RECEIVED
Jun 13 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County

Honorable Kristi F. Curtis, Circuit Court Judge

HERMAN HUGHES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001415

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated at the hearing to determine whether the Family Court would waive jurisdiction to the Court of General Sessions where counsel failed to conduct any investigation whatsoever and present evidence concerning the criteria outlined by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966), and where Petitioner was prejudiced because if counsel had conducted a proper investigation and presented such evidence, there is a reasonable probability the outcome of the waiver proceeding would have been different?

STATEMENT OF THE CASE

On March 21, 1994, the state filed juvenile petitions in the Family Court of Calhoun County against Petitioner Herman Hughes alleging Hughes committed murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle. App. 2010-2025. Hughes was sixteen years old at the time of the offense. On March 24, 1994, the state filed a petition for transfer requesting the Family Court transfer the matter to the Court of General Sessions. App. 2027-2028. On April 8, 1994, a hearing was held before the Honorable Maxey G. Watson, Family Court Judge. App. 1757. Assistant Solicitor Reddick Bowman represented the state. App. 1757. Martin Banks represented Hughes. App. 1757. On April 28, 1994, Judge Watson entered an order waiving jurisdiction to the Court of General Sessions. App. 2029-2032.

A Calhoun County Grand Jury indicted Hughes on May 25, 1994 for murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle. App. 1939-1944. On October 31, 1994, the state served notice of its intent to seek the death penalty. App. 1945. A pretrial hearing was held on August 22, 1995 before the Honorable Edward B. Cottingham. App. 1825. The case was called for trial on September 5, 1995 before Judge Cottingham, and a jury. App. 6. Solicitor Walter M. Bailey, Jr. represented the state. Phillip Newsom represented Hughes. App. 6.

A competency hearing was held pursuant to Blair v. State, 275 S.C. 529, 273 S.E.2d 536 (1981) at the outset of trial. Judge Cottingham found Hughes was competent to stand trial by order filed September 7, 1995. App. 1962-1963. Jury selection concluded on September 7, 1995 and the guilt phase began that same day. On September 8, 1995, the jury found Hughes guilty as indicted. App. 1315, l. 23 – 1316, l. 12. After the twenty-four hour waiting period, the sentencing phase began on September 11, 1995. The jury found the existence of three statutory aggravating circumstances and recommended Hughes be sentenced to death. App. 1747, l. 8 –

1748, l. 11; App. 1936-1938. Judge Cottingham sentenced Hughes to death for murder, twenty-five years consecutive for armed robbery, twenty-five years consecutive for assault and battery with intent to kill, and five years concurrent for grand larceny. App. 1751, ll. 1-23.

This Court affirmed Hughes' convictions and death sentence on October 27, 1997. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997). The United States Supreme Court denied Hughes's petition for writ of certiorari on April 27, 1998. Hughes v. South Carolina, 523 U.S. 1097 (1998).

On June 22, 1998, Hughes filed an application for post-conviction relief (PCR). The matter was assigned exclusively to the Honorable Paula Thomas. The state filed a return and motion for a more definite statement dated July 21, 1998. App. 2194-2222. Hughes filed an amended application on September 16, 1998, a second amended application on September 21, 1999, and a third amended application on October 7, 1999. App. 2223-2246; App. 2363-2382. An evidentiary hearing was convened from October 11, 1999 to October 13, 1999 before Judge Thomas. App. 2383. Deputy Attorney General Donald Zelenka and Assistant Attorney General Jeffrey Jacobs represented the state. App. 2383. John Blume and Pamela Wilkins represented Hughes. App. 2383.

On May 18, 2000, Hughes filed a post-hearing memorandum in support of his third amended application for post-conviction relief. App. 3063-3202. On May 30, 2000, the state filed a post-hearing memorandum in opposition to the application for post-conviction relief. App. 3203-3374. Hughes filed a reply to the state's memorandum in opposition on June 9, 2000. App. 3375-3380. A hearing was held before Judge Thomas on November 17, 2000 concerning these post-hearing memoranda. App. 3499. On December 8, 2000, Judge Thomas filed a 188 page order denying Hughes relief. App. 3550-3743.

Hughes filed a motion to alter or amend the judgement on December 28, 2000. App. 3744. The state filed a memorandum in opposition to the motion to alter or amend the judgement on January 31, 2001. App. 4541. While the motion to alter or amend was pending, Hughes filed a motion to stay the proceedings pending the outcome of McCarver v. North Carolina, 532 U.S. 941 (2001), where the United States Supreme Court granted certiorari to consider whether an individual with an intellectual disability could be executed.[1] App. 4558-4561. Judge Thomas granted the stay by order dated May 4, 2001. App. 4583-4585.

On March 15, 2005, Hughes filed a motion for partial summary judgment in light of the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), in which the Supreme Court held it was cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution to impose the death penalty on individuals who were under the age of eighteen at the time of the offense. App. 4587-4592. The state filed a response conceding Hughes's death sentence should be vacated in light of Roper as he was only sixteen years old at the time of the offense. App. 4587-4605. By order dated May 9, 2005, Judge Thomas vacated Hughes's death sentence and remanded for resentencing. App. 4606-4607. On October 10, 2006, Hughes appeared before the Honorable Howard P. King and was sentenced to life with parole for murder. App. 2034.

On June 26, 2007, Hughes filed a *pro se* second application for post-conviction relief (PCR). App. 2056-2062. The state filed a return and motion to dismiss the application as successive on August 27, 2007. App. 2063-2153. The Honorable Diane S. Goodstein issued a conditional order of dismissal on October 18, 2007 giving Hughes twenty days to show why the order should not become final. App. 2154-2170. Hughes filed a *pro se* reply to the conditional

[1] McCarver was later replaced with Atkins v. Virginia, 536 U.S. 304 (2002), after North Carolina passed a statute under state law prohibiting the execution of individuals with an intellectual disability rending the issue in McCarver moot. App. 4712, ll. 2-14.

order on November 20, 2007 asserting he was entitled to belated appellate review of the denial of his original application for post-conviction relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 2172-2173. By order filed January 10, 2008, Judge Goodstein issued a final order of dismissal finding Hughes's application was successive. App. 2174-2175.

Hughes filed a notice of appeal. On October 29, 2010, Hughes's then appellate counsel, Robert M. Pachak, filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988), and a motion to be relieved as counsel with this Court. This Court transferred jurisdiction to the Court of Appeals pursuant to Rule 243(l), SCACR. By order filed February 11, 2014, the Court of Appeals denied counsel's motion to be relieved and directed the parties to address the following question: "Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?" App. 4609. The Court of Appeals ultimately granted certiorari and, after briefing and argument, reversed and remanded for a hearing to determine whether Hughes knowingly and voluntarily waived the right to appeal the denial of his 1998 PCR application. App. 4645-4689.

On May 20, 2021, a hearing was held before the Honorable Kristi F. Curtis. App. 4690. Senior Assistant Deputy Attorney General Megan Jameson represented the state. Jonathan Waller represented Hughes. App. 4690. By order filed November 4, 2021, Judge Curtis granted Hughes a belated appeal from the denial of his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 4728-4737.

This petition for writ of certiorari pursuant to Austin v. State follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated at the hearing to determine whether the Family Court would waive jurisdiction to the Court of General Sessions where counsel failed to conduct any investigation whatsoever and present evidence concerning the criteria outlined by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966), and where Petitioner was prejudiced because if counsel had conducted a proper investigation and presented such evidence, there is a reasonable probability the outcome of the waiver proceeding would have been different.

Relevant Facts

The waiver hearing to determine whether then sixteen year old Herman Hughes would be transferred to the Court of General Sessions to be tried as an adult occurred on April 8, 1994, exactly three weeks after the offense. The state presented three witnesses: Detective Earl Rhudy with the Calhoun County Sheriff's Department, Dolly Zeigler with the Department of Juvenile Justice, and Dennis Calvin Jones, the Sheriff of Calhoun County. App. 1759.

Detective Earl Rhudy testified about the circumstances surrounding the offense and the investigation. His department received a call around 8:30 on the night of March 18, 1994 about a shooting at the Blue Diamond Casino in St. Matthews. App. 1761, ll. 7-18. Kenneth Presley was fatally wounded. App. 1773, ll. 23-25. Kelly Hoffman was shot in the left cheek and the chest. App. 1770, l. 11 – 1771, l. 3. Hoffman survived her injuries.

Agents with the South Carolina Law Enforcement Division (SLED) processed the scene. App. 1762, ll. 13-25. Detective Rhudy identified ten photographs of the Blue Diamond, which were taken by SLED Agent Steve Derrick, and described what each depicted. App. 1762, l. 25 – 1764, l. 2. There were several photographs of the chair in which Kelly Hoffman was sitting when she was shot. App. 1765, ll. 1-9. There was blood on the chair. App. 1769, l. 19 – 1770, l.

1. There was also blood on the desk that Hoffman was sitting behind at the time she was shot. App. 1771, ll. 4-12.

The cash drawer was open when law enforcement arrived. App. 1766, ll. 1-6. All the paper bills were taken from the drawer. However, some coins remained. App. 1766, ll. 9-12. There was blood inside the drawer. App. 1766, ll. 9-15. Detective Rhudy testified that Agent Derrick, who Rhudy maintained was a latent print expert, determined that a fingerprint lifted from inside the cash drawer "matched" one of Hughes's fingerprints. App. 1772, ll. 17-24.

According to Rhudy, agents with SLED determined that a .380 pistol was used in the shooting. App. 1768, ll. 7-14.

Kenneth Presley's car was found parked outside the Ebony Club in Orangeburg County the day after the shooting. App. 1769, ll. 1-18; App. 1773, ll. 6-17. Agents with the South Carolina Law Enforcement Division also processed the vehicle. App. 1773, ll. 21-23.

Herman Hughes was identified as a suspect early in the investigation. App. 1774, ll. 1-11. Hughes gave three statements to law enforcement. App. 1774, ll. 14-16. In his statement, which was written by his mother, Hughes allegedly admitted, "On Friday night Kelsey Pierce [sic] and myself went into the Blue Diamond. I walked in and asked for the money and shot the woman. Kelsey was looking through the window and he came in and got the gun and shot the man. We got the money and took the car to Daniel's house and put the money on the bed. We divided up the money and left the house. We drove the gray car to the Ebony Club and left it there." App. 1775, l. 9 – 1776, l. 23.

Detective Rhudy created a six person photographic lineup that included Hughes. App. 1777, ll. 13-24. He showed the lineup to Kelly Hoffman on April 4, 1994, the Monday before the hearing. App. 1778, ll. 5-6. Hoffman allegedly identified Hughes as the person who shot her. App. 1778, ll. 5-20. Based on Hughes's statement and Hoffman's identification, Rhudy

concluded that Hughes shot Kelly Hoffman. App. 1778, l. 25 – 1779, l. 15. Hughes was charged with murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle. App. 1780, ll. 1-4. Through its investigation, law enforcement identified Kelsey Pearce as the other "perpetrator." App. 1778, l. 25 – 1779, l. 15.

At the conclusion of his direct examination, Rhudy testified, "There is no question in my mind that this should be waived up to General Sessions Court due to the seriousness of [the] crimes . . . and with him [Hughes] being also so close to his seventeenth birthday." App. 1779, ll. 16-25.

During cross examination, Rhudy acknowledged that he was the only detective in Calhoun County in addition to Sheriff Jones. This was only the second case Rhudy investigated as a detective. App. 1780, ll. 7-19. Rhudy admitted that the SLED agents who processed the scene would have been more qualified to answer the solicitor's questions. App. 1781, ll. 8-22. The desk depicted in the photographs where the cash drawer was located had been moved by paramedics who responded to treat Hoffman and Presley. App. 1782, l. 8 – 1783, l. 21. Rhudy did not know where the desk or the chair Hoffman had been sitting in was located during the robbery. App. 1783, ll. 4-21.

Detective Rhudy admitted that Hoffman had read newspaper reports about the robbery before he showed her the photographic lineup. The newspaper reports identified Hughes as a perpetrator. App. 1784, ll. 7-22. While Hoffman allegedly did not know Hughes, she called him by his first name when shown the lineup. App. 1784, ll. 14-22. Rhudy maintained that Hoffman's knowledge of Hughes from the newspaper did not "spoil" her identification of him as the person who shot her. App. 1784, l. 14 – 1785, l. 8.

Dolly Zeigler testified that as part of her "official duties" at the Department of Juvenile Justice, she was familiar with Hughes's school records. App. 1787, ll. 4-19. Hughes was last

enrolled at John Ford Middle School. He was in the eighth grade. App. 1787, ll. 20-25. He was suspended on February 2, 1994, about six weeks before the shooting, for the remainder of the school year. App. 1787, ll. 23-25; App. 1789, ll. 2-3. Prior to his suspension, Zeigler testified Hughes had "twenty one absences, fourteen were suspension days, six unexcused, and one excused." App. 1787, l. 25 – 1788, l. 2. Hughes also "had approximately twenty one disciplines" between November 12, 1993 and January 31, 1994. App. 1788, ll. 2-13. Some of the offenses for which Hughes had been disciplined included disrespect to a teacher, disrupting class, leaving class without permission, and use of profanity. App. 1788, ll. 16-23.

Zeigler maintained that Hughes was in "regular classes" in school. App. 1792, ll. 2-6. He studied mathematics, South Carolina history, language arts, introduction to consumer homemaking, physical education, health, reading, and earth science. App. 1791, ll. 17-22. To her knowledge, Hughes was never placed in any special education classes. App. 1791, l. 23 – 1792, l. 1. According to Zeigler, after Hughes was suspended for the remainder of the school year in February 1994, he did not participate in any alternative educational programs. App. 1791, ll. 13-16.

Zeigler also testified about Hughes involvement with the Department of Juvenile Justice (DJJ). In March 1993, Hughes was charged with pointing a firearm. This charge was dismissed. App. 1789, ll. 16-20. On February 15, 1994, "a runaway pickup order was completed." App. 1789, ll. 20-22. On March 8, 1994, Hughes was charged with possession of a stolen vehicle. This charge was still pending. App. 1789, l. 22 – 1790, l. 1. On March 21, 1994, Hughes was charged with petty larceny of a firearm. The owner of the firearm was listed as Miranda Singletiary, Hughes's mother. This charge was also still pending. App. 1790, l. 3 – 1791, l. 12.

Zeigler testified that on February 15, 1994, Lucille Hughes, Hughes's grandmother, and Miranda Singletiary, his mother, came to DJJ and filed an "incorrigible complaint." They

inquired into the possibility of placing Hughes in "some type of alternative placement." Zeigler explained that the Department of Juvenile Justice does not place juveniles into alternative placement unless court ordered to do so. App. 1792, l. 7 – 1793, l. 13. Zeigler offered the women "a referral package which lists alternative placement and counselling services" for juveniles, but they did not want it. App. 1793, l. 14 – 1794, l. 7. However, Hughes's grandmother "did do the runaway pickup order." App. 1793, ll. 21-24.

Zeigler explained that, according to testimony at Hughes's prior detention hearing, Hughes had lived with his maternal grandmother for the last twelve years. App. 1794, ll. 20-25.

Zeigler had no opinion regarding the likelihood that Hughes could be rehabilitated within the juvenile justice system. App. 1795, ll. 1-7. She would not personally form such opinions. She explained that had a DJJ "pre-waiver evaluation" been completed, the evaluator would have rendered such an opinion. However, a pre-waiver evaluation was not requested. App. 1795, ll. 8-16. On cross-examination, Zeigler stated it was the defense attorney's responsibility to request a pre-waiver evaluation be conducted. App. 1797, ll. 8-11. She maintained that she did not know how long such an evaluation would take to be completed. App. 1797, l. 23 – 1798, l. 8.

Sheriff Jones was the third and last witness to testify. He arrived at the Blue Diamond Casino before Detective Rhudy on the night of the robbery. Paramedics were treating Hoffman and Presley. App. 1800, ll. 4-16. Hoffman was conscious at the time. App. 1802, ll. 7-9. She had a wound to her head. App. 1803, ll. 2-3. Deputies were talking to Hoffman in an effort to determine what happened. Hoffman said "somebody came in and shot them and then she got tired and she asked them if they would please quit questioning" her. App. 1802, ll. 7-15. Like Rhudy, Jones described what several of the photographs taken by Agent Derrick depicted. App. 1801, l. 2 – 1803, l. 10.

Jones interviewed Hughes on March 20, 1994. After Hughes was identified as a suspect, Jones went to Hughes's mother's home. Jones told Hughes's mother, Miranda Singletiary, that he wanted to speak with Hughes. Singletiary told Jones that Hughes was in Columbia. Jones "got his [Hughes's] mother to ride with [him] to Columbia." They picked up Hughes in Columbia and "brought him back to the Sheriff's Department" in Calhoun. App. 1803, l. 20 – 1804, l. 3. Jones escorted Hughes and Singletiary to a room at the department. App. 1804, ll. 14-18. He advised Hughes of his Miranda rights and asked Singletiary if Hughes would give a statement. App. 1804, ll. 18-21. Hughes allegedly confessed to shooting Hoffman. App. 1804, ll. 19-22. Singletiary "went into shock" and "left the room." App. 1804, ll. 21-24. Jones took out a tape recorder, advised Hughes of his rights, and had him repeated his "confession." App. 1804, l. 24 – 1805, l. 1. After Singletiary "gathered her thoughts," she returned to the room. Jones asked Singletiary if she would write a statement for Hughes. Singletiary agreed because Hughes "didn't write too well." App. 1805, ll. 1-8. Jones claimed Hughes "confessed" to participating in the armed robbery of the Blue Diamond Casino, shooting Hoffman, stealing Presley's car, and riding in the car to Orangeburg. App. 1805, ll. 11-22. However, Hughes maintained that Kelsey Pearce shot and killed Kenneth Presley. App. 1805, ll. 20-22. Hughes's written statement was marked and admitted into evidence. App. 1805, l. 23 – 1806, l. 1.

On cross examination, Jones clarified that Hughes admitted he took the money from the cash drawer and Pearce drove Presley's car. Jones asserted, "He confessed to taking the money, shooting the girl, and . . . riding with Kelsey in the car." App. 1806, ll. 5-25. Jones further testified that when he first arrived at the Blue Diamond after the shooting, he overheard Kelly Hoffman say, "somebody came in and shot them." App. 1807, ll. 1-13. Based on Hoffman's statement, Jones thought Hoffman did not know who shot them. App. 1808, ll. 11-14. However,

according to Jones, Hoffman's statement did not mean she could not later identify who shot her. App. 1809, ll. 2-5.

During redirect examination, Jones gave additional details about Hughes's statement. According to Jones, Hughes admitted that he went into the Blue Diamond alone, asked Hoffman and Presley how to play one of the games, told them he needed to go outside to get money, went outside, and returned with a fifty dollar bill. Hughes then shot Hoffman. App. 1810, ll. 2-17.

After the state concluded its presentation of evidence, Hughes's counsel, Martin Banks, stated he had no witnesses. App. 1811, ll. 11-15.

The solicitor argued the Family Court should waive jurisdiction to the Court of General Sessions. He emphasized the "seriousness" of the charges, the violent nature of the offenses, and that the "crimes [were] against people." App. 1811, l. 16 – 1812, l. 21. The solicitor referred to Hughes and Kelsey Pearce as "an armed robbery gang." "All be it a gang of just two." App. 1813, ll. 19-21. He asserted that Hughes was "equally culpable of the murder" of Kenneth Presley under the hand of one is the hand of all despite Hughes's contention that Pearce shot Presley. App. 1813, ll. 14-18. Moreover, the solicitor maintained "there is great prosecutorial merit to this case" given Hughes's alleged confession, Hoffman's identification of Hughes as the shooter, and the "fingerprint" that "ties Mr. Hughes to the actual drawer that had the money in it. The money tray." App. 1814, ll. 1-13. Lastly, the solicitor argued "there would be a certain judicial economy that would arise out of having Mr. Pierce's [sic] case, the adult's case[,] and Herman Hughes['s] case disposed of in General Sessions Court and under the adult criminal justice process." App. 1814, ll. 17-25.

The solicitor concluded that although Hughes was only sixteen, he was "near his seventeenth birthday" and was "a very sophisticated individual" and "street smart." App. 1815, ll. 1-5. He emphasized that Hughes had "never been – according to the testimony – in anything

but the regular academic career track. He's not been in any special education or shown an emotional handicap or anything . . . of that nature." App. 1815, ll. 21-25. According to the solicitor, "society and justice would be best served by having [the Family Court] waive . . . jurisdiction" and disposed of the case in the Court of General Sessions. App. 1816, ll. 14-17.

Mr. Banks, Hughes's counsel, argued that Kelsey Pearce "was the leader of the gang" mentioned by the solicitor. Pearce "had influence over" Hughes and, as an adult, should have more "responsibility" than Hughes. App. 1816, l. 21 – 1817, l. 2. Banks asserted, "[T]his is a case of an adult leading a juvenile into no good and that adult is the one that is properly tried in that Court. Juveniles properly tried in this Court." App. 1818, ll. 4-8. As far as judicial economy, Banks emphasized that Hughes and Pearce would not be tried together if the Family Court waived jurisdiction because they "already [had] different stories." There would be "two General Sessions trials. Not one." Moreover, Hughes's case would be dispensed with "a lot quicker" if it remained in Family Court. App. 1817, ll. 2-13.

Banks emphasized that the petition to transfer was filed on March 24, 1994 and he was served with a copy on March 26, 1994 or March 28, 1994. The summons and notice of hearing were never filed. App. 1818, ll. 9-15. Due to the hearing date, April 8, 1994, and the "time constraint" placed upon him, Banks requested the Family Court judge delay ruling until Banks could request DJJ conduct an evaluation. App. 1818, l. 15 – 1819, l. 2.

The Family Court judge found there was probable cause that Hughes committed murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle. He emphasized that the state had a "very strong case" against Hughes given Hughes's "confession" and Hoffman's identification. App. 1819, l. 4 – 1820, l. 14. The judge found the murder was premeditated and "cold blooded." It was a "very serious crime" and involved "violence against a person." App. 1820, ll. 23-25. The judge concluded, "There is no rehabilitation in the juvenile

justice system for this young man for that kind of crime. Juvenile justice provides no rehabilitation." App. 1821, ll. 9-13. He asserted Hughes "has certainly sufficient maturity and sophistication to be responsible for his actions and to be held accountable for his crimes." App. 1822, ll. 17-20. Lastly, the judge contended waiving jurisdiction to the Court of General Sessions would be a deterrent not only to Hughes, but to others in the community. App. 1823, ll. 4-10.

The judge's oral ruling was followed by a written order dated April 28, 1994 and filed May 31, 1994. App. 2029-2032. The judge indicated he was following the criteria outlined by the United States Supreme Court in Kent v. United States, 383 U.S. 541. (1966). App. 2031. However, based on the order, it appeared the judge was relying almost exclusively on the seriousness of the alleged offenses. He concluded, "The State presented testimony that the minor committed a serious, violent cold-blooded crime . . . that involved physical violence against a person with a weapon." App. 2031.

During Hughes's first PCR hearing in October 1999, Martin Banks, who represented Hughes's during the Family Court waiver hearing, testified that he was appointed to represent Hughes. At the time, Banks was a public defender in Calhoun County. App. 2620, ll. 5-9. Hughes was one of the first juveniles Banks ever represented. App. 2620, ll. 18-20. Banks received "very little notice" of the appointment. App. 2621, ll. 2-6. He admitted that he did not obtain Hughes's school records or his Department of Social Services records nor did he interview any of Hughes's teachers. App. 2621, l. 17 – 2622, l. 4. Banks did not request that Hughes be evaluated by any type of mental health professional. App. 2621, ll. 23-25. He assumed the state would request a pre-waiver evaluation be conducted and expected to be handed a report when he appeared in court for the waiver hearing. App. 2622, ll. 5-25. Banks did not conduct any "investigation" prior to the hearing. All he did was talk to Hughes's family and "at least one officer." App. 2632, l. 20 – 2633, l. 1.

Banks explained that at the conclusion of the waiver hearing, he asked the Family Court judge to delay ruling until an evaluation could be performed. However, the judge denied the request. App. 2630, l. 22 – 2630, l. 8.

Dr. Jonathan Venn, a clinical psychologist, evaluated Hughes in 1999 for purposes of Hughes's first post-conviction relief action. Venn earned a Ph.D. in clinical psychology from Northwestern University in 1977. App. 2636, l. 21 – 2637, l. 1. He was board certified in clinical psychology, forensic psychology, and child psychology. App. 2638, ll. 11-17. He was also licensed in clinical psychology in Maryland and South Carolina. App. 2638, ll. 5-10. After earning his doctorate, Dr. Venn accepted a commission in the United States Naval Reserve. He was on active duty in the Navy for four years. App. 2637, ll. 2-8. He then taught for the University of Maryland and was employed as a clinical psychologist for the Baltimore Gas and Electric Company where he conducted evaluations and provided therapy. App. 2637, ll. 2-13. Dr. Venn subsequently moved to South Carolina. He worked for the William S. Hall Psychiatric Institute in Columbia as a forensic psychologist. App. 2637, ll. 13-15. Then from 1989 to 1997, Dr. Venn was employed as a psychologist at the Department of Juvenile Justice. During those eight years, Venn "did more than one hundred waiver evaluations" and testified about sixty times at various juvenile waiver hearings. App. 2637, l. 15 – 2639, l. 8.

Dr. Venn was qualified as an expert in psychology without objection during the PCR hearing. App. 2640, ll. 2-22. He was asked to conduct a psychological evaluation of Hughes, the same type of evaluation he would have done at the Department of Juvenile Justice. During such an evaluation, Venn is "looking for the factors that help predict whether or not a juvenile may have long term behavior problems." App. 2642, ll. 18-24. As part of this evaluation, Venn interviewed Hughes, reviewed records from the Hall Institute and the Department of Juvenile Justice as well as Hughes's school records, and spoke to Hughes's principal from John Ford

Middle School. App. 2641, ll. 1-9. Venn also administered two psychological tests, the Justus Inventory and the Wender Utah Rating Scale, both of which are commonly used in the field and were available in 1994. App. 2641, ll. 10-14; App. 2641, l. 25 – 2642, l. 12. The Justus Inventory measures factors relevant "in the assessment of juvenile delinquents." App. 2641, ll. 17-24. The Wender is "a set of questions [asked of] adults to identify whether they had problems as a child in the areas of hyperactivity, inattention, and impulsivity." App. 2642, ll. 9-17.

Based on his evaluation, Dr. Venn opined that Hughes should have been retained in Family Court. App. 2643, ll. 19-23. He believed Hughes would have been rehabilitated in the juvenile justice system. Hughes had no prior record at the time of the offense. "This crime was unusual for him." App. 2644, ll. 1-4. Venn testified that this was significant because often juveniles "who appear in family court once don't appear again. They don't continue to commit offenses." App. 2645, ll. 5-13. While the crime Hughes committed in 1994 is serious, research shows that most "juveniles who've committed homicide" "do not get into trouble again." App. 2649, ll. 10-19. Additionally, Hughes "had no record of serious antisocial or aggressive behavior as . . . a young child." App. 2644, ll. 6-10. Venn explained that this was important because research shows that the "earlier the onset of . . . behavior problems the more likely it is" that a child will "have long term behavior problems." App. 2644, ll. 17-24.

Venn also testified that Hughes had an "internal locus of control," meaning he accepted responsibility for his behavior. App. 2645, l. 14 – 2646, l. 3. As to this offense, Hughes told Venn that, while "it was someone else's idea . . . it was his decision to go along with it." App. 2646, ll. 15-19. Venn found this significant because "juveniles who blame other people for their actions are more likely to continue to commit offenses and get in trouble." App. 2646, ll. 4-8. Hughes's "subtype" based on the Justus Inventory indicated he had "an average risk of reoffending." App. 2647, l. 22 – 2648, l. 12.

Dr. Venn further opined that Hughes, even at age twenty two, was "not a sophisticated individual." App. 2647, ll. 11-15. Venn explained that Hughes "has a low level of intellectual functioning. He's . . . not bright enough for me to consider him to be a sophisticated individual." App. 4647, ll. 16-21.

Dr. Venn "did find some negative factors." App. 2649, ll. 20-22. Hughes's score on the Wender Utah Rating Scale indicates Hughes likely had problems with hyperactivity, inattention, and impulsivity as a child. While this is not a negative factor on its own, children with hyperactivity, inattention, and impulsivity combined with "conduct problems" "do tend to keep getting into trouble." App. 2649, l. 23 – 2650, l. 11. Hughes's limited intellectual functioning and marijuana and alcohol abuse were also negative factors. App. 2650, ll. 15-22.

Again, Dr. Venn opined Hughes could have been rehabilitated within the juvenile justice system. App. 2651, ll. 18-21. He determined that Hughes's behavior problems in school and "his offense patterns coincided with his grandfather's deteriorating health" and his grandfather's placement in a nursing home. Venn believed there was a "cause and effect relationship" between this event and Hughes's behavior. App. 2651, ll. 2-17.

Dr. Marty Beyer, a clinical psychologist, evaluated Hughes in 1999 for purposes of his first action for post-conviction relief. App. 2391, l. 24 – 2392, l. 1. Dr. Beyer was qualified "as an expert in child development and children and juvenile justice issues" without objection. App. 2391, ll. 16-22. She explained that sixteen year olds, because of their level of cognitive, moral, and identity development are "typically not able to function like adults and are, therefore, less culpable and that Herman Hughes specifically was, because of his intellectual limitations, because of the trauma he had experienced, and because of his alcohol abuse, was less mature than a typical sixteen year old and, therefore, less culpable." App. 2393, ll. 1-12. She further

opined that Hughes "should not have been waived to the adult court and instead that family court should have continued [its] jurisdiction over him." App. 2393, ll. 12-15.

Dr. Beyer explained that Hughes's "cognitive development was both different from an adult and different from other adolescents at sixteen." App. 2402, ll. 21-23. Testing showed Hughes "had a lower IQ than is typical of adolescents." App. 2402, ll. 23-25. He also had "a simplistic way of thinking." App. 2402, l. 25 – 2403, l. 1. Dr. Beyer emphasized that Hughes "took risks and did not imagine the consequences." App. 2403, ll. 12-13. On the night of the offense, because of Hughes's limited way of thinking, he felt "boxed in to following his codefendant . . . and he did not consider saying no to his codefendant." App. 2405, ll. 14-22. Additionally, Hughes's "immature thought processes and his intellectual abilities were further compromised by his being drunk" during the offense. App. 2405, ll. 22-24.

Dr. Beyer testified that it was discovered when Hughes was in second grade that he had a learning disability. However, his disability was never addressed by the school system. App. 2409, ll. 5-25. Beyer explained that Hughes should have been placed in special education classes to address his reading disability. App. 2411, ll. 2-16.

Dr. Beyer further opined that Hughes would have benefited from juvenile rehabilitative services. "He had a lot of growing up left to do." App. 2417, ll. 12-25. "He was not a chronic juvenile offender. He had not received treatment in the juvenile system nor had he received treatment for his alcohol problem." App. 2417, l. 25 – 2418, l. 8. Consequently, Beyer would have recommended the Family Court retain jurisdiction over Hughes. App. 2417, l. 12 – 2418, l. 8.

Judge Thomas, the PCR judge, denied Hughes relief on this claim. She found "[t]he waiver hearing was extensive and the family court's order reflects that the evidence presented at the hearing was duly considered." App. 3594. She emphasized that "the family court specifically

considered the Kent factors, which in previous cases the South Carolina Supreme Court has implicitly approved as appropriate criteria." App. 3594 (citing State v. Avery, 333 S.C. 284, 289 n. 3, 509 S.E.2d 476, 479 n. 3 (1998) and State v. Kelsey, 331 S.C. 50, 65 n. 4, 502 S.E.2d 63, 70 n. 4 (1998)). As to ineffective assistance of counsel, Judge Thomas emphasized that counsel Banks requested a delay and an evaluation be conducted at the conclusion of the waiver hearing, but the Family Court judge denied the request. App. 3607. She found there was no evidence the Family Court judge "would have ordered the DJJ evaluation if requested earlier by counsel." App. 3607.

"Assuming arguendo that the request" that a pre-waiver evaluation be conducted by DJJ, Judge Thomas found Hughes failed to provide prejudice. App. 3607. She asserted, "Assuming a presentation similar to the testimony of Dr. Venn would have occurred it is reasonably likely that transfer would have occurred." App. 3607. She emphasized that the Family Court judge knew Hughes had no prior adjudications and that, although the judge did not know that at one time Hughes was placed in special education classes, he "correctly knew" that Hughes "had been attending regular classes prior to his expulsion." App. 3607. Moreover, Judge Thomas maintained that Hughes's "version of the crime" to Dr. Venn was different than the version Hughes told his trial counsel in 1994 "(admitting shooting three times) . . . [Presley, Hoffman, then Presley again]." App. 3608 (citing to PCR Hearing Transcript at 423-425). She determined Hughes's "new version to Dr. Venn" attempted to remove blame from him for the shootings," which was a negative factor "based upon the 'locus of control.'" App. 3608. Judge Thomas also emphasized other negative factors found by Dr. Venn including "Hughes' low IQ, failure to perform well in school, behavior problems in school, history of running away, abuse of marijuana and alcohol, and conduct problems and hyperactive attention deficient disorder." App. 3607-3608. Judge Thomas concluded Hughes "failed to show a reasonable probability that if

counsel had provided this information the result would have been to remain in the Family Court." App. 3611.

Discussion

In 1994, S.C. Code Ann. § 20-7-430(4) provided in full: "If a child sixteen years of age or older is charged with an offense which would be a misdemeanor or felony if committed by an adult and if the court, *after full investigation*, deems it contrary to the best interest of such child or of the public to retain jurisdiction, the court may, in its discretion, acting as committing magistrate, bind over such child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult." S.C. Code Ann. § 20-7-430(4) (1985) (emphasis added).[2]

The Supreme Court of the United States has specifically held that waiver hearings, which determine whether a juvenile will be transferred to adult court, constitute a "critical" point in criminal proceedings against a juvenile. Kent v. United States, 383 U.S. 541, 560 (1966). Recognizing such, the Court has exclaimed, "[T]here is no place in our system of law for reaching a result of such tremendous consequences [to transfer jurisdiction from Family Court] without ceremony—without hearing, *without effective assistance of counsel*, with a statement of reasons." Kent, 383 U.S. at 554 (emphasis added). Thus, the Sixth Amendment right to the effective assistance of counsel clearly attaches to a juvenile offender at a proceeding to determine whether the Family Court should transfer the juvenile to the jurisdiction of the Court of General Sessions.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that

[2] S.C. Code Ann. § 20-7-430 was repealed by 1996 Act No. 383, § 2, effective July 1, 1996.

the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691) (alterations in original); See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard, 372 S.C. at 331, 642 S.E.2d at 597 (quoting Strickland v. Washington, 466 U.S. at 690).

Before entering a transfer order, the Family Court has the responsibility to conduct a full investigation and set forth a sufficient statement of reasons for its decision, including the salient facts on which the order is based. In re Sullivan, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980). Although "[t]he serious nature of the offense is a major factor in the transfer decision," Sanders v. State, 281 S.C. 53, 56, 314 S.E.2d 319, 321 (1984), the Family Court and appellate courts

reviewing transfer decisions must also give appropriate weight to the other considerations set forth by the Supreme Court in its seminal decision in Kent v. United States, 383 U.S. at 566-567 (1966). In Kent, the Supreme Court delineated the following factors for determining whether juvenile jurisdiction should be waived in the District of Columbia:

> (1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver; (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted; (4) The prosecutive merit of the complaint . . . (5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia; **(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living**; (7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; **(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services, and facilities currently available to the Juvenile Court.**

Kent, 383 U.S. at 566-567 (emphasis added).

Counsel's performance was deficient. He admitted he failed to obtain any records or conduct any investigation whatsoever beyond talking to a law enforcement officer and possibly a few of Hughes's family members. Counsel failed to present any evidence, notwithstanding the plethora of evidence available both to show transfer was improper and to rebut the misleading picture the state painted of Hughes. Not only did counsel fail to retain an independent mental health expert to evaluate Hughes, but he also failed to timely request the Department of Juvenile Justice conduct an evaluation to determine Hughes's maturity, sophistication, potential for rehabilitation, and other factors pertinent to the waiver hearing. Counsel assumed, incorrectly, that the state would request DJJ conduct an evaluation and that he would simply be handed a

report from said evaluation at the start of the hearing. Counsel had no strategic explanation for any of these failures.

Because of counsel's deficient performance, the Family Court judge did not hear any evidence concerning Hughes's prospects for reasonable rehabilitation (Criteria 8 above) and only heard the state's evidence about Hughes's sophistication and maturity (Criteria 6 above) and manner of the alleged offense (Criteria 2 above). See Kent, 383 U.S. at 566-567. As discussed above, Dr. Venn, who would have supervised any DJJ waiver evaluation in Calhoun County in 1994, testified that Hughes likely could have been rehabilitated within DJJ and that Hughes was not a sophisticated individual. Hughes's school records could have provided additional information showing Hughes suffered from low intellectual functioning and was not at all sophisticated or mature.

Instead of being given the full picture, the Family Court judge was only given the state's version of events. The judge merely saw a number of crime scene photographs, heard evidence that Hughes had confessed to shooting Kelly Hoffman, and heard that Hughes had behavior problems at school leading to his expulsion. In short, counsel's ineffectiveness resulted in the Family Court judge being deprived of information crucial to the question of waiver. Counsel's failure to investigate and present this evidence undermines confidence in the outcome of the waiver proceeding. There is a reasonable probability that had counsel conducted a proper investigation, Hughes would have been retained in Family Court.

Respectfully, this Court should reverse the decision of the post-conviction relief judge, hold counsel was ineffective, and remand to the Family Court for further proceedings.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of June, 2022.