

tive psychiatric care units within corrections settings to serve defendants and sentenced prisoners.

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The Scope of Mitigation in the Death Penalty

Court Rules on Limits of Mitigation

In *Moore v. Parker*, 425 F.3d 250 (6th Cir. 2005), the U.S. Court of Appeals for the Sixth Circuit reviewed the denial by the U.S. District Court for the Western District of Kentucky at Louisville of Keith Moore's petition for a writ of *habeas corpus* based on ineffective assistance of counsel in a capital murder case.

Facts of the Case

In 1984, a Kentucky jury convicted Brian Moore of the 1979 kidnapping, first-degree robbery, and murder of a 77-year-old man, Virgil Harris. A mitigation psychologist, Dr. Bresler, was to testify during the penalty phase of the trial but was exposed for fraudulent practices and was not called during sentencing. Moore was sentenced to death, and the Kentucky Supreme Court affirmed his conviction in 1988. Moore appealed to the United States Supreme Court, which denied *certiorari* in 1990. Moore then filed a motion to vacate his sentence in state criminal (trial) court citing ineffective assistance of counsel. While that motion was pending, Moore filed a motion for a new trial in the state civil court based on new evidence. In considering the second motion, the trial court allowed Moore to present the new evidence, which included the testimony of a mitigation expert, a master's level psychologist, Dr. Veltkamp, who interviewed Moore for three to four hours. Both of Moore's motions were denied in January 1997. The Kentucky Supreme Court affirmed this decision in 1998, and the United States Supreme Court denied *certiorari* in 1999.

In November 1999, Moore filed a petition for *habeas corpus* in the district court on the basis of ineffective assistance of counsel, trial errors, prosecutorial misconduct, a due process violation, and vio-

lation of *Miranda* rights. The district court ruled that Moore's claims were either meritless or procedurally defaulted. Moore then appealed to the Sixth Circuit, which granted him a certificate of appealability to examine five claims. In one of those claims, he argued that his counsel was ineffective because he had inadequately prepared for the penalty phase, as evidenced in three ways: he had spent only three percent of the preparation time on the penalty phase of the trial, he had failed to conduct a thorough investigation of Moore's background for mitigation, and he was negligent in not replacing the first mitigation psychologist who had been dismissed for fraud.

Ruling

The Sixth Circuit Court ruled to affirm the district court's denial of Moore's writ of *habeas corpus*.

Reasoning

The court reviewed the case in accordance with the standard set forth by the Antiterrorism and Effective Death Penalty Act (AEDPA), which allows *habeas* relief only if the district court's decision "was contrary to, or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts." *Strickland v. Washington*, 466 U.S. 668 (1984) established the standards for adjudicating ineffective assistance claims, requiring that a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense such that, but for counsel's deficiencies, there was a reasonable probability that the outcome would have been different.

The court ruled that Moore's counsel had adequately prepared for the penalty phase, in that sufficient mitigation evidence had been presented at sentencing. It cited several witnesses (Moore's aunt and cousin, two reverends, and his prison "boss"), who testified at his sentencing hearing and offered mitigation regarding his childhood and potential for rehabilitation. The court further held that Moore's expert, who testified at a hearing after the sentencing, had given testimony to the district court, which characterized the testimony as presenting "Moore as an easily angered, impulsive, out-of-control emotional leech with poor judgment." The court reasoned that more mitigation would underscore his dangerousness and generate even less sympathy among the jury

members. It concluded that “counsel’s failure to seek or present more background evidence was not even deficient performance, let alone prejudicial,” thus failing to satisfy either prong of the *Strickland* requirement.

Dissent

Judge Martin dissented, arguing that the Kentucky Supreme Court unreasonably applied *Strickland* and *Wiggins v. Smith*, 539 U.S. 510 (2003) when considering Moore’s claim of ineffective counsel. The judge stressed the importance of a mitigation expert. Moore’s attorney had indicated recognition that a mitigation expert was desirable if not necessary to the case by retaining such an expert. When that expert was disqualified as a witness, however, counsel did not seek to find another. Further, Judge Martin refuted the majority’s claim that a mitigation expert had testified at sentencing, noting that Dr. Veltkamp had testified at a separate postsentencing hearing. Therefore, no mitigation expert evaluated Moore in preparation for sentencing. Judge Martin objected to the majority’s opinion that sufficient mitigation evidence had already been presented at Moore’s sentencing trial. The testimony of family members, clergy, and a prison boss could not replace the professional assessment and testimony that could clarify the role of childhood neglect and abuse. The judge opined that counsel’s refusal to replace the fraudulent expert resulted from oversight and inattention and was not part of a plan in which withholding or selective use of mitigation evidence could be seen as part of an overall defense strategy. Citing *Wiggins*, Judge Martin concluded that “counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.”

Finally, Judge Martin argued that the majority had mischaracterized Dr. Veltkamp’s testimony as emphasizing equally Moore’s dangerousness and his abusive and deprived childhood and disputed the majority opinion that more mitigation testimony would have been similar to Dr. Veltkamp’s and necessarily detrimental to Moore’s mitigation case. Without mitigation expertise, Moore’s dangerousness was not properly understood to be the result of his troubled upbringing. Judge Martin concluded

the “immense weight” of mitigation evidence available from Moore’s background history would have led to a reasonable probability of a different outcome at sentencing.

Discussion

Moore v. Parker represents a change in the tide of recent decisions on the parameters of mitigation. While the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6 (1989) and recent court rulings (e.g., *Wiggins*, *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003)) have broadened the scope of mitigation, the Sixth Circuit’s decision in *Moore v. Parker* effectively diminished the implied standard for determining the quality and sufficiency of mitigation investigation and testimony. The ruling that sufficient mitigation had been presented even though a fraudulent mitigation expert had not been replaced and a subsequent mitigation expert had testified only at a hearing after sentencing had occurred seemed counter to the spirit of *Wiggins*, in which an exhaustive search for mitigating evidence was set as the standard.

More important, the court’s view that mitigation evidence was potentially harmful to the defendant, engendering less rather than greater sympathy for Moore, reflected a limited appreciation for the process of mitigation both in the legal and psychological arena. In *Moore v. Parker*, the court decided what is usually left to the jury—determining the balance of the evidence as favorable to or against the defendant. The majority implied by its decision that the only goal of mitigation is to engender sympathy. Judge Martin in his dissent recognized the complexity of mitigation and the need for an expert to guide the jury to an understanding of the connection between a horrendous background and an equally horrendous deed. Collectively, higher court decisions will continue to shape the role of mitigation and mitigation experts in death penalty cases. Ideally, forensic psychiatrists and psychologists will influence these court decisions.

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