do a mitigation investigation. Because of his passing, it is impossible to get an affidavit from him. But considering the affidavits of Mr. Busby and Mr. Orozco, it is clear that the neglect was not a strategic decision.

The ABA Guidelines require lead counsel to bear 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."[82] In Mr. Ronk's case, "there was no fully functional leader with respect to Mr. Ronk's defense team. No one was calling the shots

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[80] Affidavit of Ramiro Orozco, attached as Ex. 6, at ¶¶ 7–13.

[81] *Wiggins*, 539 U.S. at 528 (citing *Strickland*, 466 U.S. at 690–91).

[82] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.4 B (Rev. 2003).

or directing defense team members what to do."[83]

Even without looking outside the trial record, it is apparent that lead counsel did not, and likely was not able to, discharge that responsibility. And Mr. Busby's affidavit makes that even more apparent.[84] Perhaps it is possible that someone serving as lead counsel in a capital-murder trial might be able to effectively "allocate, direct and supervise [a trial team's] work in accordance with these Guidelines and professional standards"[85] while sick and requiring periodic hospitalization. But in this case, that did not happen.

In light of all that is known about lead counsel's serious health problems, he should have sought permission to withdraw so that Mr. Ronk might be represented by effective counsel. Such a withdrawal is contemplated, and even required, by Mississippi Rule of Professional Conduct 1.16(a):

> Except as stated in paragraph (c) [i.e., if ordered to continue the representation by the court], a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client . . . .[86]

While it is obviously too late for the withdrawal of lead counsel to prevent injustice, this Court should reverse and remand this case for a new trial, or at the least a new sentencing hearing, as a corrective.

B. Mr. Ronk's trial counsel was ineffective for "opening the door" to damaging evidence during the sentencing phase, for eliciting otherwise inadmissible and prejudicial prior-bad-acts evidence from Dr. Smallwood, and for failing to

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[83] Affidavit of Matthew Busby, attached as Ex. 2, at ¶ 11.

[84] *See generally* affidavit of Matthew Busby, attached as Ex. 2.

[85] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.4 B (Rev. 2003).

[86] Miss. R. Prof. Conduct 1.16(a)(2).

anticipate and/or meet additional non-statutory aggravating evidence the State elicited from her during cross examination.

Failure to anticipate damaging evidence that the State is likely to adduce, even if not elicited from the defendant's own witness, is prejudicial ineffectiveness standing alone.[87] When it is the defendant's own witness who provides that damaging information, it is even more ineffective and prejudicial.[88]

In *Ross v. State*, this Court found "undoubtedly highly prejudicial" ineffectiveness in the penalty phase where, without sufficient investigation, the defense adopted a "good prisoner" *Skipper v. South Carolina*[89] mitigation theory that opened the door to introduction by the State of evidence to "cast Ross as unrepentant [and a] danger to society."[90] Because of insufficient investigation—including a failure to fully interview their client—Ross's counsel called two witnesses in aid of the *Skipper* mitigation theory: the local sheriff who had housed Ross after his original arrest, and Ross himself. On cross examination the State elicited evidence from the sheriff that Ross had attempted an escape while in the testifying sheriff's custody and had thereafter been moved to another, more secure jail to await trial.[91] The State's cross of Ross elicited that he actually had a poor disciplinary record during other incarcerations as well, including having been disciplined for manufacturing alcohol while in federal custody.[92]

The instant matter is factually on all fours with *Ross*. Mr. Ronk's counsel permitted the

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[87] *Rompilla*, 545 U.S. at 382–90.

[88] *Ross*, 954 So. 2d at 1005–06.

[89] *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

[90] *Ross*, 954 So. 2d at 1006.

[91] *Id.* at 1005.

[92] *Id.*

jury to hear prejudicial evidence and inferences from the testimony of Mr. Ronk's own mitigation witness. Mr. Ronk's counsel, like Ross's, adopted a mitigation theory without minimal investigation of even what the client could tell him, much less obtaining information about him from those who knew him or from third parties. Mr. Ronk's counsel then went on to present that theory through a witness who could present it in only a weak and minimal fashion, and whose testimony was exploited by the State to do much more harm than good. This was, as in *Ross*, "undoubtedly highly prejudicial."[93]

The only mitigation theory or evidence presented by Mr. Ronk's trial counsel was based on testimony from Dr. Smallwood that Mr. Ronk gave her a history of a difficult and unhappy childhood and youth that was disrupted by drug abuse and behavior problems, and which had involved numerous institutionalizations over the course of his life. Those behaviors were, Dr. Smallwood opined, "congruent with" diagnoses of bipolar disorder and attention deficit hyperactivity disorder (ADHD), a diagnosis that had been made during the single prior hospitalization whose records had been furnished her by the defense.[94]

That single set of records was from Mountainside Hospital in New Jersey. Post-conviction counsel has obtained many other records from numerous institutions where Mr. Ronk was treated over the years. They are attached as exhibits to this motion and number in the vicinity of 1,000 pages.[95] Apparently trial counsel made no effort to obtain them. As Dr. Smallwood noted in her final recommendations, the lone record trial counsel provided to her was

[93] *Id.* at 1006.

[94] Tr. at 679.

[95] Exs. 11–18, 20–22.

insufficient for a full mitigation study by whoever was retained to perform one.[96]

Due to the failure of Mr. Ronk's counsel to do the necessary investigation to provide her with a full medical and psychological treatment history, Dr. Smallwood was unable to include diagnoses in her report.[97] When she testified, she likewise could not, and did not, make a definitive diagnosis of bipolar disorder or attention deficit disorder or any other serious mental illness on direct examination; she could testify only that such diagnoses had been made in the one medical record she was able to review.[98] The most she could say as a psychological expert was that based on damaging prior bad acts admitted to by the defendant, the earlier diagnoses of bipolar disorder and ADHD were "consistent" with such behavior patterns, though she could not "substantiate" that Mr. Ronk actually had bipolar disorder.[99]

The relevant behaviors on which Dr. Smallwood relied to make this non-diagnosis were full of otherwise inadmissible and extremely damaging information concerning prior bad acts by Mr. Ronk, including

> a history throughout his life of impulsive behavior, aggressive and threatening kind of behavior, not thinking before he made decisions, and that is something that certainly, you know, are Hallmarks [*sic*] of both manic depressive disorder and ADHD.[100]

Even more damaging was her testimony, still on direct examination, about a previously undiagnosed childhood conduct disorder. And this testimony, astonishingly, was in response to Mr. Ronk's counsel bringing it up:

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[96] Smallwood report, attached as Ex. 8, at 24–25.

[97] *Id.* at 22–25.

[98] Tr. at 682.

[99] Tr. at 683.

[100] Tr. at 679.

> Q. Okay. Based upon your interviews and testing did you find that Mr. Ronk had any kind of what we would call a conduct problem, conduct disorder, anything like that?
>
> A. Right. This was not documented in his records, but as I look back to the history that was given it appears that he would have had a conduct disorder in his childhood.
>
> Q. [W]hat with regard to Mr. Ronk would that be?
>
> A. [W]ell it's—conduct disorder is not just having a little bad behavior, which a lot of kids have, but, in fact, it's a repetitive and persistent pattern of behavior in which the basic rights of others or age appropriate norms are violated. It can involve aggression to people or animals, it could involve destruction of property, deceitfulness and threat of serious violation of rules, and all of those were present in Mr. Ronk.[101]

None of this damaging testimony would have been admissible had it been offered by the State to establish the general bad character of the defendant in connection with sentencing.[102]

If defense counsel had properly prepared himself and his witness for her testimony, he would have known that, although tepid, this testimony was the best Dr. Smallwood could do. Instead, he asked again if these prior diagnoses might, in a stressful situation, make Mr. Ronk "prone to act and make the wrong decision and not totally be in control of that." After dodging the second question for a while, Dr. Smallwood only answered "not totally" and immediately felt it necessary to qualify even that answer with a disclaimer that Mr. Ronk "did not have a mental disorder that overpowered his will."[103]

Even if this Court were to consider only what trial counsel elected to put before the jury during Dr. Smallwood's direct examination, it should reverse for ineffective assistance.

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[101] Tr. at 687–88.

[102] Miss. R. Evid. 403, 404(b), *Stringer v. State*, 500 So. 2d 928, 941 (Miss. 1986) (affirming capital murder conviction but reversing sentence due to inflammatory effect on jury at sentencing of inadmissible prior bad acts and misdemeanor offenses).

[103] Tr. at 689.

However, the testimony defense counsel elicited about bad acts and conduct disorder opened the door for the State on cross. And the prosecutor walked right in.

The State began its cross-examination by expanding on the history of misbehavior: that all of Mr. Ronk's bad acts, up to and including killing Ms. Craite, were mere "behavior choice[s], and that he "was not overcome by some kind or organic mental disorder or anything like that."[104] The prosecutor then deftly moved on to explore in more detail the behaviors Dr. Smallwood had relied on in arriving at her "consistent with" bipolar disorder opinion. This added law-breaking and manipulation of others to the litany of Mr. Ronk's bad "behavior choices." Then, the State brought out more aggravating information: that Mr. Ronk allegedly told Heather Hindall in a love letter that he planned an escape from jail to be with her.[105] Accusations of escape are something this Court has recognized as "highly prejudicial" when made part of the record in a sentencing matter.[106] Moreover, the letter was never actually introduced or acknowledged to have been seen by the witness.

The State's cross-examination culminated with getting Dr. Smallwood, Mr. Ronk's witness, to label him a "sociopath," and to give that damaging label the imprimatur of scientific certainty as a firm diagnosis of "anti-social personality disorder."[107] This is a much stronger opinion than she had offered earlier about his history being only "consistent" or "congruent" with the less stigmatizing—and certainly more mitigating—mental illness of bipolar disorder. It also discredited Mr. Ronk's version of the events that led to Ms. Craite's death and supported the

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[104] Tr. at 691.

[105] Tr. at 698–99.

[106] *Ross*, 954 So. 2d at 1005–06; Tr. at 694–99.

[107] Tr. at 700.

State's "heinous, atrocious and cruel" aggravator.[108] This Court has recognized that when, as a result of lack of proper investigation and preparation by the defense before adopting a mitigation theory, the State is able to elicit evidence from the defendant's own mitigation witness that tends to cast him as "unrepentant" or a "danger to society," as the bad-acts and sociopath evidence did in this case, such evidence is "undoubtedly highly prejudicial."[109]

At no point during the State's cross-examination of Dr. Smallwood did defense counsel lodge an objection—even when the State elicited rank speculation on matters the witness had no business testifying about. For example:

> Q: Which would include violation of the law perhaps?
> A: Perhaps, yes, sir."[110]

and:

> Q: That doesn't excuse necessarily, does it, what he did?
> A: No.
> Q. It would probably be a fair statistic that the overwhelming majority of adopted children don't stab and kill somebody and burn their house, do they?
> A. Yes, that's correct.[111]

In argument, the State exploited this testimony to cast Mr. Ronk in exactly that light. It used Mr. Ronk's own witness to paint him as an "evil," manipulative, exploitative sociopath hiding behind nothing more than a "bad childhood,"[112] rather than a traumatized, disturbed child who grew up to have a serious mental illness that contributed to his committing the crime. This exacerbated the harm caused by using an unqualified witness to present mitigation evidence, as

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[108] Tr. at 699–700.

[109] *Ross*, 954 So. 2d at 1006.

[110] Tr. at 695.

[111] Tr. at 697.

[112] Tr. at 736, 742.

well as counsel's failure to make any significant effort to argue and explain the mitigation.

The State then capitalized on all this by reminding the jury that Mr. Ronk's mitigation was so flimsy that even his own witness had to testify, as a matter of scientific proof, that he was inherently violative of the rights of others, and that a death sentence was therefore the only reasonable choice.[113]

Defense counsel's redirect examination and closing argument did not even attempt to explain, much less ameliorate, Dr. Smallwood's devastating diagnosis of Mr. Ronk as having anti-social personality disorder. Rather, his redirect consisted of re-eliciting from Dr. Smallwood her damaging testimony—that she stuck by all her opinions (including apparently the sociopathy opinion) despite the fact that, based on her testing, she knew "he wasn't being completely truthful" with her.[114] In his closing argument, counsel tepidly articulated the "product of lack of normal control due to mental illness" theory,[115] but ultimately just told the jurors to listen to Dr. Smallwood, read her report, and follow their consciences.[116]

The most direct attack on Mr. Ronk's credibility was elicited not by the State, but by his own counsel. On cross-examination, Dr. Smallwood testified that Mr. Ronk was "probably" feigning, lying, or exaggerating.[117] But the final testimony the jury heard, on redirect, was more devastating. In response to defense counsel's final question, Dr. Smallwood left the jury with the clear impression that there was no "probably" about it. She testified that she "*knew* [Mr. Ronk]

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[113] Tr. at 699–700.

[114] Tr. at 703.

[115] Tr. at 738–39.

[116] Tr. at 737, 740.

[117] Tr. at 693.

wasn't being completely truthful."[118]

Had this testimony been elicited by the State it would have been unfortunate. That it was unnecessarily elicited by Mr. Ronk's own counsel as the final testimony heard by the jury is egregious. This Court has expressly condemned a lawyer's endorsing his client's untruthfulness before the trier of fact as "an independent violation of the Sixth Amendment" and "an evil of such magnitude that no showing of prejudice is necessary for a reversal."[119]

C. Trial counsel was ineffective for failing to engage an expert qualified to do the constitutionally required mitigation investigation.

This Court has recognized that a defendant must have an expert qualified to assist in the defense. In *Evans v. State*, this Court reversed the defendant's murder conviction because the trial court denied the defendant's request for funds to hire an expert in post-traumatic stress disorder (PTSD).[120] The trial court in *Evans* believed that the defendant was not entitled to a PTSD expert because he had already been evaluated for competency by a psychologist.[121] This Court reversed and held that the defendant needed an expert who could not just tell lay jurors that the defendant suffered from PTSD, but who could also "'translate a medical diagnosis into a language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.'"[122] Similar to the defendant in *Evans*, Mr. Ronk also needed an expert qualified to conduct a mitigation study and to explain it to the jury. As the *Williams* Court

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[118] Tr. at 703 (emphasis added).

[119] *Ferguson v. State*, 507 So. 2d 94, 97 (Miss. 1987**)**.

[120] *Evans v. State*, 109 So. 3d 1044, 1048–49 (Miss. 2013).

[121] *Id.* at 1047.

[122] *Id.* at 1048 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 80 105 S. Ct. 1087, 1095, 84 L. Ed. 2d 53 (1985)).

pointed out, it is not enough for an expert to merely recount the contents of a report; it is also necessary that the jury receive an explanation of the implications of the report's data.[123]

D. A constitutionally sufficient mitigation investigation would have yielded a wealth of mitigating information about Mr. Ronk that would have led to a reasonable probability of a different outcome.

A reasonable mitigation investigation would have delved into Mr. Ronk's life history.[124] It would have asked, considering that Mr. Ronk was adopted, what were the consequences of his learning of his adoption? It would have discovered that he believed that his biological mother's pregnancy resulted from rape[125]—and that he learned this fact as a child. It would have learned of his feelings of being "a mistake" and of being rejected by both his birth parents and his adoptive parents. It would have looked deeply into child-development issues. None of this was investigated by trial counsel, nor was it presented and explained to the jury, as required for a constitutionally reasonable investigation.[126]

Trial counsel should have engaged the services of a qualified expert such as Dr. James Gabarino. Mr. Ronk's post-conviction counsel commissioned a report from Dr. Gabarino on the recommendation of the psychiatrist who evaluated Mr. Ronk during the post-conviction investigation. Dr. Gabarino specializes in child development and family systems. He interviewed

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[123] *See Williams v. Taylor*, 529 U.S. 362, 399, 120 S. Ct. 1495, 1516, 146 L. Ed. 2d 389 (2000) ("[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised '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.").

[124] *See Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003) ("These [psychologist's] reports revealed nothing, however, of petitioner's life history.").

[125] His biological mother describes his conception as a "date rape." Affidavit of Jackie Burrell, attached as Ex. 5, at ¶ 9.

[126] *See* Williams, 529 U.S. at 399 (explanation is necessary).

Mr. Ronk on August 31, 2016. His report provides much that would have been compelling mitigation evidence. It could well have convinced at least one juror to spare Mr. Ronk's life.

Dr. Gabarino reported that "Tim Ronk is best understood as a troubled child inhabiting a young man's body."[127] That statement alone might have been enough to give jurors pause—to make one or more think about the fact that our society does not condone the killing of children. But there is more.

> His troubled development appears to flow from some combination of temperamental vulnerabilities combined with disrupted family relationships linked to parental rejection. Despite the generally positive family and community environment provided by his adoptive parents, the unresolved issues of his adoption and his reaction to that adoption had a serious negative effect on Tim's emotional life and development. His problems with attachment and a resulting "emotional neediness" and oppositional and defiant behavior flowed from this disconnect and deteriorated in adolescence. This in turn led to chronic maladjustment, substance abuse, and delinquent behavior leading up to the crime for which he was sentenced (to death row). His developmental problems came to fruition during adolescence and early adulthood as very serious issues with identity, socio-emotional immaturity, deceitfulness, substance abuse and depression.[128]

Dr. Gabarino discovered that Mr. Ronk has struggled nearly all his life with feelings of parental rejection. "The experience of parental rejection has been found across cultures to lead to disrupted development, an effect so powerful that the most prominent research in this field refers to it as 'a psychological malignancy.'"[129]

> In Tim's case his adoption has been the central fact of his life, as it is for so many individuals who have been adopted (for better or for worse). The developmental significance of the struggle to deal with adoption issues is captured in the title and in the content of Nancy Verrier's 2003 book "The Primal Wound." Research reveals that adopted children are disproportionately represented in a wide range of

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[127] Affidavit of James Gabarino, Ph. D., attached as Ex. 3, at 3.

[128] *Id.*

[129] *Id.* at 4.

developmental issues—ranging from depression to delinquency.[130]

Dr. Gabarino asked Mr. Ronk to name his worst childhood memory. His answer: "When I overheard my parents say they wished they had not adopted me."[131] Further,

> Tim reports that at age six he overheard his parents talking about him, and that he heard them say that "I was the biggest mistake in their whole lives." And, "I wish you were never born." And, "I wish we had never adopted you." At age 9 he remembers his mother saying, "the biggest mistake I ever made was adopting you." These combine the two most devastating things any child can hear from a parent (wishing you were never born in general, and wishing that an adopted child had not been adopted).[132]

Mr. Ronk told Dr. Gabarino that "my parents were trying to create the perfect family and they didn't want me because I wasn't good like my sister."[133]

Dr. Gabarino explained in his affidavit,

> It is difficult to know how Tim might have developed had he been born into and lived in a positive, supportive environment with a set of mature and committed biological parents (where the issue of rejection by his biological parents and tentativeness about his status with his surrogate parents would not have been an issue). As researcher Bruce Perry has found in his work on the effects of early disruption of attachment, adverse attachment experience in infancy and early childhood often results in developmental harm that is "not readily observable." It is perhaps not surprising, then, that in Tim's trial and sentencing the impact of him being an adopted child was not recognized. It appears to have been masked by the apparent normality of his external social life (e.g. participating in church youth groups) and his intellect and early academic success (e.g. IQ testing at 130 and placement in a "gifted" program in elementary school).[134]

There is more detail and analysis of Mr. Ronk's disorders stemming from his troubled

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[130] *Id.* at 5.

[131] *Id.*

[132] *Id.* at 9.

[133] *Id.*

[134] *Id.* at 8.

childhood in Dr. Gabarino's affidavit, and it is attached to this motion.[135] It concludes: "These issues constitute significant mitigating factors in any informed sentencing decisions in Tim Ronk's case, and should have been considered in his original sentencing."[136] If they had been, there is a reasonable probability of a different outcome, especially since it would have required only one juror to find that Mr. Ronk's life should be spared.

E. The failure to discover, put on, and properly explain this evidence of Mr. Ronk's mental disorders was ineffective and it prejudiced Mr. Ronk.

The failure to discover and put this evidence of Mr. Ronk's mental disorders before the jury, and to properly explain it, denied him his right to effective assistance of counsel. It prejudiced Mr. Ronk. For it has been empirically shown that evidence of mental illness does affect jurors' decision-making.

The Capital Jury Project (the Project) is a National Science Foundation-funded multistate research effort.[137] It has studied how jurors on capital cases think, what evidence influences their decisions, and how much. In one of its studies,

> Jurors who sat in forty-one South Carolina capital murder cases were randomly sampled. The goal was to interview four jurors per case. The sample includes twenty-two cases resulting in a death sentence ("death" cases) and nineteen cases resulting in a sentence of life imprisonment ("life" cases).[138]
>
> Jurors were interviewed using a fifty-one[-]page survey instrument designed and tested by the Project and covering all aspects of the guilt and sentencing phases of the trial. It included a range of questions about the crime, the defendant, the victim, the victim's family, the jurors' deliberations, and the conduct of the case

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[135] *See generally id.*

[136] *Id.* at 15.

[137] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1539 (1998).

[138] *Id.* at 1540.

> by defense counsel, the prosecutor, and the judge. The survey also asked about the jurors' background characteristics, as well as their general views on the death penalty and the criminal justice system.[139]

The study found that when asked how it would have affected sentencing decisions if the juror had known that the defendant had a history of mental illness, 26.7% of jurors said they would have been "much less likely to vote for death," and 29.5% said they would have been "slightly less likely to vote for death."[140] And when asked whether knowledge that a "defendant had been in institutions but was never given any real help," the impact of that information on jurors' decisions was similar: 20.1% said they would have been much less likely, and 28.1% slightly less likely, to vote for the death penalty.[141]

Clearly, the potentially mitigating evidence about Mr. Ronk's mental health that was never developed by his trial counsel could very well have had an impact. As in *Rompilla v. Beard*, "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing."[142] And as the Court did in *Rompilla*, this Court should reverse and remand this case for at least a new sentencing hearing, if not a whole new trial.

F. Trial counsel's brief, tepid, and incomplete opening statement and closing argument at the penalty phase were prejudicially ineffective.

Trial counsel's opening statement and closing argument at the penalty phase were both

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[139] *Id.* at 1541. More about the study, its methodology, and its findings are detailed in this law review article.

[140] *Id.* at 1559.

[141] *Id.*

[142] *Rompilla*, 545 U.S. at 393 (internal citations and quotation marks omitted).

extremely brief. The opening statement was so short it can easily be reproduced here in its entirety:

> Ladies and gentlemen. You will recall way back Monday when we started this process I talked about them making a decision about whether or not the State should take someone's life. You would want to know as much as possible about that individual, and that is what we're going to try and get across to you today, this morning, we will do that through the testimony of Dr. Beverly Smallwood who was a psychologist—is a psychologist and conducted an evaluation on Mr. Ronk. I'm not going to belabor what it is. She will testify, you will hear that yourselves. But I do ask that you pay attention because some of it is medicalese. And I will try and make sure that Dr. Smallwood explains that as simply as possible. Thank you.[143]

That is six sentences, not counting "Ladies and gentlemen" and "Thank you." One hundred twenty-seven words. Including "I'm not going to belabor what it is." It is not possible to say just what Mr. Geiss had in mind when he said he was "not going to belabor what it is." He should, however, have erred on the side of saying too much rather than too little. For as the U.S. Supreme Court has pointed out, effectiveness means not merely presenting mitigating testimony to the jury, but also *explaining* it: "[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised '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."[144]

Trial attorneys know that at some point they must "sell the argument." Perhaps the best opportunity to do so is in closing argument. There Mr. Ronk's counsel did no better. His close was also quite brief—less than six minutes,[145] only 795 words—and ineffective.[146]

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[143] Tr. at 670–71.

[144] *Williams*, 529 U.S. at 399 (emphasis added).

[145] This Court found abuse of discretion when a trial court limited a closing argument to *twelve* minutes. *Gray v. State*, 351 So. 2d 1342, 1346 (Miss. 1977) ("Further in the punishment

At no point did he ask the jury to enter a life sentence. But he did say that "Timothy Ronk has forfeited his life."[147] He spent eighty-six of those 795 words explaining, for some reason, that Mr. Ronk is not legally insane.[148]

He urged the jurors to read Dr. Smallwood's report,[149] but he spent little time telling them what he thought the report meant. When he attempted to, his explanation revealed more about his ineffectiveness and lack of preparation than about his client:

> If he's fed medications then he's planed out or leveled out or whatever it is that these medications do. I personally still do not understand bipolar disorder fully, but I do understand that it's treated. And if it is not treated it causes problems. Those problems, like Dr. Smallwood told you, cause people that are aggressive or Timothy in this case, to act aggressively in a threatening manner and impulsively, and that I would submit to you is what happened here. Timothy Ronk acted on impulse, and because he has a chemical imbalance his impulses were all wrong. But what you've got to consider is whether or not that's enough to put him to death. Put him to death.[150]

It is easy to imagine jurors hearing this and thinking, yes—that is enough.

Perhaps because of his admitted lack of understanding—"I personally still do not understand bipolar disorder fully"[151]—counsel failed to provide the constitutionally required explanation of what little mitigation evidence he presented. And while Dr. Smallwood briefly,

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stage the court limited the argument of defendant's counsel to twelve minutes. This was clearly an abuse of discretion because this stage of the trial is for the purpose of determining whether defendant will live or die and a defendant should be given ample time to fully argue this important question.").

[146] Tr. at 736–40.

[147] Tr. at 737.

[148] Tr. at 738.

[149] Tr. at 737.

[150] Tr. at 739.

[151] *Id.*

but without any elaboration, touched upon Mr. Ronk's having been adopted, trial counsel did not mention that at all. As Dr. Gabarino's report, commissioned by post-conviction counsel, makes clear, Mr. Ronk's "adoption has been the central fact of his life." Surely the failure to even mention it during the proceeding that would determine whether his client lived or died was prejudicial ineffective assistance of counsel.

G. Mr. Ronk's trial counsel was ineffective in the culpability phase as well as the sentencing phase of the trial.

There are indications that counsel's illness and resulting lack of focus and preparation impaired not only the sentencing hearing but also the culpability phase. For example, during his closing argument during culpability phase, he said to the jury, "[W]e are hard pressed to tell you this is a good solid self-defense case. . . ."[152] This is inexplicable. Self-defense was the strongest defense of the case. It was supported by the evidence, and the court had given a jury instruction on self-defense.[153] And then, stunningly, lead counsel undermined it with this comment. It is hard to come up with a strategic explanation for this gaffe. But he had already said, "excuse me, I'm short of breath." Perhaps he was feeling too ill to mount a vigorous argument and just needed to finish and sit down. At any rate, the effect on the jurors of hearing a defense attorney say that the main defense theory was no good must surely have made a big impression when they deliberated.

Trial counsel's illness also appears to have impeded his performance during the jury-instructions conference:

THE COURT: Mr. Geiss, anything else further that you want to say?

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[152] Tr. at 650.

[153] Tr. at 609–14.

MR. GEISS: I'm somewhat now at a loss of how to argue the case.[154]

* * *

THE COURT: Mr. Geiss, anything additional ones that you know about? [*sic*] I should have included C-5 in that. I was mainly looking at y'alls instructions?

MR. GEISS: No. I'm terribly confused.[155]

* * *

MR. GEISS: It's been our position, and I'm sure the jury would find, that, you know, Mr. Ronk is guilty of something.[156]

This despite the fact that, as previously mentioned, court had given a jury instruction on self-defense.[157] As the judge pointed out, self-defense was "his primary defense in this case."[158] If the jury had decided that it was self-defense, then Mr. Ronk would not have been guilty of murder. Mr. Geiss seemed, again, confused—and ineffective.

V. A review of cases with facts meaningfully similar to Mr. Ronk's case dispels the notion that Mr. Ronk's sentence was not "disproportionate to the penalty imposed in similar cases."[159]

In its opinion at the direct-appeal stage of this case, this Court noted that "Mississippi's sentencing scheme includes numerous safeguards to ensure that the death penalty is not imposed arbitrarily or in a discriminatory manner, not the least of which is this Court's mandatory

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[154] Tr. at 604.

[155] Tr. at 615.

[156] Tr. at 622.

[157] Tr. at 609–14.

[158] Tr. at 622.

[159] Miss. Code Ann. § 99-19-105(3)(c).

proportionality review."[160] "In making this assessment, we must consider both the crime and the defendant."[161] The opinion goes on to summarize the facts of the crime, and concludes: "After considering the circumstances of Ronk's crime and comparing it to the cases included in the appendix below, we find that the jury's imposition of the death penalty in the instant case is not excessive or disproportionate."[162]

But consider that a more telling comparison would be to those cases that were more factually similar to Mr. Ronk's: that is, cases in which the defendant was accused of a killing and an arson (and sometimes of other crimes as well). Such a comparison follows.

A recent Westlaw search of reported Mississippi Supreme Court and Court of Appeals decisions involving murder and arson turned up 137 cases. The following is a look at those cases. In doing this survey, certain cases were winnowed out. First, only cases decided after July 2, 1976, were considered. That is the date on which the U.S. Supreme Court handed down *Gregg v. Georgia*,[163] beginning what is often referred to as the modern era of capital punishment.

Of the remaining cases, only cases in which there had been a conviction for some type of killing were considered. And this killing had to be accompanied by the arson—although not all of the cases include a conviction for arson. Some had arson as the capitalizing felony, but no separate freestanding arson conviction. Other cases had arson as a charge in the indictment, but not necessarily a conviction for arson.

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[160] *Ronk v. State*, 172 So. 3d 1112, 1147 (Miss. 2015), *reh'g denied* (Sept. 17, 2015), *cert. denied*, 136 S. Ct. 1657, 194 L. Ed. 2d 773 (2016).

[161] *Id.* at 1148.

[162] *Id.*

[163] *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

The goal was to look at cases in which the defendant killed the victim or victims and set a fire in connection with the killing, and to analyze the sentences the defendants received.

Of the thirty-five cases that met the above criteria, twenty-six resulted in sentences less than death. In the remaining nine, each defendant was sentenced to death. So in 74.2% of these cases where the defendant killed and set a fire, the sentence was life, sometimes without parole and sometimes not, or a term of years, or both. In only about one quarter were the defendants condemned to die.

Several things stand out. First, in four of the cases that resulted in sentences other than death—15.3%—there was more than one victim. In two of those, both victims died. In the others, one died and one survived.

But the attacks on the survivors were brutal: in one case, the surviving victim suffered burns over more than half his body after the defendant threw a flammable liquid on him and set him alight.[164] The defendant's conduct in that case certainly seems more cruel and brazen than Mr. Ronk's. The perpetrator, after demanding money from his mother's boyfriend and being rebuffed, later returned and attacked his mother and her boyfriend in their home. He sneaked up on his mother and knocked her down. He beat her boyfriend unconscious. When the boyfriend came to, the defendant threw flammable liquid on him and set him on fire. Then the perpetrator set the house alight. The mother died of smoke inhalation in the fire; the boyfriend escaped by running outside. He had burns over 51 to 61% of his body.[165] This resulted in a conviction of capital murder and aggravated assault, after a jury trial, and sentences of life without parole and twenty years.

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[164] *McIntosh v. State*, 917 So. 2d 78 (Miss. 2005).

[165] *Id.* at 81.

Another case that ended in a life sentence was *Moss v. State*.[166] The facts of that case certainly seem more egregious than in the case at bar (although nothing being written here is intended to minimize the tragedy that befell Ms. Craite and her family and friends). The defendant's acts seem considerably more cruel and depraved. The perpetrator went to his ex-wife's home, where he started a fight with her. He took her onto the front porch. Her sister, inside the house,

> heard noises which caused her to open the front door. When she opened the door, she saw Moss standing over Angel, who had been severely beaten. McCormick [the sister] saw Moss [the defendant] pick Angel [the victim] up by her hair, draw out a pocketknife, and slash Angel's throat.
>
> Moss then put Angel in the back of his Ford Bronco truck. Moss tried to get McCormick and Regan Moss, his brother, to assist him, but neither would. Cranston Switcher, who was dating McCormick and was at the house that night, agreed to follow Moss in the Jeep Grand Cherokee that Angel had been driving.
>
> Moss, with Angel in the back cargo area, drove his Ford Bronco to County Road 157 in Alcorn County, where he pulled off the highway, got out of his truck, opened the back hatch, and beat Angel with an unknown object. Moss, followed by Switcher, then drove Angel to a field somewhere in Tishomingo County. Angel's body was transferred from the back of the Ford Bronco onto the floor of the back seat of her Jeep. The fuel line was disconnected and the Jeep was set on fire. The autopsy report indicated that Angel's immediate cause of death was smoke inhalation from the fire.[167]

The defendant pleaded guilty to murder, kidnapping, grand larceny, and arson and was sentenced to life for the murder and terms of years for the other offenses.[168]

In *Franklin v. State*,[169] the defendant shot two people to death and then burned down the

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[166] *Moss v. State*, 940 So. 2d 949 (Miss. Ct. App. 2006).

[167] *Id.* at 951.

[168] *Id.* at 950.

[169] *Franklin v. State*, 23 So. 3d 507 (Miss. Ct. App. 2009).

house around them. The "two bodies that were so severely burned that [firefighters were] unable to determine whether the victims were male or female."[170] A jury returned a verdict of guilty on "two counts of murder and one count of arson. [The defendant] was sentenced to serve a life sentence for each of the murder convictions and twenty years for the arson conviction, with the sentences to run concurrently."[171]

In *Rochell v. State*, the defendant burned down a house and killed two people, but got life.[172] In *Wilson v. State*,[173] the defendant shot two people, one of whom died. "Upon arriving on the scene, investigators found a black pickup truck on fire, with the body of Joseph Hartzog inside. . . . Two . . . neighbors . . . saw Wilson throw burning rags into the black pickup truck."[174] The defendant got life in this case, too. And in *Smith v. State*,[175] there were two victims. The defendant burned down his ex-wife's house with her and their grandson inside. The grandson died, and the ex-wife was injured. Sentence: life.[176]

A complete listing of the cases analyzed for this argument are appended to this motion.[177] They show that the application of the death penalty is arbitrary and capricious. Cases with more egregious facts than in Mr. Ronk's resulted in life sentences rather than death. Cases with

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[170] *Id.* at 510.

[171] *Id.* at 509.

[172] *Rochell v. State*, 748 So. 2d 103 (Miss. 1999).

[173] *Wilson v. State*, 923 So. 2d 1039 (Miss. Ct. App. 2005).

[174] *Id.* at 1040.

[175] *Smith v. State*, 897 So. 2d 1002 (Miss. Ct. App. 2004).

[176] *Id.*

[177] See Appendix, attached to this motion.

multiple victims resulted in life sentences, while some cases with one victim, as in the case at bar, resulted in a death sentence. Three-quarters of the cases that involved killing and arson resulted in life sentences rather than death. And whether there was a jury trial or a plea deal does not account for the differences. These cases strongly suggest a lack of proportionality in sentencing, including in Mr. Ronk's case, in violation of Mr. Ronk's rights under the Eighth and Fourteenth Amendments and Mississippi state law.

VI. Mississippi's death penalty statute is unconstitutional because it is arbitrarily and capriciously applied.

The best explanation for this situation is that the death penalty, as applied, is inherently arbitrary and capricious, despite all efforts to eliminate unfairness. As Justice Brennan observed nearly half a century ago:

> If a punishment is unusually severe, **if there is a strong probability that it is inflicted arbitrarily**, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.[178]

In 1972, the U.S. Supreme Court was concerned that the death penalty, "rather than resulting in the selection of 'extreme' cases for this punishment, actually sanction[s] an arbitrary selection."[179] In an attempt to "patch up the death penalty's legal wounds,"[180] it handed down *Gregg v. Georgia* in 1976.[181] That decision required bifurcated trials in death-penalty cases and a

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[178] *Furman v. Georgia*, 408 U.S. 238, 282, 92 S. Ct. 2726, 2748, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) (emphasis added).

[179] *Id.* at 295.

[180] *Glossip v. Gross*, 135 S. Ct. 2726, 2755, 192 L. Ed. 2d 761, *reh'g denied,* 136 S. Ct. 20, 192 L. Ed. 2d 990 (2015) (Breyer, J., dissenting).

[181] *Gregg v. Georgia*, 428 U.S. 153, 162, 96 S. Ct. 2909, 2920, 49 L. Ed. 2d 859 (1976).

couple other attempted safeguards to try to eliminate arbitrariness. After that, this Court found Mississippi's amended death-penalty statutes constitutional.[182]

Forty years later, it is apparent that the safeguards do not work. Two Justices of the U.S. Supreme Court have called for a reexamination of capital punishment in light of their view that "[a]lmost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed."[183] They believe that "[d]espite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."[184]

One of the several problems that opinion described is exactly what is suggested by the Mississippi cases discussed *supra*: those who get life sentences often commit more egregious crimes—killing more people or committing more cruel, reprehensible acts—than those who wind up on death row.[185] The opinion in *Glossip* described one of the "[t]horough studies of death penalty sentences [that] support[s] this conclusion."[186] It is clear from the study that application

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[182] *Jackson v. State*, 337 So. 2d 1242, 1249 (Miss. 1976); *Gray v. State*, 351 So. 2d 1342, 1348 (Miss. 1977).

[183] *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting) (joined by Sotomayor, J.).

[184] *Id.* at 2760 (Breyer, J., dissenting).

[185] See discussion *supra* of *McIntosh v. State*, 917 So. 2d 78 (Miss. 2005), *Moss v. State*, 940 So. 2d 949 (Miss. Ct. App. 2006), *Franklin v. State*, 23 So. 3d 507 (Miss. Ct. App. 2009), *Rochell v. State*, 748 So. 2d 103 (Miss. 1999), and *Wilson v. State*, 923 So. 2d 1039 (Miss. Ct. App. 2005).

[186] *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting).

of the death penalty fails to restrict its use to "the 'worst of the worst.'"[187] Justice Breyer, based on his twenty-plus years of reviewing death-penalty cases, wrote,

> I see discrepancies for which I can find no rational explanations. Cf. *Godfrey,* 446 U.S., at 433, 100 S.Ct. 1759 (plurality opinion) ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not"). Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime[?] Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another defendant does not, despite having committed a "triple murder" by killing a young man and his pregnant wife? For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept?[188]

Another factor that contributes to the arbitrary imposition of the death penalty is the "accident of geography." Justice Breyer pointed out,

> Geography also plays an important role in determining who is sentenced to death. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried.[189]

In Mississippi between October 5, 1976, and today, fifty-seven of the eighty-two counties have accounted for all 213 death sentences imposed.[190] And of those, only nine counties—10.9% of all Mississippi counties—accounted for 106 of all death sentences. That is, 49.7% of death

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[187] *Id.* (Breyer, J., dissenting).

[188] *Id.* at 2763 (Breyer, J., dissenting) (most internal citations omitted).

[189] *Id.* at 2761 (Breyer, J., dissenting) (internal citation omitted).

[190] Ofc. of the State Public Defender, Capital Defense Division, *Sentences Imposed*, available at http://www.ospd.ms.gov/CapDefSentences.htm (last accessed September 19, 2016).

sentences statewide were imposed in only about a tenth of the counties.

And Harrison County, where Mr. Ronk was tried and sentenced to death, had the most of all—twenty-nine death sentences. (The next closest county, Hinds, had twenty-five, despite having 41,481 more residents.[191,192]) The "accident of geography" was an unfortunate one for Mr. Ronk.

Justice Breyer also cited "[o]ther studies [that] show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*."[193] He noted that "numerous" studies, including one by the nonpartisan U.S. Government Accountability Office (GAO), "have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty."[194] This arbitrary application of capital punishment certainly holds true in Mississippi: in the 213 instances of the death penalty being imposed in Mississippi since October 1976, there have been 250 victims.[195] The racial composition of the victims: 182 white (72.8%) (including the victim in the case at bar); 55 black (22%); 7 Asian (2.8%); 5 unknown (2%); 1 Hispanic (.4%). This despite the fact

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[191] U.S. Census Bureau, QuickFacts, available at http://www.census.gov/quickfacts/table/PST045215/28047,28049,28 (last accessed September 19, 2016).

[192] The totals were Harrison, 29; Hinds, 25; Jackson, 9; Lowndes, 9; Forrest, 8; DeSoto, 7; Grenada, 7; Lee, 6; and Bolivar, 6. Ofc. of the State Public Defender, Capital Defense Division, *Sentences Imposed*, available at http://www.ospd.ms.gov/CapDefSentences.htm (last accessed September 19, 2016).

[193] *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (emphasis in original).

[194] *Id.* (Breyer, J., dissenting).

[195] Ofc. of the State Public Defender, Capital Defense Division, Mississippi Death Penalty Fact Sheet (Feb. 1, 2016), available at http://www.ospd.ms.gov/CDForms/death%20penalty%20fact%20sheet%202.1.16.pdf (last accessed September 19, 2016).

that "[a]ccording to the United States Department of Justice, Bureau of Justice Statistics, from 1976–2005 approximately 73% of all homicide victims in Mississippi were Black. A Wall Street Journal report on homicides from 2000–2010, indicated 70% of all homicide victims in Mississippi were Black."

These statistics strongly suggest that a defendant who is convicted of the capital murder of a white person is much more likely to receive the death penalty than when the victim is a person of color. This reinforces the impression that the application of the death penalty is arbitrary and influenced by factors that, in Justice Breyer's words, "ought *not* to affect application of the death penalty."[196]

As Justice Brennan wrote in his concurrence in *Furman*,

> Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the [cruel and unusual] Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments.[197]

Because of its continued arbitrary imposition—despite four decades of failed remedial efforts—this Court should declare Mississippi's death penalty statute unconstitutional.

VII. Cumulative error

The cumulative-error doctrine stems from the doctrine of harmless error.[198] Individual errors, not reversible in themselves, may combine with other errors to constitute reversible error.[199] The question under a cumulative-error analysis is whether the cumulative effect of all

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[196] *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (emphasis in original).

[197] *Furman v. Georgia*, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring).

[198] *Ross v. State***,** 954 So. 2d 968, 1018 (Miss. 2007).

[199] *Hansen v. State*, 592 So. 2d 114, 142 (Miss. 1991); *Griffin v. State*, 557 So. 2d 542,

errors deprived the defendant of a fundamentally fair and impartial trial.[200] This Court has long adhered to the cumulative-error doctrine, particularly in capital cases.[201] Under this doctrine, even if any single error is not sufficient to require reversal, the cumulative effect of them is.[202]

As the foregoing litany of errors makes clear, the factual and legal arguments concerning which are incorporated into this assignment of error by reference, this is one of those cases where, even if there are doubts about the harm of any one error in isolation, the cumulative-error doctrine requires reversal.[203]

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.[204]

The quantity of the error in this case is significant. Indeed, the error presented in the arguments above all concern significant violations of Mr. Ronk's constitutional rights under both the United States and Mississippi constitutions. Were this Court to find the above errors harmless, however, Mr. Ronk would still be entitled to reversal.

Simply put, if this Court deems any of the errors noted in the issues above harmless, the errors, when taken in concert, resulted in cumulative error, and Mr. Ronk is entitled to relief.

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553 (Miss. 1990).

[200] *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987).

[201] *Flowers v. State*, 947 So. 2d 910, 940 (Miss. 2007) (Cobb, P.J., concurring).

[202] *See Walker v. State*, 913 So. 2d 198, 216 (Miss. 2005); *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992); *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990).

[203] *Flowers*, 947 So. 2d at 940 (Cobb, P.J. concurring), *Griffin* 557 So. 2d at 553.

[204] *Ross*, 954 So. 2d at 1018.

VIII. Trial counsel failed to preserve the record for review.

Trial counsel failed to preserve the record for review. They made no official record of the race of any venire member. Nowhere in the trial record is there any evidence of the race of all qualified venire members.[205]

The U.S. Supreme Court has held, "Although a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria."[206] The Equal Protection Clause prohibits the racially discriminatory use of peremptory strikes.[207] When making a *Batson* claim, the party must first make a prima facie showing that a prohibited reason, such as race, gender, or religion, was the reason for exercising the peremptory strike.[208] If a prima facie case has been established, then the burden of production shifts to the party exercising the strike (and only the burden of production—the burden of proof remains with the party making the *Batson* claim[209]) to come forth with non-discriminatory reasons for the use of the strike.[210] If the reason given by the party exercising the strike is not facially discriminatory, then

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[205] Jury cards and venire list, attached as Ex. 28 (filed under seal).

[206] *Powers v. Ohio*, 499 U.S. 400, 404, 111 S. Ct. 1364, 1367, 113 L. Ed. 2d 411 (1991).

[207] *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986) *holding modified by Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

[208] *McFarland v. State,* 707 So. 2d 166, 171 (Miss.1997) (citing *Batson,* 476 U.S. at 96–97).

[209] *Berry v. State,* 802 So. 2d at 1042.

[210] *McFarland,* 707 So. 2d at 171.

it will be deemed neutral.[211] The party making the *Batson* claim then has the right to rebut the explanation given by the opposing party.[212]

When the process reaches the third step, the "defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination."[213] "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[214]

The trial court must then determine whether the totality of the circumstances establish that the reasons given by the proponent of the strike are pretextual.[215] This determination "requires the judge to assess the plausibility of that reason in light of all the evidence bearing on it."[216] Thus, there need only be a finding that the decision to exercise the strike was "motivated in substantial part by discriminatory intent."[217] A single discriminatory act in an otherwise nondiscriminatory jury selection process is sufficient to establish a *Batson* violation.[218]

Upon information and belief, the jury in Mr. Ronk's case was all white with one African-

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[211] *Randall v. State,* 716 So. 2d 584, 588 (Miss. 1998) (citation omitted).

[212] *Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991).

[213] *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325, 162 L. Ed. 2d 196 (2005) (quoting *Batson,* 476 U.S. at 96–97). *See also Hernandez v. New York,* 500 U.S. 352, 363, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts") (internal quotation marks and citation omitted).

[214] *Miller-El,* 537 U.S. at 338–39 (internal quotation marks and citation omitted).

[215] *McFarland*, 707 So. 2d at 171.

[216] *Miller-El*, 545 U.S. at 252.

[217] *Snyder v. Louisiana*, 552 U.S. 472, 485, 128 S. Ct. 1203, 1212, 170 L. Ed. 2d 175 (2008).

[218] *Johnson v. California*, 545 U.S. 162, 169, 125 S. Ct. 2410, 2416, 162 L. Ed. 2d 129 (2005).

American male as an alternate. The State used four strikes for cause and eight preemptory strikes.[219] The Defense raised no objection to any of the State's strikes.[220] Neither appellate counsel nor post-conviction counsel could compare the percentage of African-American venire members struck with the percentage of white venire members struck, or even determine the percentage of African-Americans in the jury venire itself.[221] Without a complete "transcript or equivalent picture of the trial proceeding" no "meaningful post-conviction proceeding can be had."[222]

IX. To be effective in fulfilling their duties to Mr. Ronk, post-conviction counsel will have to supplement this motion.

The investigation of this case by the Mississippi Office of Capital Post-Conviction Counsel and the preparations for the filing of this motion have been delayed repeatedly. Part of the delay has been due to the actions of counsel for the State from the Attorney General's office. In part because of those delays, this motion is necessarily incomplete, and counsel for Mr. Ronk will file a supplement to it as soon as possible.

First, on November 9, 2015, the Circuit Court of Harrison County, First Judicial District, found two of the attorneys in the Office, Scott A. Johnson and Alexander Kassoff, not qualified

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[219] Tr. at 305–13.

[220] *Id.*

[221] 2010 U.S. Census data lists the racial composition of Harrison County as 69% white and 22% African-American. U.S. Cesus Bureau, *Welcome to* QuickFacts, available at http://www.census.gov/quickfacts/table/PST045215/28047/accessible (last accessed Sep. 23, 2016). Census Viewer reports voter registration data for Harrison County in 2010 as 70% white and 17% African-American. CensusViewer, *Population of Harrison County, Mississippi: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Graphs, Quick Facts*, available at http://censusviewer.com/county/MS/Harrison (last accessed Sep. 23, 2016).

[222] *Chapman v. State*, 167 So. 3d 1170, 1173 (Miss. 2015); s*ee also Brown v. State*, 187 So. 3d 667, 671 (Miss. Ct. App. 2016).

pursuant to Mississippi Rule of Appellate Procedure 22(d)(3) and (5), as it then existed before this Court amended it on April 21, 2016.[223] As a result, the two attorneys, who had been doing extensive work on Mr. Ronk's case, ceased working on it to devote time to becoming qualified under the second paragraph of Rule 22(d)(5). They filed motions in this Court requesting that it grant its consent as contemplated by the Rule. Then, when this Court amended the Rule, those motions became moot, since the two attorneys were clearly qualified under the new version of the Rule.

Then, in the spring of 2016, the Office took routine steps to secure an Order for Access from the trial court to allow an expert to evaluate Mr. Ronk. As it had done in at least fifty previous cases, it approached counsel for the Mississippi Department of Corrections, seeking to have an agreed order signed—again, a routine practice for years. This time, however, counsel from the Attorney General's office decided for some reason to "resist discovery." This necessitated a hearing before the circuit judge. At that hearing on June 7, 2016, after listening to the State's argument that the Office's request for access constituted discovery and that the State had standing to resist, and upon rejecting that argument, the court granted the Motion for Access.[224] But by that time, the window of opportunity for Mr. Ronk's forensic psychiatrist, Dr. Bhushan Agharkar, to travel to Mississippi to do the evaluation had closed due to other commitments. So new dates for the evaluation were arranged. By the time Dr. Agharkar was able to see Mr. Ronk, it was already July. As of the filing of this motion, his work is not yet completed. He has provided an affidavit summarizing his initial findings and stating that he must

[223] Tr. of hearing, Nov. 9, 2015, attached as Ex. 10.

[224] Tr. of hearing, June 7, 2016, attached as Ex. 9.

do another interview and more testing before issuing a report.[225] Barring any other conflicts, follow-up evaluations will occur as scheduled in October. Additional documents that post-conviction counsel has sought are pending from other sources at the time of this filing. Supplementation of this motion will be necessary.

X. Conclusion

The claims and evidence discussed in this motion, 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."[226] This Court also has authority to grant the relief requested.[227] Mr. Ronk prays that this Court will grant him the requested relief, or allow the filing of the motion in the trial court for further proceedings under the Mississippi Uniform Post-Conviction Collateral Relief Act.[228]

Respectfully Submitted:
Timothy Robert Ronk, Petitioner

By:
/s/Alexander D. M. Kassoff
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[225] Affidavit of Bhushan Agharkar, MD, attached as Ex. 7.

[226] *Crawford v. State*, No. 2013-DR-02147-SCT, 2016 WL 4141748, at *23 (Miss. Aug. 4, 2016) (Dickinson, J., concurring in part and dissenting in part).

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

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

Facsimile: (601) 359-5050

CERTIFICATE OF SERVICE

I, Alexander D. M. Kassoff, hereby certify that on this day I electronically filed the foregoing 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 Smith
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220
bsmit@ago.state.ms.us

Additionally, I have caused to be sent via first-class U.S. mail, postage fully pre-paid, a copy of this Motion to the following:

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

This the 23rd day of September 2016.

/s/Alexander D. M. Kassoff
Certifying Attorney