STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Calhoun County

Honorable Kristi F. Curtis, Circuit Court Judge

---

RECEIVED

**Jun 13 2022**

S.C. SUPREME COURT

HERMAN HUGHES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001415

---

# APPENDIX

---

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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Attorney General

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ATTORNEYS FOR RESPONDENT

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[redacted]

**EARL RHUDY:** UN HUN.

**KELLY HOFFMAN:** BUT FROM, AND LATER ON HE MIGHT HAVE SHOT KEN AGAIN I DON'T KNOW.

**EARL RHUDY:** OKAY, LET ME ASK YOU SOMETHING, HOW MANY TIMES WAS THE GUN FIRED?

**KELLY HOFFMAN:** FOUR.

**EARL RHUDY:** FOUR TIMES. HE SHOT KEN FIRST YOU'RE SAYING AND THEN HE SHOT YOU.

**KELLY HOFFMAN:** AND ME TWICE AND THEN SOMETHING ELSE I THOUGHT IT WAS THE PHONE.

**EARL RHUDY:** OKAY.

**KELLY HOFFMAN:** THEN I WASN'T SURE, IT MIGHT HAVE BEEN KEN AND THEN HE LEFT AND HE CUT OFF THE LIGHTS AND LOCKED THE DOOR BEHIND HIM.

**EARL RHUDY:** HE LOCKED THE DOOR BEHIND HIM?

**KELLY HOFFMAN:** SO LIKE WHEN NOBODY WOULD, IF A CUSTOMER CAME HE WOULDN'T HELP US, HE WOULD JUST THINK WE WERE CLOSED AND SO UM, I WAS SCARED TO LIFT MY HEAD UP CAUSE I WAS SCARED HE WOULDN'T GONE YET AND I KINDA PEEKED AND HE WAS GONE.

**EARL RHUDY:** BUT YOU WERE STILL SITTING AT THE DESK?

**KELLY HOFFMAN:** YES.

**EARL RHUDY:** OKAY.

**KELLY HOFFMAN:** AND I KINDA SAT UP AND I, FIRST I HIT THE POLICE BUTTON AND THEN I TRIED TO GET TO THE PHONE IT WAS FAR AWAY WAY OVER ON THE OTHER SIDE OF THE DESK AND I GOT IT AND I CALLED 411 AND TOLD THEM I'D BEEN SHOT AND WOULD THEY COME, AND THEN A WHILE LATER THE POLICEMAN CAME.

**EARL RHUDY:** OKAY, SO BASICALLY THAT'S THE STORY. UH, GOING BACK THROUGH IT AGAIN, YOU WERE SITTING THERE WITH KEN, YOU GOT THERE ABOUT 8 O'CLOCK WITH KEN. DID YOU COME WITH KEN? YOU DID?

**KELLY HOFFMAN:** YES.

**EARL RHUDY:** OKAY, NOW YOU WILL HAVE TO ANSWER ME CAUSE THEY CAN'T SEE YOUR NODDING ON THE TAPE RECORDER, OKAY? AND WHAT YOU'RE TELLING ME IS THAT UH, DO YOU REMEMBER WHAT TIME THE UH GUY, THE FIRST TIME HE CAME IN, APPROXIMATELY?

**KELLY HOFFMAN:** MAYBE AROUND . . . .

**EARL RHUDY:** HOW LONG AFTER YOU GOT THERE?

**KELLY HOFFMAN:** 8:05.

**EARL RHUDY:** RIGHT AFTER YOU CAME . . .

**KELLY HOFFMAN:** INAUDIBLE . . . . . WHAT I'M REMEMBERING IS KEN'S BOSS ASKED HIM TO COME IN A LITTLE BIT EARLY, WE GOT THERE 5 MINUTES EARLY. I WOULD SAY 5 TIL 8, AROUND 8:05 THE GUY CAME IN.

**EARL RHUDY:** AND HE, AND THE GUY CAME IN THERE AND HE STARTED TALKING TO KEN AND ASKED HIM TO SHOW HIM HOW TO PLAY THE VIDEO MACHINES, OKAY? YOU GETTIN TIRED?

**KELLY HOFFMAN:** YEA.

**EARL RHUDY:** OKAY, YOU READY . .

**KELLY HOFFMAN:** IT'S HOT.

**EARL RHUDY:** WELL, WE'LL STOP IF YOU IF YOU WANT TO, YOU WANT TO GO BACK TO YOUR ROOM?

**KELLY HOFFMAN:** I'M NOT FEELING GOOD.

EARL RHUDY: OKAY, LET ME, AH, TIME OF TERMINATION BE A 6:50 MARCH 25TH.

END OF FIRST INTERVIEW

EARL RHUDY: OKAY, I'M GOING BACK ON TAPE RECORDER. SO A, IT'S 7:23 P.M. MARCH 25TH I'M IN KELLY'S ROOM AT THE HOSPITAL. KELLY, IS THERE ANYTHING ELSE THAT YOU WANT TO TELL ME OR A ANYTHING ABOUT THE CASE OR ANYTHING?

KELLY HOFFMAN: NO.

EARL RHUDY: NO?

KELLY HOFFMAN: NOT REALLY.

EARL RHUDY: THERE'S NOT? YOU TIRED NOW?

KELLY HOFFMAN: NO.

EARL RHUDY: OKAY, UH, WE WILL TRY TO GET A LINE UP JUST AS SOON AS WE CAN, PHOTO LINE UP, MIGHT WAIT TIL YOU GET OUT OF THE HOSPITAL BEFORE WE AH, AH, DO THIS, YOU KNOW, MAKE A PHOTO LINE UP AND EVERYTHING CAUSE I WANT YOU TO FEEL GOOD AND IF YOU NEED TO TALK TO ANYONE GET YOUR MOTHER TO CALL THE SHERIFF'S DEPARTMENT,

**EARL RHUDY CONTINUED:** I'M GOING TO BE OUT OF TOWN FOR A LITTLE WHILE, AH, MONDAY, TUESDAY, AND WEDNESDAY, I'LL BE BACK IN THURSDAY MORNING AND I'LL CHECK ON YOU AS SOON AS I GET BACK IN THEN, OKAY? CAUSE I'VE GOT TO GO TO SCHOOL FOR A LITTLE WHILE. ANYTHING THAT YOU WANT TO ASK ME OR TELL ME OR ANYTHING, WHILE WE'RE, ANY QUESTIONS YOU WANT TO ASK ME, I MAY NOT BE ABLE TO ANSWER THEM, BUT AH, . . . .

**CUT OFF ON TAPE**

**KELLY HOFFMAN:** I REMEMBER KELSEY PIERCE.

**EARL RHUDY:** UN HUN.

**KELLY HOFFMAN:** AND HE WAS NOT IN THERE.

**EARL RHUDY:** YOU DIDN'T SEE HIM IN THERE, RIGHT?

**KELLY HOFFMAN:** HE WASN'T.

**EARL RHUDY:** DID YOU SEE ANYONE ON THE OUTSIDE OF THE BUILDING?

KELLY HOFFMAN: I DIDN'T LOOK.

EARL RHUDY: YOU DIDN'T LOOK? COULD YOU HAVE SEEN OUT OF THE BUILDING HAD YOU LOOKED?

KELLY HOFFMAN: PROBABLY NOT.

EARL RHUDY: OKAY. THE YOUNG MAN THAT DID THE SHOOTING, HAD YOU SEEN HIM BEFORE?

KELLY HOFFMAN: NO.

EARL RHUDY: YOU HAD NOT?

KELLY HOFFMAN: NO, BUT HE WAS IN SCHOOL WITH MY LITTLE SISTER.

EARL RHUDY: BUT WHAT?

KELLY HOFFMAN: HE WENT TO SCHOOL WITH MY LITTLE SISTER.

EARL RHUDY: HE WENT TO SCHOOL WITH YOUR LITTLE SISTER?

KELLY HOFFMAN: YES.

EARL RHUDY: WHAT, WHICH SISTER'S NAME IS THIS, WHICH SISTER?

**KELLY HOFFMAN:** MY YOUNGER ONE.

**EARL RHUDY:** NAME. HER NAME.

**KELLY HOFFMAN:** CANDY.

**EARL RHUDY:** WHAT, CANDY? INAUDIBLE - TAPE FUZZY HE WENT TO SCHOOL WITH YOUR LITTLE SISTER AND HER NAME IS WHAT? WHAT'S YOUR LITTLE SISTER'S NAME?

**KELLY HOFFMAN:** CANDY.

**EARL RHUDY:** CANDY. OKAY, OKAY. I'M GOING TO LEAVE YOU NOW, AH, YOUR A, DO YOU WANT YOUR MOTHER TO COME ON BACK HERE FOR A LITTLE WHILE?

**KELLY HOFFMAN:** I NEED A NURSE. I NEED A PAIN PILL.

**EARL RHUDY:** OKAY, ALRIGHT, I'LL AH, I'LL TELL THE NURSE TO COME BACK AND PROBABLY ALSO TELL YOUR MOTHER TOO. I'LL BE CHECKING WITH YA LATER ON, OKAY.

**KELLY HOFFMAN:** I DON'T WANT MY MOTHER, I JUST WANT THE NURSE.

**EARL RHUDY:** YOU JUST WANT THE NURSE?

**KELLY HOFFMAN:** TO BRING ME A PAIN PILL SOON.

**EARL RHUDY:** OKAY, I'LL TELL HER ON THE WAY OUT, OKAY?

**KELLY HOFFMAN:** OKAY.

**EARL RHUDY:** OKAY, YOU TAKE CARE AND AH, WE'LL GET BACK IN TOUCH WITH YA, OKAY? OKAY, YOU GET BETTER NOW, ESPECIALLY WHEN YOU GET HOME, WE'LL DO ALOT MORE TALKING, OKAY?

**KELLY HOFFMAN:** CUT OFF THE LIGHTS.

**EARL RHUDY:** CUT OFF THE LIGHTS? OKAY. THIS INTERVIEW IS CONCLUDED AT 7:27 MARCH 25TH, 1994.

**TAPE CUT OFF**

[redacted]2009

**EARL RHUDY:** TODAY'S DATE IS APRIL 5, 1994, IT'S 10:18 A.M., I'M AT THE RESIDENCE OF KELLY HOFFMAN AND BETTY HOFFMAN. WE ARE IN KELLY'S BEDROOM. PRESENT IS LT. CHRIS DOZIER OF THE CALHOUN COUNTY SHERIFF'S DEPARTMENT. ALSO PUBLIC DEFENDER MARTIN BANKS. WE ARE HERE TODAY TO TALK TO KELLY, SHE IS AWARE THIS IS RECORDING AGAIN. WHAT WE ARE GOING TO DO TODAY IS SHOW HER A PHOTO LINE UP. CAN YOU SEE ALRIGHT TODAY? DO YOU HAVE YOUR CONTACTS IN?

**KELLY HOFFMAN:** NO.

**EARL RHUDY:** DO YOU NEED YOUR CONTACTS IN?

**KELLY HOFFMAN:** NO.

**EARL RHUDY:** OKAY, NOW THESE ARE . . . .

**TAPE CUTS OFF**

2010

1966

[redacted]

ATTEST: TRUE COPY
J. KEITT [illegible]
CLERK OF COURT
CALHOUN COUNTY

FILED

MAR 21 11 44 AM '94

J. KEITT JOHN HAKER
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

IN THE FAMILY COURT
94-JU-09-5

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

A minor under the age of seventeen years.

SUMMONS

TO : HERMAN LEE HUGHES, MINOR

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: violate the South Carolina Common Law Crime of Grand Larceny of a Bicycle.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 9:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March, 1994.

ATTEST: A TRUE COPY

BY THE COURT:

PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Keitt Wannamaker
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE.

1967

2011

[redacted]

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS SC 29135

a minor under the age of seventeen years.

SUMMONS

TO : THE PARENTS AND/OR GUARDIANS OF HERMAN LEE HUGHES

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: Violate the South Carolina Common Law Crime of Grand Larceny of a Vehicle.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

_____

BY THE COURT:

_____
PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Keith Warmoth
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE.

2012

1968

[redacted]

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF:

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

A MINOR UNDER THE AGE OF SEVENTEEN YEARS.

PETITION

LAURA A. MCCANN, Petitioner, having sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court, alleges:

That the above named child is less than seventeen years of age and resides in the County at the address shown above, or was found in the County as alleged herein:

That the names and address of the child's parents or guardian or custodian are as follows:

| NAME | RELATION | ADDRESS |
|---|---|---|
| Miranda Hughes | Mother | Unknown |
| Herman Hughes | Father | Unknown |
| Lucille Hughes | Guardian | Same as above |

That on or about the 19th day of March, 1994, in the County of Calhoun, State of South Carolina, the above named child did violate the South Carolina Common Law Crime of Grand Larceny of a Vehicle. To that the above named minor child did feloniously take and carry away the personal property, to wit: 1985 gray Mazda RX 7 belonging to Kenneth Pressley, of the value of more than two thousand dollars with intent to deprive the owner permanently of such property.

Petitioner prays the Court to hear the case to determine whether the allegations are true, and whether the child is in need of the care, protection or discipline of the State.

This 21st day of March, 1994.

Laura A. McCann
Petitioner

1969

[redacted]

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

LAURA A. MCCANN, being duly sworn, says that she is the Petitioner herein, and that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief; and to those matters she believes them to be true.

Laura A McCann.
Petitioner

SWORN and subscribed before me
this 21st day of March, 1994

Patsy J Rhett
Notary Public for South Carolina
My commission expires: 6-7-98

2014

1970

FILED

Mar 21 11 48 AM '94

J. KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

[redacted]

ATTEST
J. KE
CLE
CALHOUN

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-6

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

a minor under the age of seventeen years.

SUMMONS

TO : HERMAN LEE HUGHES, MINOR

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: violate section 16-3-20, Code of Laws of South Carolina, 1976, as amended, Murder.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

BY THE COURT:

PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Keitt Wannamaker
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE.

1971

[redacted]

2015

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

a minor under the age of seventeen years.

SUMMONS

TO : THE PARENTS AND/OR GUARDIANS OF HERMAN LEE HUGHES

A petition was filed in the office of the Clerk of Court for CALHOUN County, on March 21, 1994, alleging that the minor did: violate section 16-3-20, Code of Laws of South Carolina, 1976, as amended. Murder.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

BY THE COURT:

_____
PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Todd Wannamaker
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE

2016

1972

[redacted]

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF:

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

A MINOR UNDER THE AGE OF SEVENTEEN YEARS.

PETITION

LAURA A. MCCANN, Petitioner, having sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court, alleges:

That the above named child is less than seventeen years of age and resides in the County at the address shown above, or was found in the County as alleged herein:

That the names and address of the child's parents or guardian or custodian are as follows:

| NAME | RELATION | ADDRESS |
|---|---|---|
| Miranda Hughes | Mother | Unknown |
| Herman Hughes | Father | Unknown |
| Lucille Hughes | Guardian | Same as above |

That on or about the 18th day of March, 1994, in the County of Calhoun, State of South Carolina, the above named child did violate section 16-3-20, Code of Laws of South Carolina, 1976, as amended, Murder. In that the above named minor child did feloniously, willfully and with malice aforethought, kill one Kenneth Presley, by means of shooting the said Kenneth Presley in the shoulder and the face with a Lorgin .380 caliber automatic pistol and that the said victim died as a proximate result thereof.

Petitioner prays the Court to hear the case to determine whether the allegations are true, and whether the child is in need of the care, protection or discipline of the State.

This 21st day of March, 1994.

Laura A. McCann
Petitioner

2017

1973

[redacted]

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

LAURA A. MCCANN, being duly sworn, says that she is the Petitioner herein, and that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief; and to those matters she believes them to be true.

Laura A McCann
Petitioner

SWORN and subscribed before me
this 21st day of March, 1994

Patsy F. Rhett
Notary Public for South Carolina
My commission expires: 6-7-99

2018

1974

[redacted]

ATTEST. TRUE COPY
J. KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

FILED
Mar 21 11 50 AM '94
J. KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-77

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

A minor under the age of seventeen years.

SUMMONS

TO : HERMAN LEE HUGHES, MINOR

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: violate the South Carolina Common Law Crime of Assault and Batteyr with Intent to Kill.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

BY THE COURT:

PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Keitt Wannamaker
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE.

1975

2019

[redacted]

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF :
)
HERMAN LEE HUGHES [redacted]/77 )
[redacted] )
ST. MATTHEWS, SC 29135 )
)
A minor under the age of )
seventeen years. )

SUMMONS

TO : THE PARENTS AND/OR GUARDIANS OF HERMAN LEE HUGHES

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: Violate the South Carolina Common Law Crime of Assault and Battery With Intent to Kill.

The above-named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

BY THE COURT:

_____
PRESIDING JUDGE, Family Court
First Judicial Circuit

_____
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE

2020

1976

[redacted]

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF:

HERMAN LEE HUGHES [redacted]77
[redacted]
ST. MATTHEWS, SC 29135

A MINOR UNDER THE AGE OF SEVENTEEN YEARS.

PETITION

LAURA A. MCCANN, Petitioner, having sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court, alleges:

That the above named child is less than seventeen years of age and resides in the County at the address shown above, or was found in the County as alleged herein:

That the names and address of the child's parents or guardian or custodian are as follows:

| NAME | RELATION | ADDRESS |
|---|---|---|
| Miranda Hughes | Mother | Unknown |
| Herman Hughes | Father | Unknown |
| Lucille Hughes | Guardian | Same as above |

That on or about the 18th day of March, 1994, in the County of Calhoun, State of South Carolina, the above named child did violate the South Carolina Common Law Crime of Assault and Battery with Intent to Kill. In that the above named minor child did commit an assault and battery upon the person of Kelly Hoffman by shooting the said Kelly Hoffman in the arm with a Lorcin .380 automatic pistol with intent to kill the said Kelly Hoffman, and causing her to seek medical attention.

Petitioner prays the Court to hear the case to determine whether the allegations are true, and whether the child is in need of the care, protection or discipline of the State.

This 21st day of March, 1994.

Laura A McCann
Petitioner

2021

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

LAURA A. MCCANN, being duly sworn, says that she is the Petitioner herein, and that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief; and to those matters she believes them to be true.

Laura A McCann
Petitioner

SWORN and subscribed before me
this 21st day of March, 1994

Patsy J. Rhett
Notary Public for South Carolina
My commission expires: 6-7-98

2022

1978

ATTEST. TRUE COPY
J. KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

FILED
Mar 21 11 52 AM '94
J. KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-8

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

a minor under the age of seventeen years.

SUMMONS

TO : HERMAN LEE HUGHES, MINOR

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: violate section 16 11-330, Code of Laws of South Carolina, 1976, as amended, Armed Robbery.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

BY THE COURT:

PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Keitt Wannamaker
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANCE.

1979 [redacted]

2023

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF :

HERMAN LEE HUGHES [redacted]/77
[redacted]
ST. MATTHEWS, SC 29135

A minor under the age of seventeen years.

SUMMONS

TO : THE PARENTS AND/OR GUARDIANS OF HERMAN LEE HUGHES

A petition was filed in the office of the Clerk of Court for CALHOUN County on March 21, 1994, alleging that the minor did: violate section 16-11-330, Code of Laws of South Carolina, 1976, as amended, Armed Robbery.

The above named minor and his/her parents and/or guardian are directed to appear before the Presiding Judge of the Family Court on March 21, 1994 at 3:00 P.M. at the ORANGEBURG County Courthouse, ORANGEBURG, South Carolina for a hearing.

Dated at Orangeburg, South Carolina, this 21st day of March 1994.

ATTEST: A TRUE COPY

BY THE COURT:

_____
PRESIDING JUDGE, Family Court
First Judicial Circuit

J. Keith Wannamaker
Clerk of Court

NOTICE

FOR MINOR AND PARENT(S)

YOU HAVE A RIGHT TO AN ATTORNEY TO REPRESENT YOU AT THE ADJUDICATION HEARING.

IF YOU CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED BY CALLING THE OFFICE OF THE CLERK OF COURT, CALHOUN COUNTY COURTHOUSE, ST. MATTHEWS, SOUTH CAROLINA; PHONE 874-3524.

FAILURE TO HAVE AN ATTORNEY IS NOT GROUNDS FOR CONTINUANC

2024

1980 [redacted]

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN )

IN THE FAMILY COURT
94-JU-09-_____

IN THE INTEREST OF:

HERMAN LEE HUGHES [redacted]77
[redacted]
ST. MATTHEWS, SC 29135

A MINOR UNDER THE AGE OF SEVENTEEN YEARS.

PETITION

LAURA A. MCCANN, Petitioner, having sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court, alleges:

That the above named child is less than seventeen years of age and resides in the County at the address shown above, or was found in the County as alleged herein:

That the names and address of the child's parents or guardian or custodian are as follows:

| NAME | RELATION | ADDRESS |
|---|---|---|
| Miranda Hughes | Mother | Unknown |
| Herman Hughes | Father | Unknown |
| Lucille Hughes | Guardian | Same as above |

That on or about the 18th day of March, 1994, in the County of Calhoun, State of South Carolina, the above named child did violate section 16-11-330, Code of Laws of South Carolina, 1976, as amended, Armed Robbery. In that the above named minor child did while armed with a deadly weapon, to wit: a pistol, did feloniously take from the person or presence of the Blue Diamond, by means of force and intimidation goods or monies belonging to the Blue Diamond, such goods and monies described as : approximately four hundred and fifty dollars ($450.00) in cash.

Petitioner prays the Court to hear the case to determine whether the allegations are true, and whether the child is in need of the care, protection or discipline of the State.

This 21st day of March, 1994.

Laura A. McCann
Petitioner

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

LAURA A. MCCANN, being duly sworn, says that she is the Petitioner herein, and that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief; and to those matters she believes them to be true.

Laura A McCann
Petitioner

SWORN and subscribed before me
this 21st day of March, 1994

Patsy G. Klett
Notary Public for South Carolina
My commission expires: 6-7-98

1982

[redacted]

ATTEST: TRUE COPY
J. Keitt Wannamaker
KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

FILED
Mar 24 1 24 PM '94
J. KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA )
) IN THE FAMILY COURT
COUNTY OF CALHOUN ) 94-JU-09-05,06,07,08
)
THE STATE OF SOUTH CAROLINA )
)
- vs - ) SUMMONS AND NOTICE
) OF HEARING
HERMAN HUGHES [redacted]/77 )
)
A minor under the age of )
seventeen (17) years. )

TO: HERMAN HUGHES, MINOR
PARENTS AND/OR GUARDIANS OF THE MINOR

YOU WILL PLEASE TAKE NOTICE:

That a(n) ___ transfer _____hearing will be held in the Chambers of the Family Court of the First Judicial Circuit, located at __ORANGEBURG ____ COUNTY COURTHOUSE, ____ORANGEBURG__, South Carolina, on __8th___ day of __April_____, 1994, at ___11:30___A.M. o'clock.

NOW THEREFORE, you are hereby ORDERED to appear at the aforesaid time and place along with the above named minor child.

J. Keitt Wannamaker
Clerk of Court

ATTEST: A True Copy

_____
Clerk of Court

1983

FILED
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KEITT WANNAMAKER
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA )
) IN THE FAMILY COURT
COUNTY OF CALHOUN )

THE STATE OF SOUTH CAROLINA )
)
vs )
) PETITION FOR TRANSFER
) 94-JU-09-05,06,07,08
HERMAN HUGHES )
A minor under the age of )
seventeen years. )

THAT the Petitioner would respectfully show unto this Honorable Court:

1. THAT Petition(s) was/were filed against HERMAN HUGHES, a juvenile under the age of seventeen (17) years on March 21, 1994, charging the said minor with MURDER, ASSAULT AND BATTERY WITH INTENT TO KILL, GRAND LARCENY OF A VEHICLE and ARMED ROBBERY.

2. THAT Petitioner feels it would be in the best interest of the community and minor that this juvenile be transferred to the Court of General Sessions and be tried as an adult.

WHEREFORE, Petitioner prays that this Honorable Court inquire and determine whether or not it would be in the interest of the community and minor for this matter to be transferred to the Court of General Sessions and the said juvenile to be tried as an adult.

This 21st day of March, 1994.

Petitioner

1813

1984

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )

Laura McCann, Petitioner, being sworn, says that he/she is the Petitioner herein, and that he/she has read the foregoing Petition and knows the contents thereof, that the same is true of his/her own knowledge, except as to the matters therein stated to be alleged on information and belief, and to those matters he/she believes them to be true.

Laura McCann
Petitioner

SWORN and subscribed before me
this 21st day of March 1994.

Peter J. Klett
Notary Public for South Carolina
My commission expires: 6-7-98

#244

FILED

Mar 3 1 49 PM '94

J. KEITH [illegible]MAKER
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA )
) IN THE FAMILY COURT
COUNTY OF CALHOUN ) 94-JU-09-05,06,07,08
)
THE STATE OF SOUTH CAROLINA )
)
- vs - ) ORDER
)
HERMAN HUGHES, )
A minor under the age of )
seventeen years. )
)

This matter was before the Court on the 8th day of April, 1994 pursuant to petition numbered 94-JU-09-05,06,07,08, which charged the minor defendant, Herman Hughes, with Murder, Assault and Battery with Intent to Kill, Armed Robbery and Grand Larceny of a Vehicle.

Present in the Courtroom were: Reddick Bowman, Assistant Solicitor; Martin Banks, Attorney for the minor; the minor defendant, Herman Hughes; the mother of the minor; Sheriff D. Jones, and Deputy Earl Rhudy, Calhoun County Sheriff's Department and representatives from the Department of Juvenile Justice.

At the call of the case the Court was informed by Mr. Bowman, Assistant Solicitor, that the State was prepared for a transfer hearing per 20-7-430 (4), Code of Laws of South Carolina, 1976, as amended. The testimony of Sheriff Jones and Deputy Rhudy, Calhoun County Sheriff's Department was presented. Deputy Rhudy and Sheriff Jones testified that they investigated an incident that occurred in the evening of March 18, 1994 at the Blue Diamond Casino. Testimony indicated that the victim, Kelly Huffman called law enforcement after having been shot twice, on

Page 44

State v. H. Hughes 94-JU-09-05,06,07,08

in the arm and once on the face. She was transported to Richland Memorial Hospital for treatment. Another victim, Kenneth Pressley, was also found shot twice. He was transported by EMS to the hospital and died later that evening. The vehicle of the victim, K. Pressley, was found the next morning at the Ebony Club in Orangeburg County. The owner of the Ebony Club provided law enforcement with information about the stolen vehicle. Further investigation indicated that Daniel Owens, provided law enforcement with a statement that the minor defendant and the adult co-defendant, Kelsey Pierce was driving the vehicle. The minor defendant, Herman Hughes, made a statement to law enforcement on March 20, 1994 whereby he admitted to shooting the victim Kelly Hoffman. Additional statements were received from numerous individuals who heard the adult co-defendant, Kelsey Pierce, admit to the incident. Both Sheriff Jones and Deputy Rhudy requested that the minor be transferred to the Court of General Sessions to be tried as an adult due to the seriousness of the offense.

The State then presented the testimony of Ms. Dolly Zeigler, Supervisor with the Department of Juvenile Justice. Ms. Zeigler informed the Court of the minors prior Court history which indicated that the minor has no prior adjudications, however he has been referred for Pointing and Presenting a Firearm on March 31, 1993 which was dismissed. He was also referred for runaway on February 14, 1994 at which time a pick-

Page #2 MRW

up Order was issued. He also has a Grand Larceny of a Vehicle charge referred on March 8, 1994 which is still pending. Ms. Zeigler also testified about the minors educational background, and community problems that she were contained in the file. Specifically, that the minor was expelled from John Ford Middle School in February 1994. Ms. Zeigler concluded her testimony by indicated that the Department of Juvenile Justice has no opinion on the transfer of this minor to the Court of General Sessions.

The defense did not presenting any witnesses.

Based on the information presented to the Court, I find that the State has established probable cause to believe that the minor defendant, Hermon Hughes, committed the offenses of Murder, Assault and Battery with Intent to Kill, Armed Robbery and Grand Larceny of a Vehicle. The State presented testimony that the minor committed a serious, violent cold-blooded crime against person that involved physical violence against a person with a weapon. The leading authority is Kent v. United States, which sets forth the criteria for waiver. Based on the criteria, and the testimony received, the Court finds that the minor shall be transferred to the Court of General Sessions on the charges of Murder, Assault and Battery with Intent to Kill, Armed Robbery and Grand Larceny of a Vehicle.

Page #3 MW

The Court then entertained arguments for bond per 20-7-430 (8) Code of Laws of South Carolina, 1976, as amended.

Based on the information presented, the Court finds that the minor defendant shall be denied bond at this time.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED

THAT the minor, Herman Hughes, shall be transferred to the Court of General Sessions for the charges of Murder, Assault and Battery with Intent to Kill, Armed Robbery, and Grand Larceny of a Vehicle Nature;

That the defendant shall be denied bond;

AND SO IT IS ORDERED.

Page #4

Orangeburg, South Carolina

_____, 1994

Judge of the Family Court
First Judicial Circuit

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 22, 1997

Joseph L. Savitz, III
Deputy Chief Attorney

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

2034

STATE OF SOUTH CAROLINA )
COUNTY OF CALHOUN )
STATE VS. )
HERMAN HUGHES )
AKA: )
Race: B Sex: M Age: 29 )
DOB: [redacted].77 SS#: )
Address: )
City, State, Zip )
DL# SID# )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
94 -GS- 09 - 0154
AW#: 94CC002
Date of Offense: 3/18/94
S.C. Code §: 16-3-20
CDR Code #: 0 / 1 / 1 / C
☐ CASE RESTORED
SENTENCE
☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: MURDER
in violation of § 16-3-20 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / C
☐ NON-VIOLENT ☑ VIOLENT ☐ SERIOUS ☑ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor

Attorney For Defendant

Herman Hughes
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 21 Yrs, days/months/years or ☐ under the ~~**Youthful Offender Act**~~ not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with ~~**probation**~~ for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 94-GS-09-153 & 94-GS-09-154.
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

**SPECIAL CONDITIONS:**

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS
Recipient:

| | | |
|---|---|---|
| *Fine: | | $ |
| §14-1-206 (Assessments 107.5%) | | $ |
| §14-1-211(A)(1) (Conv. Surcharge) | $100 | $ |
| §14-1-211(A)(2) (DUI Surcharge) | $100 | $ |
| §56-5-2995 (DUI Assessment) | $12 | $ |
| § 35.13 (Public Def/Prob) | $500 | $ |
| §73.3, 1B TP (Law Enforce. Funding) | $25 | $ |
| §33.7, 1B TP (Drug Court Surcharge) | $100 | $ |
| §50-21-114(BUI Breath Test Fee) | $50 | $ |
| §56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| 3% to County (if paid in installments) | | $ |
| TOTAL | | $ |

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $_____ beginning _____
$_____ paid to _____ Fund
Other:

ATTEST TRUE COPY
KENNETH TASTY
CLERK OF COURT
CALHOUN COUNTY

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Norma J. Edgemon
Clerk of Court/Deputy Clerk
Court Reporter: Robin Rice

PRESIDING JUDGE: Howard P. King
Judge Code: 2 1 1 0 7
Sentence Date: 10/10/06

SCCA/217 (2/2006) *White* – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant

7-4277



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Calhoun County
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Case No.: 2007-CP-09-00103

Herman Lee Hughes, Jr., #206816, Appellant,

V.

Donald J. Zelenka, State of South Carolina, Respondent.

NOTICE OF APPEAL

Herman Lee Hughes, Jr., #206816, appeals the Final Order of the Honorable Diane S. Goodstein, dated January 2, 2008. Appellant received written notice of entry of this Order on ~~May 17,~~ July 9, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal From Calhoun County

Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge

---

Case No.: 2007-CP-09-00103

Herman Lee Hughes, Jr., #206816, Petitioner,

V.

Donald J. Zelenka, State of South Carolina, Respondent.

---

**EXPLANATION**

---

Herman Lee Hughes, Jr. #206816

Herman Lee Hughes, Jr. #206816
B.R.C.I. CO-118
4460 Broad River Road
Columbia, S.C. 29210

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## Questions Presented

1. Whether the lower courts determination that this PCR action is impermisive;

2. Whether the issues raised in the present and original pleadings now present a novel claim of Eighth and Fourteenth Amendment via Roper v. Simmons and Graham v. Florida;

3. Whether in fact the petitioner was denied effective assistance of counsel on opportunity to seek appellate review from his 2005 re-sentence via White v. State;

4. Whether the statute of limitations should apply to this novel claim.

## Statement of the Case

For purposes of this Explanation for Writ of Certiorari, petitioner agrees with the Statement of the Case provided by the respondent.

## Argument

The applicant contends in this Explanation that the lower court findings were improper in so much as the issues raised in his original and current pleadings now raise a novel question of how in light of the U.S. Supreme Courts decision in Roper v. Simmons and Graham v. Florida 2010 regarding the Constitutionality of seeking the death penalty and LWOP sentences upon juveniles.

1. The Constitutional errors in his trial and sentencing (with respect to his juvenile status) prejudiced him and worked to his actual and substantial disadvantage infecting his entire trial and sentencing with errors of constitutional dimensions. U.S. v. Frady, 102 S.Ct. 1884, and that applicant did not knowingly and voluntarily waive his right to appeal at his re-sentencing.

2. The present PCR application and the original application present issues that are now novel to this state's constitution concerning the Eighth and Fourteenth Amendment and sentencing.

3. The applicant is entitled to appeal pursuant to White v. State as applicant did not knowingly and voluntarily waive his right to appeal at re-sentencing and counsel failed to inform him of this right.

## Conclusion

For the reasons stated, this Court should grant the Petition For Writ Of Certiorari and forgo all Statutes of Limitation on the novelity of this issue.

**STATE OF SOUTH CAROLINA**

**IN THE SUPREME COURT**

---

Appeal From Calhoun County

Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge

---

Herman Lee Hughes, Jr., #206816, Petitioner,

V.

Donald J. Zelenka, State of South Carolina, Respondent.

---

**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that a true copy of Explanation for Writ of Certiorari has been served upon opposing counsel, Donald J. Zelenka, by mailing one copy in an envelope properly addressed on this 16th day of July, 2010.

SWORN and SUBSCRIBED before me

this 20th day of July 2010.

Susan D. Johnson

Notary Public South Carolina

My Commission Expires:_____

My Commission Expires
March 5, 2018

Herman Lee Hughes Jr #206816

Herman Lee Hughes, Jr. #206816
B.R.C.I. CO-118
4460 Broad River Road
Columbia, S.C. 29210

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

CERTIORARI TO CALHOUN COUNTY

DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

---

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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## ISSUE PRESENTED

Whether petitioner's case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief application?

STATEMENT

Petitioner was convicted of murder, armed robbery, assault and battery with intent to kill and grand larceny after a jury trial held before the Honorable Edward B. Cottingham in Calhoun County on September 7-12, 1995. He was sentenced to death for murder, to twenty-five (25) years consecutive for armed robbery, to twenty-five (25) years consecutive for assault and battery with intent to kill, and to five (5) years concurrent for grand larceny. Phillip F. Newsom, Esquire was trial counsel.

Petitioner appealed his convictions and sentences and they were affirmed by the South Carolina Supreme Court on October 27, 1997. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997).

A petition for writ of certiorari was filed in the United States Supreme Court and the petition was denied on April 27, 1998. Hughes v. South Carolina, 523 U.S. 1097, 118 S.Ct. 1674 (1998).

Petitioner filed his first application for post-conviction relief on June 22, 1998. An evidentiary hearing was held on October 11-13, 1999, before the Honorable Paula Thomas. Petitioner was represented by John H. Blume, Esquire. Respondent was represented by Donald J. Zelenka and Jeffrey A. Jacobs of the Office of the Attorney General. On May 9, 2005, Judge Thomas issued an order granting a new sentencing hearing after the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005) which prohibited execution of offenders under eighteen (18) years of age. On October 10, 2006, petitioner appeared before the Honorable Howard P. King and was sentenced to life imprisonment for murder.

Petitioner filed his current pro se application for post-conviction relief on June 26, 2007. Respondent filed a return and motion to dismiss the application as being successive on August 27,

2007. The Honorable Diane S. Goodstein issued a conditional order of dismissal on September 27, 2007, giving petitioner twenty (20) days to show why the order should not become final. Petitioner filed a reply to the conditional order on November 20, 2007. On January 2, 2008, Judge Goodstein issued a final order dismissing petitioner's current application as being successive.

This petition follows.

## ARGUMENT

Petitioner's case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief action.

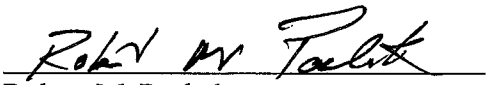
Before Judge Thomas granted petitioner a new sentencing proceeding on May 9, 2005, she had previously denied petitioner's application in its entirety in a one-hundred and eighty-nine (189) page order on December 8, 2000. (App. p. 25) No appeal was taken form this order.

In petitioner's reply to the conditional order of dismissal petitioner argued that his case should not be deemed successive because he never waived his right to challenge his convictions. He asked to be allowed to pursue an appeal of his prior PCR case. (App. p. 117) In accordance with Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) petitioner's case should be remanded with the appointment of counsel to determine if he knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief application.

## CONCLUSION

Petitioner's case should be remanded for a determination if he waived his right to appeal the denial of his first post-conviction relief case.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

CERTIORARI TO CALHOUN COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Herman Lee Hughes, Jr. states:

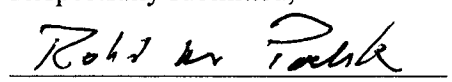
1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on . In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Herman Lee Hughes, Jr..

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

CERTIORARI TO CALHOUN COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

CERTIFICATE OF SERVICE

---

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Mary S. Williams, Esquire, and Herman Lee Hughes, Jr., #216816, Broad River Correctional Institution, this 29th day of October, 2010.

Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of October, 2010.

(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

---

# APPENDIX

---

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

P. O. Box 11549
Columbia, S. C. 29211

ATTORNEYS FOR RESPONDENT

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**FORM 5**

STATE OF SOUTH CAROLINA )

) IN THE COURT OF COMMON PLEAS

COUNTY OF Calhoun )

)

)

)

Full name and prison number (if any) of Applicant. )

Herman Hughes #206816 )

v. ) **APPLICATION FOR**

)

State of South Carolina ) **POST-CONVICTION RELIEF**

)

2007-CP-09-00103

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KENNETH HASTY CLERK OF COURT CALHOUN COUNTY
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JUN 26 A 10:51

## INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Corr. Inst.
2. Name and location of Court which imposed sentence Calhoun Co. Courthouse
3. Name(s) of co-defendant(s) (if any) Kelsey Cook & Henry D. Owens
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

ATTEST: TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY



Revised 3/2003

(a) _____

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) September 12th 1995; Sentenced to Death

(b) Sentence Vacated October 10th 2006, to terms

(c) of: Life, plus (45) forty-five years

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of Counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial Counsel failed to strike Jurors that had personal

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of Counsel; →

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Phillip Newsom

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Arraignment; trial; and sentencing

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

New Trial or new Sentencing hearing

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA )
)
County of Calhoun )

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Herman Hughes

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2007 JUN 26 A 10:51
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

SWORN to and subscribed before me this 20th day of June, 2007.

(L.S.)
*Notary Public*

My Commission Expires: January 11, 2009

**APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Herman Hughes
*Applicant*

SWORN or affirmed to and subscribed before me this 20th day of June, 2007.

*Notary Public*

My Commission Expires: January 11, 2009

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ST. MATTHEWS, SC

Revised 3/2003

| | |
|---|---|
| **STATE OF SOUTH CAROLINA )**<br>**)**<br>**COUNTY OF CALHOUN )** | **IN THE COURT OF COMMON PLEAS** |
| **Herman Lee Hughes, Jr., #206816,)**<br>**)**<br>**Applicant, )**<br>**)**<br>**v. )**<br>**)**<br>**STATE OF SOUTH CAROLINA, )**<br>**)**<br>**Respondent. )** | **2007-CP-09-00103**<br><br>**RESPONDENT' S RETURN AND MOTION TO DISMISS AS A SUCCESSIVE APPLICATION** |

The Respondents State of South Carolina, above-named, hereby make a Return and Motion to Dismiss the application for post-conviction relief filed June 26, 2007. In his present application, he challenges his 1995 convictions claiming his retained counsel, Phil Newsom was ineffective in three specifications. ***The Respondent submits that the entire application must be dismissed as successive*** **under S.C. Code Ann. § 17-27-90 (1985)** ***to his 1998 application for post-conviction relief which challenged the same convictions which was dismissed on December 8, 2000, as amended May 9, 2005 by the Honorable Paula Thomas after a hearing on the merits.*** See *Hughes v. Moore, 98-CP-09-101, Order , December 8, 2000.* As set forth below, Respondents will show that these same or similar claims sought to be raised in this 2007 action were raised and ruled upon in the prior action and no showing can be made that they were inadequately raised in the earlier action when a full evidentiary hearing, depositions and post-hearing briefing were done prior to the adjudication. Respondents would show the Court the following:

I.

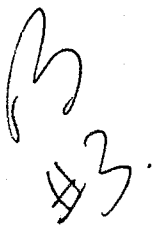
The Respondent submits that the Applicant, Herman Lee Hughes, # 206816, is challenging his 1995 murder conviction which was previously the subject of an application for post-conviction relief. In that action, Hughes v. Moore, et al, 1998 -CP-09-101, the Applicant was represented by court-appointed counsel, John H. Blume, Cornell Law School, Myron Taylor Hall, Ithaca, New York 14853-4901 (607-255-9653) and initially Pamela A. Wilkins formerly of the Center for Capital Litigation, P.O. Box 11311, Columbia, South Carolina 29211 (803-765-0650). The matter was assigned exclusively to the Honorable Paula Thomas because it was a death penalty post conviction relief action. The Respondents were represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211. The Respondents made a return and motion to make more definite and certain dated July 21, 1998. Subsequently, other amended applications were filed. An evidentiary hearing was convened in Horry County from October 11-13, 1999. The Applicant was present and represented by counsel. The Respondents were represented by above-named counsel. Evidence was presented in the form of testimony, depositions, and affidavits. Subsequent to the hearing further submissions were made. On May 17, 2000, the Applicants made their Post-Hearing Memorandum of Law In Support of the Third Amended Application For Post-Conviction Relief. The Respondents made a Memorandum Of Law In Opposition to the Application for Post-Conviction Relief on May 27, 2000.

In the initial Application dated June 22, 1998, Hughes made the following allegations through counsel as to why he believes he is being held in custody unlawfully:

I. 9(a) Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution. (Ineffective assistance of counsel - Guilt Phase Investigation and Presentation).

10(a) Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt, to effectively cross-examine the state's witnesses, or to contradict the state's theory of the case. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution. (Ineffective assistance of counsel - Sentencing Phase Investigation and Presentation).



10(b) Defense counsel failed to thoroughly investigate and present evidence in mitigation of punishment although such evidence was available. Counsel failed to adequately prepare for the sentencing phase and failed to prepare and present adequate defenses to the aggravating circumstances presented by the state. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9. (c) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances. (Ineffective assistance of counsel - Penalty Phase - Failure to object to instructions).

10 (c) 1) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. 2) The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at

> 1698. 3) Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). 4) In addition, the trial court's written instructions refer only to statutory mitigating circumstances. 5) These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

After subsequent allegations, the Applicant, through current appointed counsel made the following allegations in the **Third Amended Application** dated October 7, 1999 prior to evidentiary hearing:

> **9(a) Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.**
>
> **10(a) Although South Carolina law in 1994 required a "full investigation" prior to a decision to transfer a juvenile from family court to General Sessions Court, the State arbitrarily failed to comply with this statutory obligation. Hicks v. Oklahoma. Additionally, the hearing itself did not satisfy minimum standards of due process as delineated in Kent v. United States, 381 U.S. 902 (1965). The defects in the waiver hearing include, but are not limited to, the following:**
>
> (1) The Family Court lacked information concerning Applicant's mental retardation/borderline intellectual functioning and other cognitive limitations.
>
> (2) The Family Court heard no evidence about Applicant's potential for rehabilitation within the juvenile system, yet concluded (without any

evidentiary basis) that the Applicant could not be rehabilitated within the juvenile justice system.

(3) The Family Court heard incomplete and inaccurate information concerning the facts of the offenses and the Applicant's degree of culpability.

(4) The Family Court based its decision to transfer the Applicant to General Sessions Court based on impermissible considerations, such as the desire to "send a message" to other juveniles.

**9(b) Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.**

**10(b) Applicant's counsel at the Family Court waiver hearing failed to provide adequate representation. Counsel's deficiencies include, but are not limited to, the following:**

**(1) Counsel failed to secure necessary records and testimony to demonstrate Applicant's mental retardation or borderline intellectual functioning and to show Applicant's potential for rehabilitation within the juvenile justice system. See, e.g., State v. Bryant, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988)(finding counsel at waiver hearing ineffective for failing to introduce evidence regarding potential for rehabilitation), rev'd in part on other grounds, 569 A.2d 770 (N.J. 1989).**

**(2) Counsel's failure to adequately prepare and secure records prevented counsel from effectively cross-examining the State's witnesses, who testified (wrongly) that Applicant had never been in special education.**

(3) Counsel failed to present evidence that Kelsey Pearce, not Herman Hughes, planned and was the primary perpetrator of the crimes.

**(4) Counsel failed to make a timely motion for an evaluation by the Department of Juvenile Justice.**

(5) Counsel also failed to object to the Family Court's improper reasons for transferring Applicant to General Sessions Court, which included the desire to "send a message" to other young people and the belief that DJJ "provides no rehabilitation."

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9 ( c ) Applicant was denied the effective assistance of counsel at the hearing to determine his competency to stand trial, in violation of south Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

10 ( c ) Despite evidence that Applicant was both mentally retarded and developmentally immature, trial counsel conceded, without presenting any argument or testimony, that Applicant was competent to stand trial. State v. Johnson, 395 N.W.2d 176 (Wis. 1986)(affirming 374 N.W.2d 637 (Wis. Ct.App. 1985))(finding counsel ineffective for failing to raise viable issue concerning defendant's competence to stand trial). Counsel's concession was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

**9(d) Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.**

**10(d) Trial counsel failed to conduct an adequate *voir dire*. Counsel's deficient performance includes, but is not limited to, the following:**

**(1) Counsel failed to challenge for cause (*or use a peremptory challenge*) a number of jurors who were acquainted with the families of the victims and who had actually spoken with them about the crimes and about their loss. See Morgan v. Illinois, 504 U.S. 719 (1992)(defendant has right to impartial jury).(*Involves juror William Barron and Brenda Wise as stated in October 10, 1999 Letter from Counsel Wilkins*)**

(2) Counsel failed to rehabilitate a number of jurors who expressed reservations about the death penalty, see Witherspoon v. Illinois, 391 U.S. 510 (1968)(jurors with reservations about death penalty may not be excluded for cause if they are able to fulfill their oath as jurors), and failed to challenge for cause jurors who indicated that they were unable to consider mitigating circumstances or would automatically vote for death upon a finding of guilt. See Morgan v. Illinois, 504 U.S. 719 (1992)(jurors who would automatically vote for death are excludable for cause).

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

**9(e) Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.**

10(e) Applicant's trial counsel failed to conduct an adequate and independent investigation of Applicant's case in order to develop and present testimony to create a reasonable doubt as to Applicant's guilt, to effectively cross-examine the State's witnesses, or to contradict the State's theory of the case. Counsel's deficient performance includes, but is not limited to:

**(1) Counsel failed to adequately prepare and present evidence impeaching the credibility of Henry Daniel Owens, Jr. Steinkuehler v. Meschner, ___ F.3d ___, 1999 WL 274826 (8th**

**Cir. May 6, 1999), Williams v. Washington, 59 F.3d 673 (7th Cir. 1995).**

**(2) Counsel failed to adequately prepare and present evidence regarding Kelsey Pearce's planning of, and involvement in, the offenses. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).**

**Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).**

9(f) Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

10(f) Applicant's trial counsel failed to adequately develop and present expert and lay testimony in mitigation and in rebuttal to the aggravation evidence presented by the state. In addition, counsel failed to object to the State's introduction of inadmissible evidence, failed to object to prejudicial portions of the State's closing argument and to certain aggravating circumstances submitted by the State, and failed to ensure that the jury was properly charged. Counsel's deficient performance includes (*all allegations set forth concerning guilt phase issues of ineffective assistance according to the October 10, 1999 letter from counsel Wilkins*), but is not limited to:

(1) Counsel failed to adequately prepare and present evidence to the retained defense experts in order to ensure a competent, complete, and thorough evaluation, an accurate diagnosis, and adequate preparation for their testimony. See, e.g., Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S.Ct. 1856 (1998).

(2) Counsel failed to secure necessary expert testimony supporting Applicant's developmental, mental, and social impairments. Adbur' Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998)(finding

counsel ineffective for failing to seek needed expert assistance).

(3) Counsel failed to present evidence that Applicant's school failure stemmed, in large part, from the school system's failure to provide appropriate special education remediation.

(4) Counsel failed to adequately cross-examine the State's witnesses or to object to the admission of Applicant's school disciplinary records.

(5) Counsel failed to object to, or move to limit, the excessive and otherwise inadmissible victim impact evidence presented by the State.

(6) Counsel failed to object to the solicitor's prejudicial and inflammatory closing argument during the sentencing phase of trial. Christy v. Horn, 27 F. Supp. 2d 307 (W.D. Pa. 1998)(finding counsel ineffective for, *inter alia*, failing to object to solicitor's improper arguments during sentencing).

9(g) Applicant was denied the effective assistance of counsel under South Carolina law and the Sixth and Fourteenth Amendments by trial counsel's failure to argue that international treaties and customary international norms binding upon the United States forbid the execution of juvenile offenders.

10(g) Article 6(5) of the International Covenant on Civil and Political Rights 9ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders. Despite this binding international law, which applies to the States through the Supremacy Clause of the United States Constitution, trial counsel failed to raise the illegality of the death penalty for Applicant. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(h) Applicant's death sentence violates international treaties and customary international norms binding upon the United States.

10(h) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders.

9(I) Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

10(I) Appellate counsel failed to raise on appeal any proportionality argument concerning the propriety of a death sentence for a sixteen year old defendant with mental retardation or borderline. Appellate counsel's failure was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(j) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances.

10(j) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). In

addition, the trial court's written instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986), State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

9(k) Applicant was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the trial court's ruling that the South Carolina Constitution permits the imposition of the death penalty upon a defendant who was a juvenile at the time of the alleged crime.

10(k) Trial counsel moved to bar the State from seeking the death penalty against Applicant, arguing that imposition of the death penalty for a crime committed while the defendant was a juvenile violates both the United States Constitution and the South Carolina Constitution. After hearing oral argument, the trial court concluded that "the appropriate case law, including that of South Carolina, does not suggest that one...who was sixteen at the time of the alleged commission of the crime cannot suffer supreme penalty if a jury of 12 find it is warranted." (Emphasis added). Appellate counsel failed to appeal the trial court's finding on the state constitutional issue, despite the lack of any controlling South Carolina Supreme Court decision concerning the issue. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(l) Alternatively, in the event the court finds that the issue concerning the South Carolina Constitution in Ground 9(k) was not preserved for appeal, Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and relevant South Carolina law by trial counsel's failure to obtain a ruling regarding whether the imposition of the death penalty upon a person who was a juvenile at the time of the crime violates the South Carolina Constitution.

10(l) Although trial counsel's written Motion to Bar Imposition of the Death Penalty against Applicant relied, in part, on state constitutional grounds, Applicant failed to argue the state constitutional issue at the hearing on the motion. Furthermore, by failing to obtain a ruling from the trial court, he did not preserve the issue for appellate review. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(m) Applicant was denied his statutory right to the appointment of two attorneys to represent him at his capital trial.

10(m) Despite Applicant's indigence, the trial court failed to appoint a second lawyer to assist in his representation, as required by S.C. Code Ann. § 16-3-26 and Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

9(n) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina law by trial counsel's failure to move for the appointment of a second attorney and by the court's failure to appoint a second attorney.

10(n) Because of his indigence, Applicant was entitled under S.C. Code Ann. § 16-3-26 to the appointment of a second attorney. Nevertheless, upon information and belief, Applicant's trial counsel failed to move for the appointment of a second attorney, and the court did not appoint a second attorney. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984), see also Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

9(o) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to object to the trial court's instruction on accomplice liability.

10(o) The trial court instructed the jury that "[w]hen several people pursue a common design to commit an unlawful act and each takes a part agreed upon or assigned to him in an effort to ensure the success of the common understanding, the act of one

is the act of all, and all are presumed to be present and guilty." ROA at 1255. This charge failed to include all the elements of accomplice liability, see, e.g., Gore v. Leeke 261 S.C. 308, 199 S.E.2d 755 (1973), and also suggested to the jury that it must presume guilt even absent proof beyond a reasonable doubt of all the elements of the crime. Cf. In re Winship, 397 U.S. 358 (1970)(prosecution must prove all essential elements of crime), Sandstrom v. Montana, 442 U.S. 510 (1979)(invalidating instruction that arguably shifted burden of proof away from prosecution). Trial counsel failed to object to this charge. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(p) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to request a specific jury instruction regarding accomplice credibility.

#163.

10(p) Accomplice Daniel Owens testified at the guilt phase of Applicant's trial, stating, *inter alia*, that Applicant had admitted shooting both victims. Mr. Owens was a relative of another alleged accomplice, Kelsey Pearce, and also had been offered a deal by the State in exchange for his testimony against Applicant. Despite these facts, trial counsel failed to request a specific cautionary instruction concerning the assessment of accomplice credibility. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(q) In violation of the Sixth and Fourteenth Amendments to the United States Constitution, Applicant was denied effective assistance of counsel at his sentencing trial by counsel's failure to object to the State's introduction of Applicant's school disciplinary reports as evidence in aggravation of punishment.

10(q) Pursuant to S.C. Code § 16-3-20(B), "[o]nly such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible." With respect to Applicant's background, the Notice of Evidence in Aggravation of the Punishment alleged that the State would seek to introduce

> evidence as to the defendant's character, mentality, background, prior adult and juvenile acts of violence, adult and juvenile violations of laws, rules, regulations and/or ordinances, prior criminal adult and juvenile records and nature of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm as an adult and a juvenile, propensity for violence and unlawful conduct as an adult and juvenile, disregard for peace and good order as an adult and a juvenile, and other similar characteristics of the defendant, as an adult and a juvenile, by the testimony of victims, witnesses, police officers, statements by the defendant and other relevant testimony, photographs, and exhibits. ROA 1904.

At the sentencing phase, the State sought to introduce disciplinary reports and school records and the corroborating testimony of records custodians to show that Applicant was behaved poorly during middle school. See ROA 1332-47. The disciplinary reports detailed a series of infractions for disruptive and disrespectful conduct and consequent suspensions. See ROA 1920-35. Defense counsel raised no objection and the evidence was subsequently admitted.

The State's Notice makes no mention of school disciplinary records. The Notice's references to juvenile violations, propensity for unlawful conduct and disregard for peace and order are vague. Those categories, as well as the others, are so broad in scope that they failed to provide Applicant with reasonable notice that the State sought to introduce Applicant's middle school disciplinary records. Applicant, therefore, was not "given a fair and complete opportunity to respond to each factual allegation used the State as a justification for a sentence of death." See State v. Riddle, 353 S.E.2d 138, 141 (S.C. 1987). Accordingly, introduction of the evidence of Applicant's middle school disciplinary records violated S.C. Code § 16-3-20(B) and deprived Applicant of due process of law. Ibid.; see Gardner v. Florida, 430 U.S. 349 (1977).

Defense counsel, therefore, should have objected to the introduction of the school records as evidence in aggravation. Further, counsel should have and failed to object to the

admission of the school records on hearsay grounds, see Evidence Rule 803(6), as well as on the ground that an improper foundation had been laid for the admission of the records under state law, see S.C. Code § 19-5-510. The introduction of the school records was particularly damaging to Applicant because, as a result of the lack of notice, the information was offered in an effectively irrebuttable manner. Although the records custodians presented by the State may have been able to authenticate the records, without notice Applicant was unable to call witnesses to verify the accuracy of the information contained within those records. Defense counsel's failure to object to the introduction of the evidence was, therefore, both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9® Applicant did not knowingly or intelligently waive his right to present a case in defense of his innocence and was thereby denied due process of law as guaranteed by Article 1, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

10® Prior to opening statements, defense counsel announced to the court that, as a matter of strategy, the defense would admit to Applicant's involvement in the crime, but not to Applicant's guilt of the charged offenses. ROA 761-63. The trial judge then asked Applicant whether he had been informed of and agreed with defense counsel's strategy to admit his "involvement in th[e] affair"--"that [he] was in, around, upon and a part of it" - and Applicant answered affirmatively. ROA 765.

Insofar as there was an understanding between Applicant, defense counsel, and the court with respect to admitting involvement but not guilt, defense counsel betrayed that arrangement during opening remarks to the jury. During the opening statement, defense counsel announced to the jury that Applicant was not only involved in, but also guilty of the crimes charged:

> This young man, you will find the evidence, is involved. His guilt under the law - you'll hear about the felony murder rule. His guilt is clear. It does not matter who had the gun. It does not matter who pulled

the trigger. If you combine to commit a crime and people's lives are taken, you're guilty. ROA 809.

Based upon the colloquy that took place between the trial court and Applicant, it is evident that the waiver was secured upon an erroneous premise. Although Applicant responded affirmatively to the trial judge's question as to whether Applicant agreed to admit his involvement, Applicant was never asked whether he wished or agreed to admit his guilt of the charged offenses, and there is no evidence that he understood the court's questions as such. Given that Applicant is mentally retarded and was only sixteen years of age at the time of the waiver, it is especially unlikely that Applicant would have understood such subtlety in the proceedings. See State v. Orr, 403 S.E.2d 623, (S.C. 1991)(recognizing that scrutiny of waivers of rights is heightened in instances where the defendant may have limited mental ability, such as mental retardation; see also Butler v. State, 397 S.E.3d 87, 88 (S.C. 1990), State v. Arthur, 374 S.E.2d 291, 293-94 (S.C. 1988).

#16

Defense counsel's opening remarks, therefore, effectively deprived Applicant of the right to present a defense. Waiver of a constitutional right must be competent, intelligent, and on the record. Taylor v. Louisiana, 414 U.S. 17, 19-20 (1973), Johnson v. Zerbst, 304 U.S. 458, 465 (1938). Because Applicant did not make a knowing, voluntary, and intelligent waiver, see State v. Cooper, 439 S.E.2d 276 (S.C. 1994), State v. Charping, 437 S.E.2d 88 (S.C. 1993), State v. Orr, 403 S.E.2d 623 (S.C. 1991), State v. Reed, 362 S.E.2d 13 (1987)(S.C. 1987), this error constitutes a violation of Applicant's Sixth and Fourteenth Amendment rights.

**9(s) Applicant was denied due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments in that the state elicited testimony during direct examination of a witness that the solicitor either knew or should have known to be false.**

**10(s) During direct examination of State's witness Henry Daniel Owens, Jr.--who was facing charges of misprision of a felony, accessory before the fact of murder, and accessory before the fact of armed robbery relating to the same incident for which Applicant was charged – the solicitor**

elicited testimony from the witness with respect to his plea agreement. The witness divulged that he pled guilty to misprision and had agreed to testify in exchange for the State's dismissal of the other charges against him. ROA 823. The witness further stated that for the misprision charge he was facing "up to fifteen" years in prison. ROA 823. Specifically, the following colloquy occurred:

> Q. Would you tell the jury what that plea agreement is?
>
> A. I plead guilty to misprision [sic], and they won't charge me with the accessory charges.
>
> Q. All right. And do you know how much time you're facing on the misprision charge?
>
> A. Up to 15.
>
> Q. Okay....

ROA 823.

The solicitor knew or should have known that the witness was not facing up to fifteen years for the offense of misprision of a felony. Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As codified by federal statute § 18 U.S.C. 4 (1994), the offense is a misdemeanor not punishable by more than three years in prison. Although, under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term), the witness's claim that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., (court asking Owens, "[d]o you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "[y]es, sir").

**By not only eliciting but affirming the witness's misstatement, the solicitor improperly and intentionally created a false and misleading impression and, thereby, denied Applicant due process of law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968), Napue v. Illinois, 360 U.S. 264 (1959), Mooney v. Holohan, 294 U.S. 103 (1935), see also Johnson v. Mississippi, 486 U.S. 578 (1988).**

**9(t) Applicant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by counsel's failure to object to the solicitor's elicitation of false testimony during the direct examination of a witness.**

**10(t) The relevant facts in support of this claim are set forth in 10(d) above. Defense counsel raised no objection to the solicitor's elicitation and affirmance of the false testimony. Defense counsel's failure to object to the introduction of that evidence was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).**

**[Allegations 9(a), 9(b), 9(d), 9(e), 9(s) and 9(t) in the Third PCR application are highlighted because they address issues being (re-)litigated in the 2007 application].**

On December 8, 2000, the Honorable Paula Thomas entered a one-hundred and eighty-nine (189) page order denying state post-conviction relief in its entirety. Subsequently, the Applicant, through appointed counsel, had filed various motion to alter or amend and motions to stay pending resolution of constitutional questions involving mental retardation as well as juvenile execution matters. On May 9, 2005, Judge Thomas entered an Order which granted a new sentencing proceeding due to the intervening decision in Roper v. Simmons, 125 S.Ct. 1183 (2005) involving the constitutional prohibition of the execution of offenders under the age of eighteen which abrogated and reversed its prior holding in Stanford v. Kentucky, 492 U.S. 361,

109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Neither party appealed this order on the motion to alter or amend. The Applicant through counsel Blume advised the court that this resolved all matters.

On October 10, 2006, the Applicant appeared before the Honorable Howard P. King. The Applicant was represented by John Blume. Judge King sentence Hughes to a life sentence on murder. No appeal was taken from the sentencing proceeding.

### *A. PRIOR PROCEDURAL HISTORY*

Hughes is currently confined at Broad River Correctional Institution pursuant to orders of commitment of the Clerk of Court for Calhoun County. On May 26, 1994, the Grand Jury of the Court of General Sessions for Calhoun County indicted the Petitioner, Herman Lee Hughes, Jr., for murder (involving the March 18, 1994 death of Kenneth Presley), assault and battery with intent to kill (involving the March 18, 1994 shooting in the chest and face of Kelly Hoffman), armed robbery (involving the March 18, 1994 robbery of the Blue Diamond Casino), and grand larceny of a vehicle (94-GS-09-0154, 0155, 0156). He was represented by retained counsel, Phillip F. Newsom, of the Richland County Bar. The prosecution was initially handled by First Circuit Solicitor Walter M. Bailey, Jr.

The prosecution had previously filed petitions in the Family Court of Calhoun County on March 21, 1994 and March 24, 1994 requested the actions be transferred to the Court of General Sessions so that Hughes could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered a written order waiving jurisdiction to the Court of General Sessions.

On October 31, 1994 the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

The Honorable Edward B. Cottingham was assigned to handle the matter. Pre-trial motions were heard on August 22, 1995. The matter was called for trial on September 5, 1995. At the outset, a competency hearing was held and the court entered a written order on September 7, 1995, finding Hughes competent to stand trial. Jury selection concluded on September 7, 1996.

The guilt phase began on September 7, 1996. The Petitioner was present and represented by retained counsel Newsom. In the opening statement, counsel for the Petitioner conceded that "Mr. Hughes does not deny involvement" in the matter. R. p. 808, ll. 5-7.[1] Counsel for the defense further stated in his opening:

> This young man, you will find the evidence, is involved. His guilt under the law ... you will hear about the felony murder rule. HIS GUILT IS CLEAR. It does not matter who had the gun. It does not matter who pulled the trigger. If you combine to commit a crime and people's lives are taken, you're guilty.

R. p. 809, ll. 10-16. (Emphasis added). Counsel further stated that they had entered a plea of "not guilty" in order to have an opportunity to have a jury decide the case rather than a judge. R. p. 807, l. 15 - p. 808, l. 7; p. 809, ll. 17-19.

**(a) Summary of the Guilt Phase Evidence**

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[1] The "Record on Appeal" before the Supreme Court of South Carolina is designated as "R.".

During the guilt phase of the trial, evidence was presented that Hughes' fingerprints were found on pieces of paper in the cash drawer of the Blue Diamond Casino. R. p. 116, ll. 2-13. The critical testimony was presented by Kelly Hoffman, a survivor of Hughes' violent assaults on March 18, 1994. She testified that Kenneth Presley, the decedent, had been her boyfriend for a number of years. On March 18, 1994, she went with him to his job at the Blue Diamond Casino to keep him company. R. pp. 1153-1154. They arrived there at 10 til 8 p.m. in Presley's grey Mazda RX-7. R. p. 1154. Judy Osborne was still there working when they showed up. Hoffman described seeing a person that she identified as Herman Hughes enter the store alone. R. p. 1158. He asked Presley how to play the poker machines, and he gave him a demonstration. R. p. 1159. He then told Ken he was going outside to get some money. R. pp. 1159-60. Ten (10) minutes later, Hughes returned when Hoffman was sitting behind the desk on the telephone. R. p. 1160. Hughes then asked Presley for change for a fifty-dollar bill. R. p. 1162. Ken opened the cash drawer and when Kelly looked up, Hughes had his gun pointed at them and said, "get off the phone." R. p. 1162. Hughes then said, "give me the money" and Ken said, "O.K., no problem," and started setting the money on the desk while the gun was pointed at him. R. p. 1163. Hughes then asked for the car keys and Ken set them on the desk. Next, as Ken was reaching back in the drawer to get more money, Hughes shot Presley in the head. R. p. 1165. He fell to the floor and Hoffman said, "Oh, my God," and Hughes turned and shot her in the chest. R. p. 1165. Hughes then returned a few steps back to where Ken was and shot him a second time while he was lying on the floor. R. p. 1166. As Kelly was slumped over, Hughes walked back over to her and shot her again, this time in the face. R. p. 1167. Ms. Hoffman then described that Hughes then went over and shot Presley again. She thought that Hughes was going to shoot her again, but he stood

a few seconds, gathered up his things and cut off the lights and then left. R. pp. 1167-1168. She was clear that Hughes was the only person inside the Blue Diamond. R. p. 1168.

Hoffman testified that Hughes was a total stranger to her. She was positive that Hughes shot her and Presley. R. pp. 1169, 1175, ll. 13-25. She further declared Hughes shot all five (5) shots. On cross-examination, she acknowledged that she had given a statement at the hospital. Further, she went to school with Kelsey Pearce, but did not know him. R. p. 1181.

The record also revealed that Hughes had gotten the gun he used from Kelsey Pearce's uncle, Henry Owens, after Pearce had gotten the keys to the trunk from Owens where the gun was located. R. pp. 828-830. The state's version had Pearce and Hughes then going to the Blue Diamond Casino together. According to Owens, Pearce stated that he remained outside the store when Hughes first went in, then came out and borrowed some money from Pearce. R. p. 840. Pearce watched as Hughes re-entered the store and pulled out the gun, asked Hoffman to get off the telephone, asked for the car keys, and then heard shots. R. pp. 850-51. They then stole Presley's Mazda RX-7. See also Statement of Owens, R. pp. 1069-1074.

Evidence revealed that while Hoffman survived the assault, Ken Presley died on March 18, 1994. R. pp. 882-83. Presley had three (3) gunshot wounds to the head which had exited the left side of the head. R. pp. 892-899. The gunshot wounds to the brain were the most probable cause of death. R. pp. 896-97. Two (2) of the wounds were fatal and the injury from the third shot was potentially fatal. R. p. 899.

The evidence revealed that when help came to the store, they could not enter because the door was locked. No money remained in the cash register except for some change, and there should have been between $400-$450. R. pp. 939-40. Testimony was also received that co-

defendant Kelsey Pearce was the first suspect because he had been indicted in several auto thefts. R. p. 949. Pearce was also described as being more of a talker and more aggressive than Hughes. R. pp. 950-951. Philip Wright testified that Herman Hughes told him that he was not in trouble and Hughes told Wright that "Kelsey said in the Waffle House that he's the one that did the crime." R. p. 1038, ll. 714.

Hughes did not testify at the trial. The trial judge declared co-defendant Pearce "unavailable to testify." R. p. 1235, ll. 6-8. Hughes was found guilty of all four (4) charges.[2]

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[2]In the penalty phase of his trial, the following evidence was presented by the prosecution:

On September 11, 1995, the sentencing hearing began. In the penalty phase, the State presented various witnesses on aspects of Mr. Hughes' character. Virginia Hill, an administrative assistant at John Ford Middle School in Calhoun County, testified about Hughes' school records. R. 1322-28. The records revealed that Hughes was suspended on February 2, 1994 for the remainder of the school year and expulsion was recommended. R.p. 1327. While conceding other students have disciplinary problems, none are any worse than Hughes. R.p. 1328.

Myrtis Sally, the custodian of Special Education, records and put into evidence the psychological testing of Hughes dated January 7, 1986 (second grade) and May 5, 1991. R.p. 1330-31. (Exhibits 45, 46). She testified that in second grade he was placed in one learning disability class only for that year. Testing also revealed that when Hughes was thirteen (13) years old and six (6) months, his "mental age" was nine (9) years old and his Schlossen screening test revealed in 1986 a full scale IQ of 80 as administered by a school psychologist and in 1991 a full scale IQ of 74. R. p. 1336-37.

Kala Byrd testified that in December 1992, she saw Hughes in front of her house with others and heard a gunshot and Hughes was under the shed. She stated that she had seen Hughes in possession of a gun before a couple of times. R. p. 1341.

Capers Wannamaker testified that he saw Hughes in December 1992 in his role as Deputy Sheriff. R. p. 1346-47. He removed a pistol from Hughes that day. R. p. 1347-48. He declared he filed an incident report on the matter and referred it to D.Y.S. R. p. 1348-49.

Anthony Brown of the Calhoun Detention Center testified that he observed Hughes on December 14, 1994 at 1:35 p.m. hitting the door lock with a broom handle. He stated that when he told Hughes to stop Hughes stated "it was going to take more than just me to put him in his room" and placed Hughes in lock-down for three (3) days. R. p. 1354. On cross-examination, he described Hughes as quiet and keeps to himself, although he has been attached. R. p. 1355. Further, he denied that Hughes was a dangerous inmate, but was childlike and mischievous. R. p. 1355.

J. D. McCord, a detention officer, testified about the November 27, 1994 jail incident between inmate Duane Beckett and Tyrus Glover who were in a fight. He stated that after Beckett

was locked in his cell, Hughes was caught attempting to open the cell with a toothbrush and placed on lock-down for five (5) days. R. p. 1358-59.

Steven Derrick of SLED testified and presented crime scene photographs from the Blue Diamond Casino. R. p. 1361-67. Exhibit 56 showed an indention on the side of a refrigerator consistent with bullet contact. Exhibit 51 showed a bullet found on the floor consistent to the area of the indention mark on the refrigerator. R. p. 1368. Exhibit 50 showed a shell casing on the floor in the same area. Exhibit 54 showed 2 shell casings. Exhibit 52 shows the area where the first shell casing and bullet was found. Exhibit 55 showed a pool of blood on the desk indicating an open would and presence of a victim with blood also on the calculator on the desk. Exhibit 53 showed the refrigerator base with blood running down. R. p. 1369.

Gary Presley, the father of victim Kenneth Presley, testified about his family, his divorce, and the time he spent with his son. R. pp. 1374-75. He stated that after his divorce, his ex-wife retained custody of the children and moved from Michigan to South Carolina. He would speak with his children by telephone a number of times and Kenneth spent a year with him in school in Michigan when he was 13. R. p. 1374-75. He described his son as an average student and that he did normal things with him. R. p. 1375. He stayed with him again when he was 15. He stated they did a lot more things at that time such as ball games and go to work with him. Gary Presley was an electrician and his son showed an interest in it. R. pp. 1376-77. He described his son dropping out of school, then getting a GED and enlisting in the Navy for two (2) years. R. pp. 1377-78. Exhibit 49 a photograph of his boot camp graduation was introduced. After he joined the Navy, his father found that his son had matured, becoming very responsible, and outlined his goals in life to go to college. R. p. 1379. He also introduced a letter Kenneth left when he was 15 giving his father some advice and encouragement. R. pp. 1380-81. The last time he saw him alive was in December 1992 when he was helping his grandmother. R. p. 1381. He learned that Kenneth had died from his ex-wife and found the news has made him an angry person, and affected the way he looked at things. R. pp. 1381-82. The hardest part of the loss is "the way that he died" and that he never had a chance to have a life and do the things he wanted to do. R. p. 1382.

James Presley, the victim's older brother, testified about his relationship with his brother which became closer as they got older. He stated he was in the process of getting to South Carolina when his brother was killed. He described the loss as hard to put into words, sending flowers to the grave, the birth of his daughter who cannot know Kenneth, but was named after him. He stated he felt anger and cheated wondering why it happened. R. pp. 1385-86.

Lynell Williamson, the victim's mother, testified that he had lived in Calhoun County since 1977 after the divorce. Kenneth was her youngest and was 4 years old and lived with her. She described him as "her sweetheart" who was initially picked on by his older sisters who eventually started to look out for and after him is the close family. R. p. 1388. She said in high school, Kenneth would listened to music, work in the yard, ask to do things for her or others. Kenneth dropped out of school because he was bored. R. p. 1389. It was his dream to join the Navy and become a Navy seal. R. p. 1390. He worked to get himself into shape so he could be accepted. R .p. 1390. He signed up for a 2 year stint. She introduced various photographs including 1990 family picture for the church ®. p. 1391), a picture of their last Christmas together, photos of him in the Navy, and a picture with her before he went up to Michigan. R. pp. 1394-95. She also introduced

letters he wrote to her when they were apart from 1984, 1991, and while he was in the navy. R. pp. 1395-1403. Also a letter of appreciation from the Navy was published. R. pp. 1403-05. She stated he got out on December 31, 1993 and intended to go to U.S.C. on a military grant. Kenneth moved in with her daughter's fiancé and he worked part-time for her husband in construction and part-time at the Blue Diamond Casino. He was working for school money, car insurance. She described Kenneth telling her that he sometimes felt fear and thought about a gun which she said that he would probably get hurt. R. p. 1407.

Ms. Williamson said she learned of her son's death after her husband received a call from her son-in-law. She was told there had been an accident and to go to the hospital where she learned they had been shot. R. pp. 1409-1410. When she was sent to the counseling room, she learned of his death. She said it will always affect her, that she was in a fog and could not concentrate and would hear his voice. She said that since his death, her marriage is suffering, her children are suffering and she suffers with them. R. pp. 1409-10.

The defense called Dennis Jones, James McKinney, Kathy Link, Lucille Hughes, Dr. Harold C. Morgan, Dr. John DeWitt, and Annette Boette as witnesses. Sheriff Dennis Jones of Calhoun County testified that on March 18, 1994, he spoke with Hughes. He went with Hughes' mother and picked up Hughes. At a conference in his mother's presence, Hughes confessed and stated that he went with Kelsey Pearce to the Blue Diamond Casino, walked inside and asked for money and shot the woman while Kelsey stood outside and looked. R. p. 1427. He further testified that from information Hughes provided he recovered the weapon and placed him under arrest. He did not get statements from the other co-defendants. R. pp. 1426-27.

James McKinney, guidance counselor at Ford Middle School testified that Hughes attended school there in the 6th grade and was two (2) years behind and was a quiet, cooperative, well-mannered student. R. p. 1429. He had difficulty in reading and math. Testifying found his IQ to be low. He was cooperative, tried hard in class, and appeared to be a follower and loner. R. pp. 1431-33. He was in a remedial and chapter one class at Ford. R. p. 1432. The next year after he was held back in 6th grade, his behavior was more aggressive, hostile and disrespectful toward teachers with poor classroom performance. R. p. 1434. In 1994, he was in the eighth grade when the incident occurred. He also testified on cross-examination that Hughes was expelled after a history of infractions including destruction of school property, cursing, disrespect to teachers, and sexual misconduct. R. pp. 1439-40.

Kathy Link, a 6th grade teacher at Ford Middle School, found that Hughes had difficulty in subjects and recommended that he be tested with the Schlossen IQ screening test. R. pp. 1442-43. He was described as a quiet, not disrespectful student who was a follower. She was not surprised that he was found to be a slow learner. R. p. 1444.

Lucille Hughes, Hughes' grandmother, testified that she adopted him when he was 3 years old. R. p. 1449. She agreed to raise him when he was in the 6th grade, his mother did not want him to go to counseling because he was not crazy, but he was having problems learning. R. p. 1451. She said he was not a bad boy, quiet and easy. Her husband had a stroke when Hughes was 12 and he helped take care of him. R. p. 1453-54. She found Herman to be sweet. Herman's father would call

often and his mother was able to see him. R. p. 1455. She said she got along with Herman's mother and he would stay with her on the weekend. Lucille said she would go to school often about the counseling Herman needed. There were more problems in school when he was kept in the 6th grade. She asked the police to talk to Herman when he was running with the wrong people. R. p. 1458. Herman was never disrespectful or violent to her. He also had no problem with his father.

She described a gun incident where a boy was beating little Charlie, who was 9, and Herman went and got a pistol and shot it. The police investigated the shooting, but Herman was not arrested. R. p. 1460. She described Herman as not lying to her, that she had not had any problem with the six (6) children she raised, but he got in with the wrong crowd. R. p. 1461. On cross-examination, she declared that Hughes had plenty of love and support from the family. R. p. 1462.

Dr. Harold Morgan, a forensic psychiatrist, testified that He evaluated Hughes on August 21, 25 and September 4. He studied medical records, school records, and Ms. Boette's social history report. He learned that Hughes had a normal birth, was raised by his grandparents who adopted him at age 4. He found the reports to reveal that Hughes was "right on the borderline of retardation." R. p. 1472. He found school records to show observations of attention deficit and hyperactivity disorder. R. p. 1473. He had problems paying attention in class, had nuisance behavior, resulting in expulsion. The consistent father figure was his grandfather until the stroke. R. p. 1474. Herman's behavior took a downward spin the same time the grandfather was placed in a nursing home.

Dr. Morgan found Hughes to not show much feeling and flat. His mental slowness was the main observation, but he also found him to probably have a personality disorder. R. pp. 1475-76. He found him to be sensitive and passive, but he drank too much. R. p. 1476. He found mental retardation or borderline mental ability, the learning disability, attention deficit, hyperactivity disorder, the personality disorder, and potential alcohol problem. R. pp. 1476-77. Dr. Morgan further described his opinion as to how his mental status impact on the March 18, 1994 events. R. pp. 1477-1482.

Dr. John DeWitt, another psychiatrist, testified generally consistent with Dr. Morgan's findings. He found intellectual limitations, possibly attention deficit disorder, and traits of passivity and dependency. R. p. 1511. These traits could lead a person in stressful situations to be influenced by another and alcohol would lower his ability to analyze the situation and become impulsive. R. p. 1513. He found that Hughes has the ability to conform his behavior, but the traits would lead him in some circumstances to act impulsively. R. p. 1515.

Annette Boette, a social worker, testified about her psychosocial assessment of Hughes. R. pp. 1525-33. She described her interviews of the Applicant, his mother Miranda, father, grandmother Lucille, and grandfather Charles. She also interviewed Dr. Morgan and Dr. DeWitt, and the penalty phase investigator. R. p. 1535. She summarized the documents she reviewed. She described his normal birth with both parents involved who then lived with his parents until Herman was four (4) years old. R. p. 1537. The mother was unhappy in the marriage and Herman was adopted by the grandparents in 1981. He had a sister ten (10) months after he was born who died four (4) months after her birth and another brother, Charlie, who was 14 at the time. The real parents remained in an out of his life, although there was disagreement on how the adoption happened; whether the mother was tricked or willing to give up the child. R. p. 1539. In the second grade, Hughes had "severe problems" and developed an individualized lesson plan. He was determined to

be in need at that time of placement in learning disabled classroom where he remained the rest of the semester. R. p. 1541. Ms. Boette found deterioration of skills from testing in 1986 to 1991. His middle school scores were found to not improve and suggested a consistent pattern of failure, acceleration of some infractions, and being expelled three (3) times after Christmas. R. p. 1543. In the eighth grade she found a significant number of infractions leading up to being expelled again in February 1994. R. p. 1544.

Ms. Boette's conclusions were:

> (I) The first conclusion is that Herman Junior was born into a family with very little formal schooling and very few skills and being able to meet the needs of a child with the limitations that he had.
>
> (II) The second one is that Herman Junior's family, and particularly the two mothers, bickered over the adoption and never allowed him to resolve the trauma of this kind of open adoption.
>
> (III) Number three, Herman Junior has borderline intellectual ability.
>
> (IV) Number four, there was a failure on the part of the education system to intervene and meet his needs.
>
> (V) Five, the context of the crime shows a rapidly deteriorating situation. He had been expelled from school again. His grandfather, adopted father, had a stroke and required nursing care.
>
> (VI) ..., the sixth one is really a composite of all of these. Because of his many intellectual impairments, Herman Junior was easily influenced by others and fell prey to those who did not have his best interest at heart. Herman Junior was a child who went along with others for approval and a sense of belonging, and he was unable to judge who was safe and who was not.

R. p. 1544-45. Ms. Boette said Miranda Hughes, the birth mother, has unresolved conflict about the adoption and is denial and not seen as a positive move. R. pp. 1546-47. She saw the school records revealed Hughes never scored above 84 on IQ testing. She considered the expulsion from school in December 1993 and stroke of his grandmother combined to put him on the streets. R. p. 1548. She also found that he would be more influenced by people who are older and do not have his interest at heart. R. p. 1549.

**The Prosecution's Reply.**

On reply, Dr. Richard Frierson, the Hall Institute forensic psychiatrist, testified that he evaluated Hughes. He found the physical examination revealed no evidence of physical abnormality. R. pp. 1567-68. He did have a blood test that was positive with an exposure to syphilis. R. p. 1568.

He opined that his review of tests scores and examination revealed that Hughes does not suffer from mental retardation. R. p. 1570. He found Hughes had a good capacity concentrate, that he did not suffer from attention deficit disorder, that he had capacity to distinguish right from wrong and had capacity to conform his conduct. R. p. 1573. Dr. Frierson did conclude, however, that he had a "conduct disorder" that is based on his history of prior misconduct. R. p. 1573.

Dr. Lester Finuf, a psychologist with the Department of Disabilities and Special Needs, testified that he examined Hughes and found that he was competent to stand trial, criminally responsible, no evidence of attention deficit disorder, and had normal attention span. R. pp. 1586-87.

After the presentation of testimony in aggravation and mitigation, closing arguments were heard from the prosecution, defense, and the Petitioner. The judge instructed the jury on three (3) statutory aggravating circumstances:

1. The murder of Kenneth Presley was committed while in the commission of robbery while armed with a deadly weapon;

2. The murder of Kenneth Presley was committed while in the commission of larceny while armed with a deadly weapon; and

3. The offender, by his act of murder of Kenneth Presley, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

R. p. 1596, ll. 5-21; p. 1693, l. 25 - p. 1694, l. 10. Then he charged the following mitigating circumstances:

1. Defendant has no significant history of prior criminal conviction involving the use of violence against another person;

2. Murder was committed while defendant was under the influence of mental or emotional disturbances;

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

4. The age or mentality of the defendant at the time of

**The Direct Appeal before the Supreme Court of South Carolina.**

The Petitioner made a timely appeal to the Supreme Court of South Carolina. In the appeal, current counsel before this Court raised the following question presented:

> The judge erred by refusing to require co-defendant Kelsey Pearce, whose involvement in the crimes was the key defense issue at trial, to assert his

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> the crime;
>
> 5. The defendant was below the age of eighteen at the time of the crime;
>
> 6. The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly sub-average general intellectual functioning existing with deficits in adaptive behavior and manifested during the developmental period;
>
> 7. The defendant acted under duress or under the domination of another person; and
>
> 8. Furthermore, you may consider any other mitigating circumstances which are supported by the evidence in this case.

R. p. 1596, l. 22 - p. 1597, l. 21; p. 1698, l. 15 - p. 1700, l. 12. After deliberations, the jury found the existence of all three (3) submitted statutory aggravating circumstances and sentenced Hughes to death. R. pp. 1710-1711. After the jurors were polled, Judge Cottingham found as an affirmative fact the death sentence was appropriate. R. p. 1713. After providing Hughes the opportunity to express why the sentence should not be pronounced, Hughes was sentenced to death for murder, twenty-five (25) years consecutive for armed robbery, twenty-five (25) years consecutive for assault and battery with intent to kill, and five (5) years concurrent for grand larceny. R. p. 1714.

> privilege against self-incrimination before the jury, a procedure mandated by firmly established state law. In particular, this ruling denied appellant the opportunity to present relevant evidence in mitigation of punishment under the Eighth Amendment and S.C. Code § 16-3-20 and to rebut the state's case under the due process clause of the Fourteenth Amendment.

Final Brief of Appellant, p. 3. After briefing of this issue, the Supreme Court of South Carolina entered its order affirming the judgment of the trial court, over dissent, on October 27, 1997. The Supreme Court held that a witness may not be called by either the state or the defense solely for the sake of having the witness invoke his or her Fifth Amendment privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from the assertion; prospectively modifying State v. Perry, 279 S.C. 539, 309 S.E.2d 9 (1983). 493 S.E.2d at 823-24. The state appellate court then further concluded that any error in the trial court's refusal to do so in this case was harmless beyond a reasonable doubt. 493 S.E.2d at 824-825. A Petition for Rehearing was denied on November 20, 1998.

The Petitioner next made a Petition for Writ of Certiorari to the United States Supreme Court. The Petition was docketed as Hughes v. South Carolina, No. 97-8043 on February 24, 1998. In the Petition, Hughes, through appellate counsel Savitz raised the following issue:

> Does the harmless error standard South Carolina applies to the exclusion of mitigating and rebuttal evidence from capital sentencing comport with Chapman v. California, 386 U.S. 18 (1967)?

The Respondents made a Brief in Opposition on March 26, 1998. On April 27, 1998, the United States Supreme Court entered its Order denying the Petition for Writ of Certiorari. Hughes v. South Carolina, 523 U.S. 1097, 118 S.Ct. 1674, 140 L.Ed.2d 798 (U.S. April 27, 1998).

## II. ATTACHMENTS

Respondent attaches and incorporates herein by reference the December 8, 2000 Order in Hughes v. Moore, 98-CP-09-101 consisting of 188 pages. *Respondent also requests this Court to take judicial notice of the Court records in Hughes v. Moore, 98-CP-09-101 which includes:*

1. *Record of Appeal, State v. Herman Hughes.*
2. *State Postconviction Relief Hearing Transcript, October 11-13, 1999, Hughes v. Moore, 98-CP-09-101.*
3. *Deposition of Jeffrey Bloom.*

These matters are incorporated herein by reference.

## III. ALLEGATIONS IN THE 2007 SECOND APPLICATION FOR POST-CONVICTION RELIEF.

In the second application for postconviction relief, Hughes makes the following allegations:

I. Ineffective Assistance of Counsel:

1. Trial counsel failed to strike jurors that had personal knowledge of the case I was on trial for.
2. Trial counsel failed to have witness testimony impeached for perjury.
3. Trial counsel failed to have petitioner evaluated for psychological evaluation before being tried as an adult.

**III. The entire Application must be dismissed as successive.**

First, the State submits that the current Application for PCR must be summarily dismissed because it is successive to the Applicant's prior application for PCR. The Uniform Post Conviction Procedure Act (the Act) provides that:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (1985). Successive applications are disfavored and the burden is on the Applicant to establish that any "new" ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) (prior state PCR application); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (PCR may be deemed successive to earlier federal habeas corpus petition that was denied). More importantly, and applicable to the present scenario in the 2007 application, "**[A]ny ground finally adjudicated** . . . in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application unless the court finds a ground for relief asserted which for sufficient reason . . . was inadequately raised in the original, supplemental or amended application." Since the grounds presented in the 2007 application appear to have been adequately raised and adjudicated in the 1998 proceedings, Respondents submits that the entire application must be dismissed.

In Aice, the South Carolina Supreme Court dealt with the issue of whether an applicant may maintain an application for PCR based on ineffective assistance of previous PCR counsel. The Aice court stated, "It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view. Aice protests that only those new arguments of true merit would be advanced in successive applications and that hence our fears are unfounded. Yet, the very arguments Aice advances lack merit and demonstrate that our fears are real." Aice, supra at 394. The court reasoned, "Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." Id. at 394.

The court held the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17-27-90. Id. See also Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application). The Aice court further held that its decision in Austin was limited to its particular factual situation and that the holding in Austin was consistent with its holding. The court set forth its rationale as follows:

> In Austin the petitioner expressed his desire to seek review of the denial of his PCR application pursuant to his state law rights as set forth in S.C.Code Ann. § 17-27-100 and in Supreme Court Rule 50(9). Supreme Court Rule 50(6) expressly provides for the appointment of counsel to an indigent to seek appellate review of a denial of PCR. Austin's counsel failed to timely seek review. This Court is not empowered to expand its jurisdiction and grant Austin additional time to petition for review. Hence, merely as a method of enforcing Rule 50(6), and of enforcing Austin's entitlement to a PCR proceeding, complete with a petition for certiorari to this Court, we held that Austin could attack his PCR counsel as ineffective.
>
> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, Austin stands harmonized with the instant case.

Aice, supra at 395.

The State submits that the Applicant has failed to establish the "sufficient reason" why the allegations in his 2007 application were inadequately raised in the previous application for PCR in 1997. Therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, supra; Arnold v. State/Plath v. State, supra. Therefore, the State requests that this Court summarily dismiss the Application for PCR as successive.

## IV. The Presents Claims Were Adequately Raised and Ruled Upon in the 1998 Postconviction Relief Proceedings before Judge Thomas.

### *1. Claim that Counsel Failed to strike jurors who had personal knowledge of the case I was on trial for.*

In his first specification in his 2007 application, Hughes asserts that his counsel was ineffective in failing to strike jurors who had personal knowledge of the case I was tried on. Hughes fails to specify with any particularity which particular jurors he is referring to concerning this omission by counsel Newsom. However, a similar issue was raised and rejected by Judge Thomas in the 1997 proceeding in her December 8, 2000 Order of Dismissal. In that action, with the assistance of counsel Blume and Wilkins, and subject to a full evidentiary hearing, Hughes claimed that counsel should have struck William Barron and Brenda Wise based upon their acquaintance with the Applicant and the victims family. In denying relief in the December 8, 2000 Order, Judge Thomas addressed the issue in full in the following manner at pages 74-92:

**Issue Concerning IAC and Jury Selection - Issue 9(d) - Applicant's Brief, pp. 28-44.**

*9(d) Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

In this issue, the Applicant challenges counsel Newsom's voir dire and selection of two jurors who were acquainted with the victims, particularly Brenda Wise and William Barron. Additionally, he challenges counsel's failure to re-explain concepts of aggravation or mitigation. Respondents submit that he has failed in his burden of showing either deficient performance or prejudice under Strickland, supra.

**a.) General Law on Jury Selection and IAC.**

As stated in Strickland, counsel is presumed to act competently. Courts have found that counsel routinely make tactical decisions about juror voir dire that are not subject to challenge in collateral attack. Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994) (upheld counsel's failure to voir dire on issue of race); Sawyer v. Butler, 848 F.2d 582, 589 (5th Cir. 1988) (failure to question jurors on views on death penalty where questioned by state, no prejudice shown, and no showing rehabilitation of the jurors was possible); Frank v. Brookhart, 877 F.2d 671, 674 (8th Cir. 1989) (tactical decision not to question about the effects of

publicity); Gustave v. U.S., 627 F.2d 901, 906 (9th Cir. 1980) (decision whether to request certain voir dire questions was a strategic decision of the attorney and his failure to do so, even against his client's wishes, was not IAC).

As a general matter, courts have held that voir dire is not required on general legal principles which will be covered by instructions, as distinguished from specific questions probative of juror bias. Guam v. Palamo, 35 F.3d 373 (9th Cir. 1994). See U.S. v. Baldwin, 607 F.2d 1295, 1298 (9th Cir. 1979).

The failure to strike a juror, however, requires a showing of "actual bias" by the juror against the defendant. Goeders v. Handley, 59 F.3d 73, 75-76 (8th Cir. 1995); Smith v. Phillips, 455 U.S. 209, 215-17 (1981). In U.S. v. Quintero-Barraza, 78 F.3d 1344, 1349-50 (9th Cir. 1995), the court found no ineffectiveness based on the juror's oath even though on the record the record admitted to some bias. Where a juror's responses showed no bias, it had been held there was no ineffectiveness in failing to strike the juror.

The question of individual juror bias is a question of fact. Patton v. Yount, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984). But see Davis v. Singletary, 853 F.Supp. 1492 (M.D.Fla.1994) (petitioner failed to show counsel was ineffective in exercising peremptory strikes where counsel attempted to have veniremen stricken for cause and used peremptory strike where motion to excuse was denied) and Odle v. Calderon, 919 F.Supp. 1367 (N.D.Ca.1996) (where there was an absence of evidence in the record of voir dire which would have caused a reasonable attorney to doubt that the venireman could be an unbiased juror, no attorney error in failing to strike venireman).

Applicant's argument reflects a lack of appreciation for the innumerable factors involved in the jury selection process. Using hindsight, it is easy to identify a juror that defense counsel should have stricken. However, during the jury selection process counsel had to determine who he would prefer to be on the jury, who he would prefer to be excused and organize each venire member in terms of the degree of that preference, while simultaneously estimating who the prosecution would seek to select and strike. While the this Court does not intend to suggest that an applicant could never have a valid ineffective assistance of counsel claim for the failure to use peremptory strikes, it must find that the Petitioner failed to satisfy his burden of demonstrating attorney error rising to a 6th Amendment violation.

**b.) Fact - Analysis.**

1.) **Counsel's Voir Dire Strategy.**

In this portion of the argument, Hughes contends that his counsel failed to perform the function of voir dire in Hughes' trial for various reasons. Respondents submit that there was no Sixth Amendment violation.

a.) **Alleged Failure to Ensure Jurors Understood the Meaning of Legal Terms.**

Hughes contends that counsel is required under the Sixth Amendment to ensure the "pertinent legal concepts of murder, aggravation and mitigation." Applicant's Memo. p. 33. He relies upon Jeff Bloom's speculation that many jurors equate murder with homicide and that counsel should either ask the judge to define murder or do it himself. Bloom Deposition, p. 38. He further testified that concepts of "aggravators and mitigators" need to be explained to the jurors in the voir dire process in order for them to give appropriate answers. Further, Bloom determined that Newsom failed to ask some jurors, particularly Patricia Wise, R. p. 499, their opinion on the death penalty. Bloom Deposition, pp. 22-23, PCR Tr. p. 522. Defense counsel Mauldin testified that he felt defense counsel should not rely upon the trial court's questioning of the jurors' opinion on the death penalty. PCR Tr. pp. 606-08.

Counsel Mauldin, however, acknowledged that Judge Cottingham asked each juror their opinion on the death penalty. PCR Tr. pp. 579-80. Further, he acknowledged that no juror that was qualified stated that they could not consider a life sentence. PCR Tr. pp. 580-81. He also conceded that there was information in the record on each juror that revealed their opinion on the death penalty. PCR Tr. pp. 588-89.

Counsel Bloom conceded similarly that Judge Cottingham inquired of each vernireperson of their opinion on the death penalty by using the three types of juror inquiry and follow-up. Bloom Deposition, pp. 63-64. He acknowledged that counsel Newsom did inquire of some jurors on their opinion on the death penalty and ability to consider mitigation. Bloom Deposition, pp. 65-70. He referred to juror Vernon's voir dire by Newsom asking about the death penalty and mitigation. ®. pp. 229-36), juror Atkins asking twelve question inquiry involving three (3) questions on the death penalty ®. pp. 258-64); juror Edwards asking five questions related to the death penalty ®. pp. 288-94); juror Hudson asking three (3) questions on the death penalty in terms of youth and an explanation of mitigators ®. pp. 356-66); juror Pound on which counsel asked

no questions ®. pp. 366-72); juror Mary Gunter asking question on her church's stand on the death penalty ®. pp. 421-30); juror Cheeseboro asking five questions and two (2) specifically on the death penalty ®. pp. 434-49); juror Williams asking five questions but none specifically related to the death penalty ®. pp. 458-65); juror Patricia Wise asking ten questions, including what her views on the death penalty were, her church and its views on the death penalty and about alcohol ®. pp. 499-507); and juror Nu Vicker asking seven questions, including one on her church's position on the death penalty ®. pp. 509-18). Bloom Deposition, pp. 65-67. He also admitted that the voir dire on the alternates included defense questioning about the death penalty. Bloom Deposition, pp. 67-68.

The record also reveals that prior to the voir dire Judge Cottingham reviewed the allegations set forth in each of the indictments, including the specific elements of the murder charge. R. pp. 88-91. The trial judge further described to the entire venire the sentencing proceeding, aggravating circumstances and mitigating circumstances. R. pp. 96-98.[3]

Counsel Newsom testified that prior to the trial he was aware of his right to individually voir dire the jurors. PCR Tr. p. 417. He testified that he did some research on the status of voir dire prior to trial. Counsel indicated that he could have asked the jurors more questions to see if he could rehabilitate some jurors, but he had some general information that the community did not feel strong about Hughes, might be afraid to be on the jury that could convict him and would do their best to try to get off. PCR Tr. p. 395. Counsel Newsom stated he had done research about the types of questions that could be asked and could not be asked on voir dire. PCR Tr. pp. 397-98. However, Newsom acknowledged that there may be some questions that he could have asked on voir dire in hindsight that he did not ask. PCR Tr. p. 397, ll. 13-21.

This Court finds that the inquiry of the jurors who were selected revealed adequate information about their ability to consider a life sentence and be fair and impartial. The mere fact another lawyer would have asked different questions or even that Newsom, in hindsight, may have asked different questions does not lead to a Sixth Amendment showing of either deficiency or prejudice.

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[3] It is also important to note that contrary to the allegations of Applicant, counsel Newsom sought early in the voir dire process to "explain what the law is." R. p. 202. The trial court denied the request stating that he "will tell them what the law is." Id.

Newsom had researched the law related to voir dire questioning of jurors. During the proceeding, he actively inquired of the jurors he chose to question based upon his own research and information in an attempt to resolve his own questions as to their ability to be qualified and his discretion to select them or strike them. As stated previously, the individual questioning of jurors is a tactical decision that must be deferred to, particularly where the record reveals Newsom adjusted his inquiry on each juror based upon his individual knowledge, as well as the particular juror's responses. This Court is constrained to find that counsel was not "deficient."

Further, the complaint that counsel did not "educate" each juror cannot be deemed ineffective or even deficient. The trial judge described the particular elements of the murder during general instructions prior to voir dire, as well as the role of aggravation and mitigation in a sentencing proceeding. The trial judge, with each juror, inquired of their position on the death penalty, that was then followed-up with by the prosecutor. When Newsom deemed it appropriate or necessary, he made appropriate additional inquiry on the effect of the death penalty decision and the ability to consider mitigation following up on the court's earlier comments.

The Applicant has failed to show that there is a reasonable probability that, but for counsel's failure to ask jurors additional questions about the death sentence, aggravation or mitigation, that the result of the proceeding would have been different, i.e., a life sentence or not guilty. At the trial itself, the seated jurors were properly instructed concerning the elements of murder and in the sentencing proceeding were instructed on aggravation and mitigation. Even if there were an earlier Sixth Amendment requirement that competent counsel undertake this judicial function in voir dire, the trial court's instructions removed any possibility of Sixth Amendment prejudice. Accord, Guam v. Palamo, supra. Further, there is no showing that it was to a reasonable probability that such earlier inquiry by defense counsel would have led to disqualification of any juror. See Goeders v. Handley, supra. Each of these jurors were deemed qualified to sit based upon their responses to the court and counsel's questions. The current speculation and style critique of trial counsel fails to rise to a level showing deficient performance or prejudice.

**2.) The Failure to Challenge For Cause or Use a Peremptory Strike to Remove Jurors Brenda Wise and William Barron.**

More specifically, Hughes asserts that jurors Brenda Wise and William Barron should have been further questioned, challenged for cause, or at least had peremptory challenges used to remove them as jurors. Because defense counsel Newsom revealed a strategic reason for retaining these jurors, the Applicant has failed to show either deficient performance or prejudice under Strickland, supra.

During the jury selection process Brenda Wise revealed that she had discussed the case with her daughter Sherry, who was a friend of the victim's sister, Amy. R. p. 194. She stated that she was told that he was killed and she (Amy) would come to Sherry's house and Sherry would try to console her. R. p. 194.[4] Ms. Wise then declared in response to the court's inquiry as to whether she could set aside the knowledge that she had heard from someone else and base the verdict on the evidence that "I think I could." R. p. 194, ll. 16-21. She responded "correct" that she could base her decision on what was heard in the courtroom. R. pp. 194-95. Counsel Newsom inquired of juror Wise on whether the friendship her daughter has with the victim's sister made her uncomfortable, and she declared "probably somewhat." R. p. 205. She stated that this was due to hearing things her daughter told her from the sister about "how much pain – the hurt" of the family, but not the facts. R. pp. 205-06. Ms. Wise, however, responded that "I believe I could be fair," to consider a not guilty verdict, and opined that "I still think I have my own mind and I can use my own judgment" in response to whether it would make her more or less likely to return a death verdict because she knew of the family's pain and that her daughter knew the family. R. pp. 206-07. After this inquiry the State and counsel Newsom deemed her qualified. R. p. 208. Although Newsom used seven of his ten strikes, Brenda Wise was the first juror selected without the use of any strike. R. pp. 770-71.

The second juror that Hughes now challenges was jury foreperson William Barron. He acknowledged that he had read and heard something about the case in the newspaper. R. p. 296. He then stated that:

JURY VENIRE MEMBER: On the night that this incident happened, the murder victim's sister was out at our farm. And I do not

[4] During the PCR hearing, Amy Presley, the victim's sister, testified that she knew a Sherry Arrant who is around forty, PCR Tr. p. 516, but she stated she did not know who Mr. Wise is. PCR Tr. p. 515.

know the murder victim's family and do not know this sister well either, but she was a friend of my son's and his wife. And Officer Woody Crowder, who is a police officer with the Town of St. Matthews, called out to the farm and got me at my house and asked if I would go over and notify this sister at my son's house, and I did so. And that really is what I wanted to say. At lunchtime today, I was reminded that my daughter-in-law, who is a friend of this sister, had worked at one point at this establishment where this incident occurred. That's all.

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THE COURT: Well, I appreciate you calling that to our attention. Is there anything about what you have related to me that would impair your ability to reach a verdict based on the law and the evidence in this case?

JURY VENIRE MEMBER: No, sir.

THE COURT: Can you tell me under your oath that whatever your verdict is, it's not as a result of that incident but what you hear in this witness stand?

JURY VENIRE MEMBER: Yes, sir.

THE COURT: All right, sir. That's fine, then. The fact that that occurred, as long as you can dismiss it and base your verdict on what you hear in this courtroom under oath, is what we're interested in.

R. pp. 296-97. No further inquiry was made directed to this knowledge by the court, the State, or the defense. R. pp. 297-303. But see, R. p. 299, ll. 10-20 (general inquiry about putting aside

knowledge and basing decision strictly on facts). Both the State and defense represented that juror Barron was qualified. R. p. 303. Barron was selected as the fifth juror seated while the defense had used only one of his peremptories at that point of the seven he eventually used. R. pp. 774-75.

Counsel Newsom explained his reasons why he chose to select juror Wise and Barron to be seated. Concerning juror Barron, Newsom stated that his background information was that Barron's wife was very religious and his daughter was a missionary. PCR Tr. p. 401. It was Newsom's opinion that the missionary element would be likely to be very forgiving and that if this daughter was the one talking with Presley's sister, he hoped the forgiveness part would impact. PCR Tr. p. 401. Further, Newsom learned from Elijah Nesbit, who provided juror information to him, that the juror was educated with a college education (more than most prospective jurors) and that he could be more receptive to the position that Hughes should not be sentenced to death when Pearce, the triggerman under the trial theory, had not. R. pp. 401-02, 404.

Counsel stated that juror Barron was more attractive to him because of the missionary information he had and the compassion that might lead to a life sentence. PCR Tr. p. 420. Also, PCR Tr. p. 409. As counsel stated: "We wanted Mr. Barron in the trial." PCR Tr. pp. 408, 421. Concerning his selection of juror Wise, counsel Newsom stated (and the record supports) that he probably voir dired her longer than most of the other venirepersons. R. pp. 402-03, 420. His juror information revealed two checks by her name (as a positive juror). PCR Tr. p. 409. In his questioning of her, counsel Newsom found her demeanor was sympathetic and sincere. PCR Tr. pp. 402-03, 420. Although she would not have been his first choice, "there was something about her that impressed us that she would listen." PCR Tr. pp. 404, 420.[5]

Counsel Newsom stated that he did not seek to strike the jurors for cause because he was not offended by the fact that they had some knowledge of Mr. Presley's family because they were hoping to put the blame on Kelsey Pearce. He acknowledged that

[5] Solicitor Bailey testified that juror Brenda Wise, on different occasions, seemed to require a greater degree of proof than the reasonable doubt standard and he feared a "residual doubt" situation where she would demand 100% proof. He declared that he would have struck her if he had more than five strikes. PCR Tr. pp. 617-18. Solicitor Bailey recalled that juror Barron had a prolonged hesitation when he asked him the sixteen year old question. PCR Tr. p. 618. Bailey described the look on his face like he really didn't know if he could do it for someone that young. Id.

he could have made a motion based on their extraneous information; he did not know that Judge Cottingham would have granted it. PCR Tr. pp. 407-08.

Counsel Mauldin opined that he disagreed with counsel Newsom's selection of the jurors, but conceded that he was not aware of the reasons Newsom stated he chose to select the jurors (PCR Tr. pp. 581-82) and had "no idea" what was done in this case concerning juror background investigation. PCR Tr. pp. 587-88.

Jeffrey Bloom opined that juror Brenda Wise had direct knowledge of victim impact information from her daughter and should have been stricken for cause or at least had an available peremptory challenge used to remove her. Bloom Deposition, pp. 46-48. He was unaware of any strategic reason not to remove her. Id. p. 49.

Bloom similarly claimed that juror Barron could have been called as a victim impact witness and should have been removed for cause or have a peremptory challenge used. Id. pp. 50-54. Again, this witness was not aware of the strategic reasons for seating this juror.

This Court concludes that Hughes has failed to show deficient performance in the selection of jurors Brenda Wise and William Barron. These decisions were not the product of neglect or ignorance. Instead, the decisions to seat the jurors were based upon an expressed tactical decision with knowledge of the fact of the extraneous contact each juror had. Counsel Newsom expressed his strategic reason for having juror Barron was based upon his family religious and educational background and caused him to believe that Barron would strongly consider a life sentence and be swayed by the respective roles of Hughes, compared to Pearce. Counsel Newsom was clear – juror Barron was a juror that he definitely wanted. PCR Tr. pp. 408, 421. Counsel Newsom's strategic reason for selecting juror Brenda Wise after one of his more extensive questioning was that she would be sincere, sympathetic, and would listen to the evidence. It should be noted that the voir dire supports this assessment where she consistently stated that she would make her own decision based upon the evidence and could hold out against the majority of jurors ®. p. 205), that she would have to be 100% sure ®. p. 197), and believed that she could be fair ®. p. 206).

In Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999), the Court found that trial counsel was not ineffective in his selection of the jury, stating "in PCR proceedings, a defendant must provide

credible evidence that the trial counsel's refusal to strike a juror (when requested by a defendant) prejudiced his defense."

As the Court stated:

> While this issue has not been addressed in South Carolina, other courts have held jury selection is a process that inherently falls within the expertise and experience of trial counsel. See, e.g., People v. McKenzie, 34 Cal.3d 616, 194 Cal. Rptr. 462, 668 P.2d 769 (1983); State v. Cosey, 873 P.2d 1177 (Utah Ct. App. 1994). 'The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities.' Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989) (emphasis added). In Commonwealth v. Sanders, 299 Pa. Super. 410, 445 A.2d 820 (1982), the Pennsylvania Supreme Court held:
>
> > Inherently, a jury trial requires that the defendant be secured the right to challenge potential jurors on the basis of cause or peremptorily. Those rights are adequately secured to an accused when they are exercised by defense counsel. The fact that an accused does not personally select the jury is not a deprivation of that right.
> >
> > 445 A.2d at 824 (emphasis added). Moreover, this Court has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997).

511 S.E.2d 68. Accord, Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (if counsel articulates a valid reason for employing certain trial strategy, such tactics will not be deemed ineffective assistance of counsel). Further, it has been recognized that there are some decisions of counsel that are so clearly strategic

or tactical that overcoming the presumption of sound judgment is almost impossible, including a failure to challenge facially neutral jurors. Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992) (decision in some way may have been tactical). Here, Hughes has failed in his burden of proof to show deficient performance.

Further, this Court must conclude that Sixth Amendment prejudice cannot be shown. Each of the jurors disclosed the fact that they had had the contact and knowledge prior to the selection during the voir dire. Each of the jurors convincingly stated that they could set aside the information and render a verdict based solely on the evidence. The trial judge, as well as the defense counsel, found these jurors to be sincere in their statements and concluded that they were qualified.

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S. Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, [328 S.C. 257] 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied ___ U.S. ___, 117 S. Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S. Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. The Court has found no error in qualifying jurors who knew of a defendant's previous conviction and death sentence which were reversed on appeal when they stated they could be fair and impartial. State v Patterson , 324 S.C.5, 482 S.E.2d 760 (1998); State v. Drayton, 287 S.C. 226, 337 S.E.2d 216 (1985); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990). In Drayton, supra, the Court approved the qualification of two prospective jurors who had read newspaper accounts of the case. Each stated she could put aside the prior knowledge, follow the law as charged, and base her verdict upon the evidence presented at trial. 293 S.C. at 422-23, 361 S.E.2d 329.

The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). In Irvin, the United States Supreme Court addressed the issue of pretrial knowledge of facts by jurors where the appellant had been sentenced to death. The Court found that it was not required that jurors be totally ignorant of the facts and issues involved in a case. The Court opined that "it [was] sufficient if the juror [could] lay aside his impression or opinion and render a verdict based on the evidence presented in Court." Irvin, 366 U.S. at 723, 81 S. Ct. at 1643. Accord, State v. Bell, 302 S.C.18, 393 S.E.2d 364 (1990) (each of the jurors at issue stated that they could set aside any opinions garnered from their prior knowledge of the appellant's conviction and/or sentence of death for the murder of Shari Smith and would be able to give the appellant a fair and impartial trial.)

In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 [302 S.C. 24] L.Ed.2d 589 (1975), the defendant, "Murph the Surf", notorious for his involvement in the 1964 theft of the Star of India sapphire, claimed that the jurors were biased because they knew about his previous convictions. The Court held that juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged does not alone presumptively deprive the defendant of due process. The Court declined to find that the setting of the trial was inherently prejudicial, and declined to find prejudice in the jury selection process. Murphy, 421 U.S. at 803, 95 S. Ct. at 2038.

Our Court considered whether the trial court erred in not excusing four jurors who had heard of the case and some of its details in DeLee v. Knight, 266 S.C. 103, 112, 221 S.E.2d 844, 847 (1975), cert. denied, 426 U.S. 939, 96 S. Ct. 2658, 49 L.Ed.2d 392 (1976). Even though the jurors had some knowledge of the case, the Supreme Court found that each juror had not formed a conclusive opinion as to the guilt or innocence of the accused, and could render a just verdict based solely on the evidence presented at trial.

This Court finds that Juror Barron and Juror Brenda Wise were qualified to serve by their credible expressions that they would both rely upon the evidence in their decision, not on what they had previously heard, and could be fair and impartial. Since they each were not subject to be stricken for cause, the discretion by defense counsel in selecting the jurors is reasonable trial strategy. There is no Sixth Amendment violation.

3.) **Other Jury Claims**.

The Applicant also contends that counsel should have attempted to more fully question jurors who asked to be excused because they were acquainted with the Applicant or his family. R. pp. 109-26. Counsel Newsom expressed his disappointment, but declined to attempt rehabilitation and concluded that his information from his sources was that the community did not feel strong about Hughes and were afraid to be on the jury. PCR Tr. p. 395. Although he acknowledged that he could have sought to rehabilitate them, he chose not to do so in light of their expressions of bias and inability to be fair.[6] Counsel Newsom declined to make inquiry of the potential jurors who sought to be removed due to impartiality except for Keith Mitchell, a friend of Hughes. R. pp. 122-23.

Clearly, counsel acted with knowledge of his ability to rehabilitate the potential jurors and chose not to do so. R. pp. 123-24. The Applicant has failed to show either deficient performance or prejudice where each of these potential jurors declared that the relationship with the victim's family would impair their ability to be a fair juror.

The Applicant further contends that counsel should have objected to the State's question about the ability of the juror to sentence a person to death who was sixteen at the time of the crime. See R. p. 197, ll. 12-19 (solicitor's question of juror Brenda Wise on whether she could impose a death sentence on a sixteen year-old at the time they committed murder). The Applicant contends that South Carolina law on jury selection prevents this inquiry of jurors, citing State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (disallowing hypothetical questions by defense lawyer in voir dire); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985). Counsel Newsom testified that he did not object to the questions. PCR Tr. pp. 397-99. Expert Mauldin, however, acknowledged that if a prosecutor asked a juror if they could ever sentence a sixteen year-old to death, despite the facts or circumstances, and the juror stated that he could not, then he would be excludable for cause. PCR Tr. p. 592, ll. 14-23. Mauldin stated that it may have been the opinion of the trial judge that in order to

[6] Friends and close neighbors (109); relation by marriage and cousin lives nearby (2) (109-10); defendant's father is his brother-in-law (111); known him all of my days (112) (already had been excused for other reasons); defendant's wife is her cousin (113); neighbor and friend of Hughes' grandmother (114); neighbor and friend of the family (115); I know him quite well and "I don't think I would be a good juror" (117); I know Herman personally, schoolmate and it may affect my judgment (120).

qualify the jury in this case, that the question had to be asked. PCR Tr. p. 594. But he contended counsel should have objected.

This Court concludes that the solicitor complied with the South Carolina law and the trial judge did not err in allowing the "16 year old defendant" question to be asked. As acknowledged by the experts, if the question resulted in the potential juror stating they could never give the death penalty to a sixteen year-old regardless of the facts and circumstances presented, they would be disqualified as a matter of law.

Solicitor Bailey testified that he developed this question after reviewing State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993). PCR Tr. p. 619. In Longworth, the Court upheld the disqualification of a prospective juror, who stated that she could not impose the death penalty on a young person, on the grounds that her views would substantially impair her performance as a juror since, contrary to her views, age was not a bar to capital punishment in this case.

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), the Court concluded that disqualification was proper of a potential juror who unequivocally stated she would never impose the death penalty on a mentally retarded defendant, no matter how egregious the crime and how slight the mental retardation, where Davis was urging retardation. Implicitly in the right to an impartial jury is the right to determine if the juror can carry out the law as explained to him. In Davis, the mental retardation question was the same as the solicitor's question about the sixteen year-old. It revealed the inability to follow instructions to consider statutory aggravating factors. The question was proper under Davis and counsel was neither deficient nor was prejudice proven where a negative response could only eliminate jurors who had to be removed, as a matter of law.

Finally, he contends that there was a Sixth Amendment violation concerning the order of questioning of jurors in the voir dire. In his brief, he relies upon § 16-3-20(D), who authorizes defense counsel a right to voir dire jurors and State v. Plath, 277 S.C. 126, 284 S.E.2d 222 (1981). In Plath, the Court stated, however, that case law establishes the solicitor does have the right of voir dire in capital cases, citing State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980) (State's right to voir dire examination is discretionary with the judge). Here, the experts speculate that there is a strategic advantage in questioning potential jurors before the prosecution. Solicitor Bailey acknowledged that the custom in the over twenty cases that he had tried that in all but two cases, the

prosecution went first in asking the voir dire questions. PCR Tr. p. 617. He equated it with the burden of proof and that he would proceed first, except in two cases where the prosecution and defense alternated.

Here, the failure of the defense counsel to follow the particular strategy of Bloom and Mauldin does not create a constitutional violation. No statute sets forth the order of inquiry which is merely a matter of custom. It is difficult to speculate on how this negatively impacts on the ultimate selection of the jury or upon the verdict by properly qualified jurors. Neither deficient performance in seeking to vary the custom within the First Circuit nor prejudice has been shown.

**4.) Summary of Findings of Fact and Conclusions of Law.**

Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the jury would have found reasonable doubt as to the guilt of Applicant. Tactical decisions of trial counsel are not subject to challenge in collateral attack. Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994), Sawyer v. Butler, 848 F.2d 583 (5th Cir. 1988), Frank v. Bookhart, 877 F.2d 671 (8th Cir. 1989), Gustave v. U.S., 627 F.2d 901 (9th Cir. 1980). Voir dire is not required on general legal principles which will be covered by instructions to the jury. Guam v. Palamo, 35 F.3d 373 (9th Cir. 1994), U.S. v. Baldwin, 607 F.2d 1295 (9th Cir. 1979). The question of whether or not an individual juror is biased is a question of fact.
This Court finds:

1. Trial judge described the elements of the crime, as well as the role of aggravation and mitigation, during his general instructions to the jury panel prior to voir dire.

2. The trial judge questioned each individual juror regarding their opinion of the death penalty and their responses were put on the record.

3. Counsel provided tactical reasons for his decision not to ask more in depth questions.

4. Counsel also provided tactical reasons for failing to use his peremptory strikes against jurors Brenda Wise and William Barron and for failing to strike these jurors for cause.

a. Barron's wife was very religious and his daughter is a missionary. Barron himself was educated.

b. Counsel found Wise to be more sympathetic and sincere.

5. Counsel acknowledged disappointment with the jurors' acquaintance with the victim's family, but provided a tactical reason for not attempting rehabilitation.

6. The mere fact that another lawyer may have questioned the jurors differently does not necessarily amount to ineffective assistance of counsel.

7. Applicant has failed to show any prejudice resulting from counsel's performance at voir dire.

Allegation 9(d) is denied and dismissed.

*Hughes v. Moore, Order, December 8, 2000, p. 74-92.*

Respondent submits that this determination of the same issue by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to strike jurors based upon their knowledge of the case. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*).

***2. Claim that Counsel Failed to have witness testimony impeached for perjury.***

In his second specification of ineffective assistance of counsel in his 2007 application, Hughes contends that his counsel failed to impeach unnamed witness or witnesses "for perjury." Like the above issue, similar issues were raised concerning state witnesses Henry Owens and

Kelly Hoffman and denied by Judge Thomas in the 1998 proceedings within her 2000 Order of Dismissal at pages 92-103, . Respondent submits that the previous showing and denial requires dismissal of the similar claims with this application as successive:

> ***Ground Concerning IAC and Guilt Phase - 9(e) - Applicant's Brief, pp. 45-51.***
> *9(e). Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.*
>
> In allegation 9(e), the Applicant asserts that counsel should have challenged the State's proof in the guilt phase in a number of different ways to challenge the testimony of Henry Daniel Owens, Kelly Hoffman and present further testimony to support the theory that Kelsey Pearce was involved as a triggerman.
>
> **a.) Henry Daniel Owens.**
>
> During the trial, Henry Daniel Owens testified that he was the uncle of Kelsey Pearce and knew Herman Hughes. Owens testified that he had charges pending against him in this case which were:
>
> - misprision of a felony;
> - accessory before the fact of murder;
> - accessory before the fact of armed robbery.
>
> R. p. 823. He further stated that he had a plea agreement with the State that he pled guilty to "misprision of a felony" and they won't charge him with accessory and that he gave true testimony. He declared that he was facing up to fifteen years on the misprision charge.[7] Owens described seeing Hughes and Pearce at his house on March 18, 1994, with a "15 pack of Bull" that they drank. R. p. 826. They made plans to go to a bar that evening with Pearce. R. p. 827. Owens testified that he had a .380 Larson gun with a clip in his trunk. R. p. 828. Owens stated Hughes stated that he wanted to get the gun, then Owens said he would give it to him, and then they agreed upon $50. R. p. 830. Owens stated he gave the gun to Kelsey and Kelsey and Hughes left. R. p. 831. After they were gone for about 30-45 minutes, they returned to the house and Hughes, Pearce and Owens split up the money. R. p. 832. He

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[7] The witness was actually facing up to ten years on the misprision of a felony charge. An issue about this response is raised in 9(s) and (t), herein, as a Brady violation.

left to go to the club, leaving Hughes and Pearce at his house. R. p. 833. He stopped for a car problem and saw police going toward St. Matthews. Subsequently, he saw two black males in a Mazda; one was wearing clothes similarly to Hughes'. R. pp. 835-38. Later, he was with Hughes and Herman shot the gun out the window. Owens said that Hughes was "pretty normal." R. pp. 839-40. Owens then described a conversation he had with Pearce and Hughes about the Blue Diamond, stating that Kelsey did not go in the casino and that Pearce said Hughes went in, came out and borrowed money, then went back in and asked for change, and Hughes pulled out a gun, told Kelly to get off the phone, asked for keys to the car, and as soon as the keys hit the floor, Kelsey heard gunshots. R. pp. 849-50. Kelsey then shut the door when Hughes came out and they got in the Mazda and went to Owens' house. R. p. 851. Owens stated that while Kelsey was describing the events, Hughes was shaking his head. The only thing Hughes said was "I bucked them down," meaning I shot the gun. R. p. 852. At this time, they had been drinking and Hughes was "kind of shaky" but "wasn't real bad off." R. p. 853. It was around 4:00 A.M. then. Owens then stated the next morning Ricardo Guiford dropped Pearce off at his house. On that morning, he found the gun in his car on the floorboard. He took it out and put it in a box. Later, Hughes asked him where the gun was.

On cross-examination, Newsom inquired why it took him until now to state the story. Further, he presented that the agreement was entered "last week." R. p. 859. Newsom sought to develop that Herman had been drinking beer ®. p. 861); that Herman was quiet (but not around Kelsey) ®. p. 862); that Kelsey was more outgoing, bigger and taller ®. p. 862); and that they were older than Hughes ®. p. 862). Newsom attempted to show that Hughes did not talk about buying the gun until later that evening and that they came to him so they could use it in a robbery. R. pp. 863-64. Owens stated that they split the money with him because Kelsey owed him "a lot of money" because he does things for him to keep him out of trouble, such as when he breaks windows that his father will not pay for. R. p. 865.

Newsom also sought to impeach Owens by showing the difference between his testimony and statements. He pointed out that Kelsey did not have money, but in his statement he said he had a 50 dollar bill. R. p. 865. He also pointed out that nothing in his statement said that he got part of the money. R. pp. 868-69. Owens denied that Hughes was too drunk to know what he was doing when he shot the gun through the car window. R. p. 870.

Upon questioning, Owens denied he was drunk when he took the money. R. p. 871.

The Applicant criticizes counsel Newsom because he failed to point out the fact that the accessory before the fact charge would carry a life sentence to reveal the quality of the plea bargain, which exposed him only to a potential punishment of ten (10) years.[8] § 16-1-40 (punishment for accessory before the fact shall be punished as principals). State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980) (misprision of felony is a common law offense); § 17-25-20 (ten (10) year punishment maximum for felonies when not specifically provided for); § 16-1-110 (classification for common law felonies not assigned). Here, the plea bargain involving the dropping of the other charges was revealed to the jury as well as the new exposure in the mind of witnesses of fifteen (15) years (although legally it was ten). Defense counsel sought to impeach the witness by the fact that his version of providing the gun and receiving benefits of the robbery, yet claiming he was unaware that it would occur was not credible, that Hughes had to be more intoxicated than he claimed, that his testimony varied from his prior statement and suggested that his testimony was a new product of the plea bargain.

The failure to use more impeaching evidence has been rejected as ineffectiveness both under the performance prong of Strickland; U.S. v. Michaud, 925 F.2d 37, 43 (1st Cir. 1991), and the prejudice prong; Russell v. Collins, 944 F.2d 202, 206 (5th Cir. 1996). Generally, impeachment tactics have been held to be matters of trial strategy. Gustave v. U.S., 627 F.2d 901, 906 (9th Cir. 1980). If the failure to impeach would have little effect on the overall trial, there is no ineffectiveness because Strickland prejudice would not exist if it did not undermine confidence in the outcome. Foster v. Delo, 39 F.3d 873, 880 (8th Cir. 1994); Bergman v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (impeachment on collateral matter could not have changed result).

Here, this Court finds that counsel was not deficient in failing to point out the comparative punishments between his charges and the plea bargain. The jury was aware that the comparative potential difference between a death sentence that Hughes was facing and the fifteen (15) [or actually ten] year sentence that Owens was facing where Owens had supplied the weapon prior to the murder and shared in the proceeds after the

[8] During the PCR hearing, counsel Newsom testified that he did not recall why he did not bring out the penalty for accessory. PCR Tr. pp. 356-59.

murder. His familial connection to Kelsey Pearce was also exploited by Newsom revealing that he frequently had to come to his aid to "get him out of trouble." R. p. 864. Additionally, counsel was aware that they had already conceded guilt in the opening statement and that Hughes' statement that revealed he had participated in the robbery and shot Hoffman was admitted. Even if this Court were to find that counsel was required under the Sixth Amendment to also point out to the jury the punishment for accessory before the fact to murder, prejudice has not been shown. The Applicant has failed to show that there was a reasonable probability that had counsel advised the jury of this penalty, that the result of either guilt or penalty would have been different. This was not a complete failure to impeach a witness at all; rather, it was a failure to provide the jury with additional evidence that could be used for that purpose. The allegation must be denied.

**b.) Kelly Hoffman.**

In this assertion, Hughes now claims Hoffman should have been impeached in a different manner than counsel Newsom impeached her during the trial. Counsel Newsom testified at the PCR hearing that he made a "conscious decision" not to go after Hoffman. PCR Tr. p. 332. He stated that this was based on the fact that Herman had shot her and opined that it would have been "disasterous." PCR Tr. p. 333. Counsel recognized that Hoffman had given a statement after the shooting while she was under the influence of medication. PCR Tr. p. 334. He noted that she gave a later taped statement that was consistent with Hughes' theory that she may not have seen Kelsey come in after she was shot. PCR Tr. p. 335. At the trial, Hoffman testified that she was certain that Hughes fired all the shots. PCR Tr. p. 336. In the PCR, it was pointed out that her later testimony in State v. Pearce was that she did not know if Pearce was in the casino or not. PCR Tr. pp. 338-39. Newsom admitted that he had received information that Officer Danny Kirkland heard Hoffman state on the night she was shot that she was shot by a tall black man and then on another occasion that she was shot by a short black man and then stated that there were "two." PCR Tr. p. 340. Newsom did not recall why he did not attempt to bring out this statement. PCR Tr. pp. 340-43.

Counsel Newsom declared that his strategy was to avoid going after her when he had admitted Hughes' involvement because it might alienate the jury. PCR Tr. pp. 343-44. He admitted that there were a number of inconsistencies in the details. PCR Tr. p. 344.

Further, counsel was aware of some information that Hoffman had been with Pearce and Gilmore some months prior and Hughes had seen them. PCR Tr. pp. 345-46. Counsel stated he could not put Hughes on the stand and did not know if Hoffman would admit it. PCR Tr. p. 346. Further, counsel, listening to the tape of the earlier statement, concluded that she was under the influence of pain medication when she spoke with Detective Rhudy. PCR Tr. p. 347. Counsel stated that at trial, he attempted to impeach her with portions of the statement. PCR Tr. p. 348.

On cross-examination, Newsom reiterated that he chose at trial not to be rough on her. He noted that he was rougher at the pretrial hearing when he found her to be feisty, but at trial she appeared to be more reserved and prepared as a witness. PCR Tr. p. 433.

Counsel stated that he did seek to impeach her on the prior statement given to Officer Kirkland about the "two" person version. PCR Tr. p. 434. R. pp. 1180-81. Counsel stated that he did have some background information that Hoffman had been romantically involved with Kelsey Pearce or one of his cousins. PCR Tr. p. 435. He noted that Hoffman stated that she went to school with Pearce, but really did not know him. PCR Tr. p. 437, R. p. 1181, ll. 9-12.

During the state PCR hearing, Kelly Hoffman Driggers testified that she had a boyfriend/girlfriend relationship with Ken Presley. However, she stated Pearce was a casual acquaintance. PCR Tr. p. 646. Although Pearce had called her once, she denied that she ever went places with him and found ridiculous his request at one time that he wanted to be her boyfriend. PCR Tr. p. 647.

She specifically stated that she lived with Presley at the time of the crime. Further, she denied that she tried to limit the testimony about Pearce's involvement in the crime based upon any alleged relationship. PCR Tr. p. 648. She specifically denied the existence of any sexual relationship. PCR Tr. pp. 649-50. She admitted that she would have recognized him had he come into the Blue Diamond. PCR Tr. p. 650. She stated that she did not see Pearce in the Blue Diamond on that day. PCR Tr. pp. 659-60.

As with Owens, this Court finds that trial counsel was not deficient in his cross-examination of Hoffman. Newsom had previously examined Hoffman during a pretrial hearing. Prior to the trial, the strategy to concede guilt was made and a decision to go softer on her to avoid alienating the jury was made. However, as counsel noted, he did not abandon impeaching Hoffman; he only chose not to be aggressive in his style.

Hoffman testified that Hughes was the only one she saw inside the casino that night. R. pp. 1168-69. She testified that when she gave a taped statement that she was under medication and did not recall what she said. R. pp. 1169-70. On cross-examination, Newsom immediately attempted to impeach Hoffman with the prior statement she made to Officer Kirkland that there were two people, but she clarified that she meant her and Ken, not two perpetrators. R. p. 1180. She did not recall the descriptions she gave of the two men. R. p. 1181. She further stated that she went to school with Pearce, but did not really know him. R. p. 1181.

This Court finds that Hughes has failed to show either deficient performance or prejudice. Counsel strategically chose to point out the fact that different versions of the event was given by Hoffman on tape (that was played), to Officer Kirkland, and in court. His style in doing so is not challengeable as deficient performance. Whitehead, supra. Further, the Applicant has failed to prove the existence of any relationship between Hoffman and Pearce that would suggest she would only put blame on Hughes rather than Pearce. Counsel reasonably sought to challenge the State's version of the facts, while acknowledging his own guilt. He cannot be deemed deficient on the basis of this record.

Assuming arguendo that he was required to take these additional steps, this Court finds that Sixth Amendment prejudice has not been shown. Hughes admitted shooting the victim. Hoffman, injured seriously at the time of the event and subsequently medicated, gave inconsistent statements. The jury had this information about her credibility and convicted him. Confidence in the outcome is not undermined by counsel's actions. See, Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (case where IAC found on a failure to challenge victim's statement).

**c.) Miscellaneous Matters.**

In this argument, he also contends counsel failed to present other testimony in the guilt phase, particularly Amy Presley, Ricardo Duane Gilmore, and Danny Kirkland.

The Applicant contends that the victim's sister, Amy Presley, should have been called to testify that she had seen Pearce at Hardee's a few days before the crime and that he asked her when she would be working again at the casino. PCR Tr. pp. 513-16. Apparently, he contends that this would suggest Pearce's advance planning for the robbery. Counsel Newsom testified that he was aware of the information from Ms. Hughes, but did not attempt to call Ms. Presley on the issue and hoped to inquire of Pearce about

it if he testified. PCR Tr. pp. 405-07. Respondents submit that there was no Sixth Amendment violation. The jury was aware that Pearce was involved in the planning of the robbery from the testimony of Owens and Hughes' own statement. Prejudice under Stricikland has not been shown even if counsel is found to have been required to put up this collateral evidence that speculates that the Pearce comment may have been part of a plan to rob.

Similarly, the failure to call Duane Gilmore about the alleged fact that Pearce had bragged about the shooting and considered fleeing was not a Sixth Amendment violation. Although counsel could not recall why they did not call him, he noted that this was inconsistent with their theory because Pearce did not shoot Kelly; Hughes did. PCR Tr. pp. 362-63. Respondents submit that the admission of involvement by Pearce in the robbery was not contested by the State at trial. As Newsom stated, "I think we got that out" that Pearce was more culpable. PCR Tr. p. 362. Even if counsel could have found and presented Gilmore at trial, under Jones v. State, supra, prejudice has not been proven.

Finally, the decision not to recall Officer Danny Kirkland about Hoffman's statement at the crime scene does not rise to ineffective assistance. As stated above, the matter was presented in Hoffman's cross-examination which she clarified or did not recall saying. The failure to further present inconsistent statements did not undermine confidence in the outcome. The allegation must be dismissed.

**d. Summary of Findings and Conclusions**

This Court is constrained to dent relief on allegation 9(e). Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the jury would have found reasonable doubt as to the guilt of Applicant. Failure to use more impeaching evidence has been rejected as ineffectiveness under the performance and prejudice prongs of *Strickland*. U.S. v. Michaud, 925 F.2d 37 (1st Cir. 1991), Russell v. Collins, 944 F.2d 202 (5th Cir. 1996), Gustave v. U.S., 627 F.2d 901 (9th Cir. 1980). If failure to impeach would have little or no effect on the trial overall, the prejudice prong is not satisfied. Foster v. Delo, 39 F.3d 873 (8th Cir. 1994), Bergman v. McCaughtry, 65 F.3d 1372 (7th Cir. 1995). This Court finds:

1. Counsel attempted to impeach Henry Daniel Owens by questioning him about his plea bargain and inconsistencies in statements regarding his knowledge of the robbery.

2. Counsel is not deficient for failing to point out the comparative punishments between his charge and the plea bargain.

3. Applicant failed to show a reasonable probability that the outcome would have been different had the jury known of difference in penalties; this was not a complete failure to impeach, but a failure to provide additional information to the jury that could be used for that purpose.

4. With respect to Kelly Hoffman, counsel testified at the PCR hearing that he made the conscious decision not to "go after Hoffman" because he did not want to alienate the jury. However, he still attempted to impeach her with information that she and Kelsey (or 1 of his cousins) had a romantic relationship; Hoffman stated at trial that he was an acquaintance but denied any sexual relationship.

5. With respect to the inconsistent statements regarding 1 shooter or 2, Hoffman clarified under cross by counsel that she meant her and Ken Presley and not 2 shooters. Furthermore, Hoffman was seriously injured and medicated when she gave the inconsistent statement.

6. Counsel explained that he did not want Applicant to testify on the stand and did not know if Hoffman would admit that she had been with Kelsey months prior and that Applicant saw them.

7. Counsel was not ineffective for failing to call Amy Presley, the victim's sister, to testify that she saw Pearce at Hardees a few days before the crime and that Pearce asked her when she would be working at the casino. Counsel testified that he was aware of this information, but did not attempt to call Ms. Presley on the issue because he hoped to question Pearce about it.

8. Applicant's 6th Amendment constitutional rights were not violated because the jury knew that Pearce was involved in planning the crime based on the testimony from Owens and Applicant's statements.

9. Counsel not ineffective for failing to call Ricardo Gilmore who could testify that Pearce bragged about the shooting and had plans to flee.

10. Counsel could not remember why he did not call him, but said questioning Gilmore on the matter was inconsistent with his theory because
a. Applicant shot Hoffman, not Pearce;
b. Admission of involvement by Pearce in the robbery was not contested by the State at the trial;
c. Counsel thought he had "got that out" at trial as to Pearce's greater culpability.

11. Applicant failed to show that confidence in outcome of the trial was undermined by counsel's actions and therefore failed to show prejudice.

The claim is denied.

***Order, p. 92-103***

***Issues Related to Owens' Misstatement about Penalty for Misprision of Felony and Prosecutorial Misconduct and IAC - Grounds 9(s), 9(t) - Applicant's Brief, pp. 122- 125***

*9(s) Applicant was denied due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments in that the state elicited testimony during direct examination of a witness that the solicitor either knew or should have known to be false.*

*9(t) Applicant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by counsel's failure to object to the solicitor's elicitation of false testimony during the direct examination of a witness.*

As stated in the argument set forth herein in ground 9(d), during direct examination of State's witness Henry Daniel Owens,

Jr. -- who was facing charges of misprision of a felony, accessory before the fact of murder, and accessory before the fact of armed robbery relating to the same incident for which Applicant was charged – the solicitor elicited testimony from the witness with respect to his plea agreement. The witness divulged that he pled guilty to misprision and had agreed to testify in exchange for the State's dismissal of the other charges against him. ROA p. 823. The witness further stated that for the misprision charge he was facing "up to fifteen" years in prison. ROA p. 823. Specifically, the following colloquy occurred:

Q. Would you tell the jury what that plea agreement is?

A. I plead guilty to misprision [sic], and they won't charge me with the accessory charges.

Q. All right. And do you know how much time you're facing on the misprision charge?

A. Up to 15.

Q. Okay....

ROA p. 823.

Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As set forth before in argument 9(d),under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term). The witness's mistaken statement or belief at the time of his testimony that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., (court asking Owens, "[d]o you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "[y]es, sir").

The Applicant contends that by not only eliciting but affirming (by silence) the witness's misstatement, the solicitor improperly and intentionally created a false and misleading impression and, thereby, denied Applicant due process of law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968), Napue v. Illinois, 360 U.S. 264 (1959), Mooney v. Holohan, 294 U.S. 103 (1935), see also

Johnson v. Mississippi, 486 U.S. 578 (1988). This Court finds that this comment does not mandate a new trial under any theory of prosecutorial misconduct.

In his testimony before the PCR court, Solicitor Bailey addressed his reasons for not correcting the statement of Owens at the time of the questioning.[9] He stated that he asked Owens about the plea bargain to preempt Newsom from asking the questions and did not make it want to appear that he was hiding anything. PCR Tr. p. 621. He stated that he wanted to elicit what Owens understanding in his mind was of the plea agreement and what motivated him to give the testimony. He stated that he did not think it was significant what the crime actually carried. PCR Tr. p. 621. "I thought the significant issue was what he thought it carried because that would have been the only thing that could have motivated him." ROA p. 621. Solicitor Bailey conceded that he was aware that misprision carried a ten year sentence, but stated that his purpose was not to get into a debate with Owens about what the actual time was. He said that he was not privy to what Mr. Culclasure, who represented Owens, had told him the time was. Solicitor Bailey stated he did not think that it was appropriate to go and try to correct anything that his lawyer had told him. The solicitor stated that the issue was not what the time was but what Owens understanding was and that he had answered that question. ROA p. 632.

Counsel Newsom stated that he did not recall Owens testimony at trial about the penalty for misprision. PCR Tr. pp. 358-59. Newsom stated that he was aware that the penalty for misprision was ten years. PCR Tr. p. 359. Newsom stated that he did not recall why he did not object or request clarification. PCR Tr. p. 359.

**1.) Law and Analysis.**

This Court agrees with Respondents contention that this Court should begin the analysis by identifying the essential components of a Brady violation. In Brady the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S., at 87,

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[9] Solicitor Bailey in his guilt phase closing statement correctly stated that misprision of a felony carries a penalty of ten years. Particularly, he stated: " Daniel Owens has a plea negotiation with the state which limits his potential prison time, as he stated, to **ten** years because of his involvement in this thing." ROA 1259, 14-18.

83 S.Ct. 1194. The duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682, 105 S.Ct. 3375; see also Kyles v. Whitley, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Id., at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S., at 437, 115 S.Ct. 1555.

These cases, together with earlier cases condemning the knowing use of perjured testimony, (See, e.g., Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (per curiam); Pyle v. Kansas, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Napue v. Illinois, 360 U.S. 264, 269- 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).) illustrate the special role played by the American prosecutor in the search for truth in criminal trials.

In Napue, the principal state witness at the defendant's murder trial testified falsely that he had received no promises in exchange for his testimony. In fact, the prosecutor had promised the witness a recommendation for a reduced sentence. The prosecutor failed to correct the witness' perjured testimony, although he clearly knew it to be false. The Supreme Court held that the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial, and accordingly, reversed the defendant's conviction. Id. at 272, 79 S.Ct. 1173. Likewise, in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the government's only witness linking the defendant with the crime falsely testified on cross-examination that he had received no promise of immunity from prosecution. The prosecutor failed to correct his perjury and repeated the witness' falsehood in his summation. The Supreme Court reversed the defendant's conviction because there was reasonable likelihood that the prosecutor's knowing use of perjury on an issue so relevant to the witness' credibility affected the judgment of the jury. Giglio, 405 U.S. at 154-55, 92 S.Ct. 763.

The United States Supreme Court in Giglios stated that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice; the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Accord, Washington v. State, 324 S.C.232, 487 S.E.2d 883(1996). (State's failure to correct false information about its relationship with one of its witnesses warranted postconviction relief of new trial; evidence indicated that state made incorrect statement in opening argument that no plea agreement existed with witness, and presented testimony at trial that no deal existed when if fact a deal existed).

A defendant who alleges a Brady violation about a prosecutor's use of perjured testimony, must clear a lower hurdle in proving materiality. In such situations, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the outcome of the jury." United States v. Bagley, 473 U.S. at 678, 105 S.Ct. at 3381-82, 87 L.Ed.2d at 492.

Within the federal system, for example, the Supreme Court has said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

This special status explains both the basis for the prosecution's broad duty of disclosure and the conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence--that is, to any suppression of so-called "Brady material"--although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

The Supreme Court held that due process is violated when the state knowingly offers false testimony to obtain a conviction and permits that testimony go uncorrected. Napue, 360 U.S. at 269, 79 S.Ct. at 1177. In applying this doctrine, the Fifth Circuit has held that: [f]alse testimony for these purposes includes testimony that affects only the credibility of a witness. Napue, 360 U.S. at 269-70, 79 S.Ct. at 1177. Thus, the grant of a new trial based upon a Napue violation is proper only if (1) the statements in question are shown to be actually false; (2) the prosecution knew that they were false; and (3) the statements were material. United States v. Blackburn, 9 F.3d 353, 357 (5th Cir.1993). United States v. O'Keefe, 128 F.3d 885, 893 (5th Cir. 1997).

Here, the question arises that it was not proven that Owens was aware at the time of his testimony that he was facing ten years rather than fifteen to determine that his response was not only inaccurate but false. Solicitor Bailey conceded that he knew the response was legally inaccurate since misprision carried 10 years but did not know how Owens had been advised. When the Solicitor was given his opportunity to state the potential punishment in his argument to the jury, he clarified that it was a ten year potential.

The question as to whether there was prejudice, however, is not difficult to answer. The test for prejudice for "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood that the false testimony could have affected the outcome of the jury.*" United States v. Bagley, supra. Here, the difference in potential punishment was a slight difference of five years contrasted to the potential life sentence he had been facing for accessory before the fact to murder. It is difficult to see how this difference would have uniquely undermined the credibility of the witness. Also, the jury was told the accurate potential sentence when the prosecution made its closing argument. Finally, this difference created no "reasonable likelihood" that the outcome of the jury could have been affected. The Applicant had conceded guilt and an unchallenged admission that he shot the victim was entered into evidence. Hughes was identified as the only perpetrator by the surviving witness. His print was found on the cash drawer. There was no showing that this erroneous statement, *later corrected by the prosecution*, to a reasonable likelihood affected either guilt or sentencing verdicts. [See also, Order at 9(d).]

As this issue relates to ineffective assistance of counsel because counsel Newsom failed to correct the punishment for misprision, Respondents submit that "prejudice" under Strickland has not been proven for the same reasons that Brady "prejudice" was not shown. There is no "reasonable probability" that but for counsel's failure to point out the five year difference in penalty that the result of the guilt or penalty phase would be different.

**A. Summary of Conclusions and Findings of Fact**

This Court must deny relief. Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show prejudice.

Applicant claims that the solicitor's office had knowledge of witness Owens providing false testimony as to the penalty he faced for misprision of a felony. This Court specifically finds:

1. Guilty plea transcript of Owens reveals the court asking "do you understand that for misprision of a felony, I could put you in jail for ten years." Owens responded, "yes."

2. Solicitor's affirming witnesses misstatement (through silence) does not mandate a new trial under any theory of prosecutorial misconduct.

3. Solicitor Bailey testified at PCR hearing that did not correct misstatements because he did not want it to appear that he was hiding anything and that he wanted to elicit what Owens' understanding *in his mind* of the plea agreement and what motivated him to testify.

4. Solicitor Bailey did correctly state in closing statement that misprision of felony carried 10 years. Stated, "Daniel Owens has a plea negotiation with the state which limits his potential prison time, as he stated, to ten years because of his involvement in this thing."

5. The difference in punishment was a slight difference (5years) and pointing out that difference

would not have uniquely undermined the credibility of the witness.

6. The 5 year difference created no "reasonable likelihood"that the outcome of the jury could have been affected.

7. Applicant failed to show that he was prejudiced by Owens' testimony, particularly given the following:

a. Applicant conceded guilt.
b. Applicant's unchallenged admission that he shot Kelly Hoffman was entered into evidence.
c. Applicant was identified as the perpetrator by the surviving witness.
d. Applicant's prints were found on cash drawer at the scene.
e. The prosecutor corrected Owens' misstatement in summation.

The allegation for relief must be denied.

***Order, p. 180-188.***

Respondents submit that this determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to have witnesses impeached. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*).

***3. Counsel failed to have defendant evaluated for psychological evaluation before allowing petitioner to be tried as an adult.***

In his third allegation in the 2007 application, Hughes contends that he received ineffective assistance of counsel because he claims that his trial counsel was ineffective in failing

"to have petitioner evaluated for psychological -evaluation before allowing petitioner to be tried as an adult. This issue was adequately presented in the 1997 PCR proceedings and adjudicated in Judge Thomas's 2000 Order of Dismissal. Order, p. 36-64

***Issues Concerning Family Court Transfer - Grounds 9(a) and 9(b) - Applicant's Memorandum, pp. 9-20***

*9(a) Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.*

*9(b) Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

The Family Court, upon motion of the prosecution, transferred jurisdiction on the charges of murder, assault and battery with intent to kill, armed robbery, and grand larceny to the Court of General Sessions. This decision was made after a detention hearing and after a hearing, summarized below, on the specific issue of transfer consistent with South Carolina law. Relying on the factors of Kent v. U. S., the Family Court determined in the exercise of its discretion that transfer was appropriate. This determination was proper as a matter of state and federal law.[10]

The Applicant now comes before this Court to assert two arguments challenging the determination. First, he contends it was a "due process" violation under § 20-7-430 and the mandates of Hicks

[10] The trial record reveals that prior to selection of the jury, trial counsel Newsom challenged the jurisdiction of the General Sessions Court based on the transfer order of Family Court Judge Watson. Particularly, counsel Newsom asserted deficiencies in the order in that it did not address the background and life or a complete investigation of Hughes and that there were no interviews done of family witnesses and no evaluation done by D.Y.S. (DJJ) and asserted that the court lacked jurisdiction. R. 760-761. Judge Cottingham stated that he reviewed the order and concluded that it met the statutory requirements and under the order and the findings of Judge Watson that the Court had jurisdiction. R. 761. No appeal of this denial of the jurisdictional argument was taken to the Supreme Court.

v. Oklahoma, 447 U.S. 343 (1980) because the Family Court failed to do a "full investigation" of the matter, implicitly because it failed to independently request or require a recommendation and evaluation from the Department of Juvenile Justice.[11]

His second allegation is a claim that appointed counsel failed to adequately prepare and present mitigating evidence for the juvenile transfer hearing and object to certain reasons for denying transfer. For the reasons set forth below, each of these grounds lack merit for state post-conviction relief.

**(a.) Juvenile Transfer Hearing.**

On April 4, 1994, a juvenile transfer hearing pursuant to S.C. Code § 20-7-430 (1976) was held before Family Court Judge Maxey G. Watson. R. pp. 1720-85. Hughes was present and represented by his original appointed counsel, Martin Banks, the Calhoun County Public Defender. The State was represented by Reddick Bowman, of the Solicitor's Office. A petition for the transfer of Hughes dated March 23, 1994, from Family Court to General Sessions had been filed on March 24, 1994, for the crimes of murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle arising from the Blue Diamond Casino incident on March 18, 1994.[12]

The record reveals that testimony was presented at the hearing by the prosecution to support the transfer. First, Detective Earl Rhudy testified generally about his investigation of the death of Ken Presley, the assault of Kelly Hoffman, and the robbery of the Blue Diamond Casino on March 21, 1994. R. pp. 1723-33. He testified that Ms. Hoffman was shot in the cheek, as well as in the chest area. R. pp. 1733-34. Fingerprints matching the Applicant's were found "inside the cash drawer." R. pp. 1735-36. Subsequently, the stolen vehicle was found. Hughes gave a statement to the police, in his mother's presence, after Miranda warnings that:

> On Friday night Kelsey Pearce 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

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[11] As will be set forth below, neither the prosecution, defense, nor court requested such an evaluation to be done prior to the transfer hearing. At the conclusion of the hearing, defense counsel made a request which was implicitly denied. R. pp. 1780-81.

[12] A detention hearing was also held before Judge Watson on March 21, 1994. As a result of that hearing, Hughes was ordered detained until the transfer hearing. "Order of March 23, 1994," filed March 24, 1994. Counsel Banks participated at this hearing also.

> 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 grey car to the Ebony Club and left it there.

R. p. 1739, ll. 11-19. Later, the surviving witness, Kelly Hoffman, identified Hughes from a photographic lineup. R. pp. 1740-41. Det. Rhudy opined that the matter should be transferred to General Sessions Court "due to the seriousness of the crimes," that Hughes was involved in all crimes, and that Hughes was "close to his seventeenth birthday." R. pp. 1741-42.

On cross-examination by Banks, Det. Rhudy stated that Hoffman had told him that she had read press reports of the crime and called Hughes by his first name and that he had gone to school with her little sister, but he did not see how that could taint the lineup. R. pp. 1746-48.

Department of Juvenile Justice employee Dolly Zeigler, a community specialist, testified about Hughes' school record. R. p. 1749. She stated that he was last enrolled at John Ford Middle School in the eighth grade and had been suspended in February. She said from November 12, 1993, until January 31, 1994, Hughes had twenty-one (21) absences from school and twenty-one (21) disciplines; including disrespect to teacher (18), disrupting class (1), profanity (1), and leaving class without permission (1). R. p. 1750. She testified that Hughes had been in juvenile detention custody since March 23, 1994. R. p. 1751. His juvenile history includes (1) pointing a firearm - March 1993 - dismissed; (2) runaway - February 15, 1994; (3) possession of stolen vehicle - March 8, 1994 (pending - scheduled for intake March 23, 1994); (4) petty larceny of a gun - March 21, 1994 - pending. R. pp. 1752-53.

Ms. Zeigler also testified that Hughes was in regular classes at school. Also, on February 15, 1994, her records reveal that Hughes' mother and grandmother filed an "incorrigibility" complaint seeking alternative placement. R. pp. 1754-55. However, the materials were not completed. R. p. 1756. Her understanding was that Hughes had resided with his maternal grandmother for the last twelve years.

Ms. Zeigler stated that she had "no opinion" on the likelihood of Hughes' rehabilitation within the juvenile justice system or

whether he should be waived to Family Court. R. p. 1757. She stated that no DJJ pre-waiver evaluation had been ordered. R. p. 1757.

On cross-examination, it was developed that the school "disrespect" complaints involved three (3) different teachers. R. p. 1758. She said that the pointing a gun charge had been dismissed and the stolen vehicle charge was still pending. R. p. 1758. She also testified that the attorney can request an evaluation by DJJ and if it was ordered by the Court it would be completed. R. pp. 1759-60.

Sheriff D. C. "Bing" Jones testified that he also went to the scene of the robbery. R. p. 1762. He stated that when he arrived Ms. Hoffman was sitting in the chair, conscious, and that she was trying to tell the deputies what happened, but then asked them to stop questioning her because she was tired. R. pp. 1764-65. He further described taking Hughes' statement on March 20, 1994, when he went with Hughes' mother to pick up Hughes in Columbia. He stated that Hughes admitted shooting Kelly Hoffman in his mother's presence, that he then took a taped statement, and that his mother returned and that she wrote down his written statement. Sheriff Jones acknowledged that Hughes confessed to shooting Hoffman, taking money from the Blue Diamond, participating in taking the car to Orangeburg, except that he asserted his co-defendant shot Presley. R. pp. 1766-67.

On cross-examination, Sheriff Jones clarified that Hughes told him that he took the money from the cash drawer and that Kelsey drove the car. R. p. 1768. He also stated that he overheard Kelly say at the scene that "somebody came in and shot them." R. pp. 1769-70. He stated that it indicated to him that she did not know who shot them. R. p. 1770.

On reply, he clarified that her comments did not mean she could not identify who shot them and that with her wound, he was surprised that she was conscious. He also stated that Hughes admitted dividing the money. R. p. 1771. He also stated that he had learned that Hughes and Kelsey Pearce had come into the store, went back to a house and got a gun, returned to the store and Hughes requested instruction on how to play a video game, went outside to get some money, and came back with a $50 dollar bill and shot the woman. R. p. 1772.

No further witnesses testified. The prosecution urged transfer. He stressed the seriousness of the offenses; armed robbery and murder, grand larceny of an automobile, and assault and battery warrant the transfer. He further pointed out the violence revealed at the scene, the premeditation and planning, and the joint culpability of the participants. R. pp. 1774-75. Furthermore, the strength of the

prosecution's case reveals an identification of Hughes by the victim, the fingerprint on the cash drawer, and his own admissions. R. p. 1776. The prosecution contended there would be "judicial economy" of having both cases disposed of in General Sessions. He argued that Hughes was sixteen, but "near his seventeenth birthday," "very sophisticated individual," and "street smart."

He pointed out that he had a history of a firearm charge that was dismissed. Further, his school record of suspension and disrespect led to his expulsion. R. p. 1777. The prosecutor noted that Hughes was in the "regular academic career" track and not in either special education or emotional handicap classes. R. p. 1777. The prosecution closed with the assertion that protecting society from Hughes is best served by transfer, stating the particular planned brutality of this incident. R. p. 1778.

Defense counsel Banks argued that the adult (Pearce) was the leader who is more deserving of culpability than his client. R. pp. 1778-79. He sought to defeat the "judicial economy" claim by the swiftness of the Family Court system and the fact that the co-defendants would not be tried together. R. p. 1779. He claimed that the disrespect charges may have another side to it. Further, he noted that Hughes was "innocent" of the gun charge despite what the prosecutor stated and similarly stands innocent of the vehicle charge. R. pp. 1779-80. He described the incident as "an adult leading juvenile into no good" and that transfer should not occur.

Counsel Banks asked, because of the time constraints, that the result of the hearing be delayed:

> If you decide that you need more information and delay your decision until we request an evaluation from the team at DJJ. I kind of think we are kind of in a bubble in this case but at least if you see yourself leaning toward siding against us that you ought to have at least that input based on the time constraint that was placed on me in this matter. . . .

R. p. 1780, l. 19 - p. 1781, l. 3.

The Family Court Judge entered an oral order and then a written Order transferring jurisdiction. R. pp. 1781-85; 1985-88. In his oral order, Judge Watson found the existence of probable cause to believe Hughes had committed the crimes and that the prosecution has "a very good case of murder, armed robbery, theft of a vehicle. .

. ." R. p. 1781. Noting the signed confession admitting the shooting of the woman, theft of the car, identification by Hoffman, the evidence satisfied probable cause. R. p. 1781. Further, "the hand of one, hand of all" concept where he said after he shot the woman and then turned the gun over to Pearce who shot the other makes him "as guilty as the person who shot. . .," "shares in the responsibility and revealed a very strong case." R. p. 1782.

Judge Watson compared it with lesser crimes that could have occurred, but did not where no shooting would have occurred in the robbery. R. p. 1782. He described this incident as "cold-blooded."

Relying upon the Kent factors, the court found this was "a serious crime." He stated that assuming no prior record and no prior adjudication, "the question is whether or not he could be rehabilitated in the juvenile justice system." R. p. 1783, ll. 5-8. The Court found that he was "almost seventeen," a serious premeditated crime and "there is no rehabilitation in the juvenile justice system for this young man for that type of crime." R. p. 1783, ll. 10-11. "Juvenile justice provides no rehabilitation.[13] R. p. 1783. He found that General Sessions can deal with the matter for whatever time is appropriate for detention and rehabilitation, whereas the Family Court would be limited to indeterminate detention not to exceed his twenty-first birthday. R. p. 1783. As the Family Court found: "I just don't believe that this young man could be rehabilitated under those circumstances by our juvenile justice system." R. p. 1784, ll. 2-4. The Court found his maturity and sophistication weighed in favor of transfer. He found that he was almost seventeen and intended to use the powerful gun, rather than a child thinking a gun is unloaded and it fires and kills someone. The Court found that Hughes had the level of maturity and sophistication sufficient to be held accountable for his actions. R. p. 1784. The Court determined that these type cases involving juvenile crimes of violence need to be tried in public to show the State is doing something about it and that the act will be a deterrent to others, as well as incarceration will be a deterrent to him. R. p. 1785.

In the written Order, dated April 28, 1994, and filed May 3, 1994, Judge Watson summarized the testimony presented at the hearing. R. pp. 1985-87. Particularly, the Family Court concluded:

> Based on the information presented to this Court, I find that the state has

[13] Respondents note that the period of juvenile disposition and custody is set forth in 1994 at § 20-7-1330(b) (disposition) and § 20-7-2170 (commitment to DYS). Both statutes were repealed in 1996.

> established probable cause to believe that the minor defendant, Herman Hughes, committed the offenses of murder, assault and battery with intent to kill, armed robbery and grand larceny of a vehicle. The state presented testimony that the minor committed a serious, violent, cold-blooded crime against a person that involved physical violence against a person with a weapon. The leading authority is Kent v. United States [383 U.S. 541 (1966)], which sets forth the criteria for waiver. Based on the criteria, and testimony received, the Court finds that the minor should be transferred to the Court of General Sessions. . . .

R. p. 1987, ll. 10-22.

No appeal was taken to the Supreme Court concerning the waiver to the Court of General Sessions, although defense counsel Newsom raised the alleged deficiencies and failure to have a D.J.J. evaluation as grounds for why the General Sessions Court lacked jurisdiction that was denied. R. 760-761.

**(b) Law on Transfer (Waiver) From Family Court to Circuit Court**

In 1994, § 20-7-430(4), (6) provided for waiver of Family Court jurisdiction for sixteen (16) year olds who are charged with a felony if committed by an adult if the court "after full investigation, deems it contrary to the best interest of such child or of the public to retain jurisdiction. . ." and in the case of murder charges may transfer the child to General Sessions Court.

In making its motion to transfer jurisdiction, the State relied on S.C. Code Ann. § 20-7-430(4) and (6) (1985). Section 20-7-430(4) provides that the family court may transfer jurisdiction if that court finds "it contrary to the best interest of such child or of the public to retain jurisdiction." After conducting a hearing on the State's transfer motion, the family court ordered jurisdiction over Hughes' case be transferred to the Court of General Sessions. The family court found it was in the best interest of Hughes and the community to have Hughes tried as an adult. R. p. 1781-85, 1985-88. The family court's findings were explicitly based primarily upon

criteria established in the appendix to the United States Supreme Court case of Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). R. p. 1987.

In Kent, the Court established the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Court Act:

(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, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

(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.

The waiver hearing was extensive and the family court's order reflects that the evidence presented at the hearing was duly considered. R. p. 1782-85, 1985-88. See State v. Kelsey, 331 S.C. 50, 65, 502 S.E.2d 63, 70-71 (1998) ("It is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of reasons for, and considerations leading to, that decision."). Moreover, the family court specifically considered the Kent factors, which in previous cases the South Carolina Supreme has implicitly approved as appropriate criteria. See State v. Avery, 333 S.C. 284, 289 n. 3, 509 S.E.2d 476, 479 n. 3 (1998); Kelsey, 331 S.C. at 65 n. 4, 502 S.E.2d at 70 n. 4.

South Carolina Code Ann. § 20-7-430(6) (1985) authorizes the family court to determine whether it is appropriate to transfer a juvenile charged with murder to the general sessions court. The appellate court will affirm a transfer order unless the family court has abused its discretion.[14] Sanders v. State, 281 S.C. 53, 314 S.E.2d 319 (1984); State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977). Regardless of the procedural aspects of the transfer proceedings, the Supreme Court in a direct appeal reviews the merits of a transfer order for an abuse of the family court's discretion. Avery, 333 S.C. at 292, 509 S.E.2d at 481; Sanders, 281 S.C. at 56, 314 S.E.2d at 321; State v. Wright, 269 S.C. 414, 419-20, 237 S.E.2d 764, 767 (1977). The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support. Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996); South Carolina State Highway Dep't v. Sharpe, 242 S.C. 397, 402, 131 S.E.2d 257, 259 (1963). The Court notes, however,

> [i]t is not always easy to determine when and if a trial judge has abused his discretion. Overly

[14] A family court order transferring jurisdiction over a defendant to the Court of General Sessions is interlocutory and not subject to immediate appeal to the appellate courts. State v. Lockhart, 275 S.C. 160, 267 S.E.2d 720 (1980).

> simplified, abuse of discretion involves the extent of disagreement. When an appellate court is in agreement with a discretionary ruling or is only mildly in disagreement, it says that the trial judge did not abuse his discretion. On the other hand, when the appellate court is in substantial or violent disagreement, it says that there has been an abuse of discretion.

Rish v. Rish, 296 S.C. 14, 15-16, 370 S.E.2d 102, 103 (Ct. App.1988).

In evaluating whether the family court abused its discretion, the appellate court would consider the Kent factors. The Supreme Court has consistently emphasized that the serious nature of the offense is a major factor in the transfer decision. Avery, 333 S.C. at 292, 509 S.E.2d at 481; Kelsey, 331 S.C. at 65, 502 S.E.2d at 71; Sanders, 281 S.C. at 56, 314 S.E.2d at 321. Furthermore, "[t]he best interests of the public or of the juvenile may require the juvenile be held accountable as an adult for his criminal conduct." Avery, 333 S.C. at 293, 509 S.E.2d at 481.

Recently, in State v Corey D., 339 S.C. 107, 529 S.E.2d. 20 (S.C. S.Ct. March 6, 2000), the Court found "the family court's decision to deny the transfer motion was not reasonably supported by its own factual findings. The family court found, and the evidence supports, that these horrible, shocking crimes were willfully committed and there was probable cause to believe respondent participated actively in all aspects of the crimes. The fact that these crimes were violent, premeditated, and committed against elderly women clearly indicates their serious nature. While murder will always be considered "serious," the heinousness of these particular crimes is beyond dispute."

Additionally, the family court in Corey D. found indictment by a grand jury likely and that it would be easier for the state to proceed against all defendants in the same court. Nonetheless, the family court waived his co-defendants to general sessions court while retaining jurisdiction of his case. Though the family court did find that respondent's intellectual abilities were superior to those of his co-defendants and that respondent was more susceptible to rehabilitation than his co-defendants, the Supreme Court found that under the circumstances of this case these considerations do not overcome the overwhelming amount of evidence which militates in favor of transferring the murder charges to a court of general sessions for Corey D . The Court concluded that the lower court abused its

discretion in failing to transfer jurisdiction to Circuit over the murder charge.

In Sanders, the PCR applicant alleged error in the denial of post-conviction relief. The Court found no error under our standard of review in these cases. "Any evidence" of probative value to support the court's finding of facts is sufficient to uphold those findings on appeal. Griffin v. Warden, 277 S.C. 288, 286 S.E.2d 145 (1982). Specifically he asserted that his court-appointed attorney provided him ineffective assistance of counsel by his failure to preserve an objection to the transfer. The Court agreed with the post-conviction hearing judge that trial counsel's failure to except in the record, in order to secure his right to appeal, did not render his assistance ineffective.

However, since the objection was not properly preserved, the state asserted that the Supreme Court could not consider the propriety of transfer. The Court disagreed and reviewed the transfer record under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Sanders could not have untimely appealed the transfer alone. However, his appeal from the denial of post-conviction relief is properly before this Court. Furthermore, appellant did not knowingly and intelligently waive his right to appeal the transfer order. See Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981). Nevertheless, a White v. State review revealed that the family court judge did not abuse his discretion in transferring the case.

The jurisdiction of the family court over juveniles is a privilege rather than a matter of right. The best interests of the public or of the juvenile may require that the juvenile be held accountable as an adult for his criminal conduct. Sanders, supra.; In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980). Sanders was charged with two counts of murder. Had the case remained in family court, the maximum sentence appellant could have received was an indeterminate period of confinement not to extend past his twenty-first birthday. The circuit court could, in contrast, impose an adult term sentence. The Supreme Court concluded that the family court judge did not abuse his discretion in binding appellant over to circuit court.

As stated before, the serious nature of the offense is a ***major*** factor in the transfer decision. See State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (transfer upheld where defendant was charged with murder); Sanders v. State, supra (transfer upheld where defendant was charged with two counts of murder and two counts of assault and battery with intent to kill); State v. Wright, supra (transfer upheld where defendants were charged with armed robbery and assault and

battery with intent to kill). The best interests of the public or of the juvenile may require the juvenile be held accountable as an adult for his criminal conduct. In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980).

"[I]t is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of the reasons for, and considerations leading to, that decision. Conclusory statements, or a mere recitation of statutory requirements, without further explanation will not suffice. The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court. The salient facts upon which the order is based are to be set forth in the order."

In re Sullivan, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980).

**© The Relevant State PCR Testimony**

At the PCR hearing, the Applicant presented various witnesses on the issue of whether the Family Court should have waived jurisdiction. The first witness, Dr. Marty Beyer, an expert in child development and juvenile justice issues and a psychologist, testified that she performed an evaluation of Hughes for purposes of the state PCR hearing. PCR Tr. p. 8. She opined that sixteen year olds are not able to function as adults due to cognitive skills and are less culpable; that Hughes, because of his intellectual limitations, trauma, and alcohol abuse, was less mature than a normal sixteen year old and less culpable; that he should have been continued in Family Court jurisdiction and had doubts about his competence at trial. PCR Tr. pp. 9-11. She determined that he had a lower IQ than typical adolescents (PCR Tr. p. 18), that he had a simplistic way of thinking (PCR Tr. p. 19), lacked planning (PCR Tr. p. 19), and took risks without considering the consequences, such as the dangerousness of carrying a gun. (PCR Tr. p. 19). In terms of his moral development, Dr. Beyer opined that he knew hurting people was wrong, but because he was drunk he was unable to use his moral values. PCR Tr. p. 22. She stated that he was unable to initially feel for the victims although he had empathy for others in his life. She said that his simplistic thinking and loyalty to friends may have led to his participation in the crime. PCR Tr. p. 22. She found that Hughes did not have a stable sense of identity of himself. He had struggled in school, in sports, and lacked job goals. Further, he found that his role as a class clown led to disrespect from teachers. PCR Tr. p. 24. She found that Hughes suffered from trauma from the school's failure to meet his needs and not remedying his learning disability through special education despite the indicators. PCR Tr. p. 25. Further, vocational

education was not done that may have supported his functioning. PCR Tr. p. 26. She found that he was placed in "regular classes" and permitted to fail, rather than provided special classes. PCR Tr. pp. 26-27. Further "trauma" was found when his grandfather had a stroke and led to Hughes losing interest in life. PCR Tr. p. 28. Further, his grandmother did not provide limits and allowed him to get away with things in his adoptive home. PCR Tr. pp. 28-31. The grandfather was his nurturer. His school disciplinary problems began when his grandfather's illness occurred. PCR Tr. p. 30.

Dr. Beyer concluded that Hughes did not function as a normal sixteen year old and was more immature. PCR Tr. p. 32. Dr. Beyer stated that she made recommendations to the courts on development and amenability to rehabilitation. She said that she would have recommended retention in Family Court because of his intellectual deficits, his immature cognitive, moral, and identity development. PCR Tr. p. 33. She found he was not a chronic juvenile offender and had not received adequate treatment in the juvenile system. Further, she opined that he did not receive alcohol treatment or appropriate education that suggested to her that he would benefit in juvenile court. PCR Tr. p. 34.

On cross-examination, she stated that in 1993 and 1994, she opined that the South Carolina juvenile justice system had many deficiencies in the mental health, education, and other facilities. PCR Tr. pp. 38-39. She further opined that a sixteen year old who is functioning like a sixteen or seventeen year old should not be sentenced to death. PCR Tr. pp. 39-42. She declared her disagreement with South Carolina law.

Dr. Beyer testified about the circumstances of the crime that Hughes told her during the recent interview on October 6, 1999. She was told that he had a six-pack of high alcohol beer that he received from Pearce. PCR Tr. p. 43. She said he told her that Pearce borrowed the gun from one of Pearce's relatives and came up with the idea of the robbery that surprised him. PCR Tr. pp. 44-45. He told her that he had gone to the Blue Diamond previously that day and a different person was working there, an older woman. PCR Tr. pp. 45-46. He told her that he did not know Ken Presley or Kelly Hoffman but that Pearce did and that he could not go into the store. PCR Tr. p. 46. She acknowledged that Hughes told her that he knew there was going to be a robbery, that he would be involved, and that he had to go into the store to rob it after he had been in there before. PCR Tr. p. 47. She said that he had visited the store earlier that day, then went back and came back out, unable to carry out the robbery, that his co-defendant "belittled" him and he went back in and shot the

individuals. He recalled the gun went off, which surprised him, being startled by the keys being thrown down. PCR Tr. p. 48. Dr. Beyer was not aware of the statement Hughes had told his attorney that he shot twice or that he feared being recognized by Hoffman. PCR Tr. pp. 48-49. Further, she acknowledged that Hughes attempted to withdraw from the robbery, but that he could not explain why he continued it because this was inconsistent with him. PCR Tr. p. 54. She acknowledged that Hughes got expelled from school for fighting. Further, she described Hughes assisting the grandmother in caretaking of the stroke victim. Further, she admitted that Hughes attempted to join the Job Corps to learn welding, but left because he was unhappy. PCR Tr. pp. 57-58.

Dr. Beyer further stated that he was a weekend alcohol user and periodic marijuana user. PCR Tr. pp. 59-60. She further acknowledged that she was not employed by DJJ to do evaluations in 1994-1995. PCR Tr. p. 63. Importantly, Hughes never told her that Pearce told him to go into the store and shoot either Kelly Hoffman or Kelsey Pearce. PCR Tr. p. 64.

On reply, despite counsel's math, Dr. Beyer maintained that Hughes told her "he described his drinking a six-pack." PCR Tr. p. 65. Further, Dr. Beyer admitted that Hughes described the events to her in 1999 different than he described the event to counsel Newsom. PCR Tr. p. 73.

His original appointed counsel, Martin Banks, testified that he was appointed to represent Hughes as one of his first juvenile appointments. PCR Tr. p. 236. He acknowledged that prior to the transfer hearing, he did not have Hughes evaluated by a mental health professional, nor obtain his school records or DSS records. PCR Tr. p. 237. He declared that Hughes was in Columbia, but that he had talked with family members and was prepared to present a defense as to why he should not be treated as an adult. PCR Tr. p. 237.

Counsel Banks stated that in the past, he had received a pre-evaluation report, but one was not done in this case. PCR Tr. pp. 238-39.

On cross-examination, Banks acknowledged that he had earlier participated in the "detention" hearing where similar testimony was presented by an officer, the DJJ counselor, Dollie Zeigler, on March 21, 1994, before the April 8, 1994, transfer hearing. PCR Tr. pp. 244-45. He admitted that he asked the Family Court judge to defer consideration, seek more information, and have a DJJ evaluation, but that the judge chose not to and ordered a transfer. PCR Tr. p. 247. Counsel Banks stated that he had expected that an

evaluation would have been done.[15] Banks stated that prior to the hearing he had spoken with at least one officer, talked to Hughes' family and learned "what type of individual he was and what problems he had had." PCR. Tr. p. 249. He learned about Hughes' age, his school problems and his family problems. PCR Tr. p. 250.

Dr. Jonathan Venn is a clinical psychologist, formerly employed at the Department of Juvenile Justice (DJJ) from 1989 through 1997. PCR Tr. pp. 253-54. He stated, at Hughes' current counsel's request, he performed an evaluation of Hughes consisting of interviews of Hughes and his school principal at John Ford Middle School, administered psychological tests, and reviewed records from Hall Institute, school records and DJJ records. Although he later admitted that he would not have done the assessment in 1994 (PCR Tr. p. 273), he opined that Hughes should have been retained in Family Court. PCR Tr. p. 259. He stated that he believed Hughes could have been rehabilitated in the juvenile justice system because it was his first time in court and he had no record of anti-social or aggressive behavior. PCR Tr. p. 260. Further, he looked at Hughes' "locus of control" (who do people blame for their behavior). PCR Tr. p. 261. In his current interview, he found that Hughes accepted responsibility for his behavior and stated although it was someone else's idea, he went along with it. PCR Tr. p. 262. Dr. Venn opined that Hughes was not a "sophisticated" twenty-two year old. PCR Tr. p. 263. On the Jesness (JI) scale, he found Hughes had an "average risk of reoffending." Further, his current SCDC record did not have documented misbehavior. PCR Tr. pp. 264-65. Dr. Venn found the seriousness of the offense (murder) is hard to measure, but opined that most juveniles who commit homicide do not get into trouble again. PCR Tr. p. 265.

Dr. Venn did admit to finding negative factors. In one test, WURS, he found problems with hyperactivity, inattention, and impulsivity. PCR Tr. p. 266. He also found negative factors in his marijuana and alcohol abuse, his school problems and limited intellectual functioning. PCR Tr. p. 266.

On cross-examination, however, Dr. Venn revealed an important bias – he is morally opposed to the death penalty and "would obviously be opposed to an individual that was sixteen or seventeen years old being sentenced to death." PCR Tr. p. 268. He admitted that people who blame others for their problems are more

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[15] It is unclear where the authority for DJJ to complete pre-transfer recommendations develops from. See S.C. Code, §§ 20-7-3210, -3220, and 20-7-630. Compare § 20-7-7215 (recommendation on detention); § 20-7-7405. Cf. State v. Avery, supra.

likely to re-offend, but he was not aware that Hoffman testified that Hughes had shot both, rather the situation he was told. PCR Tr. pp. 268-69. Dr. Venn acknowledged that he does have "external locus of control" that would be one more negative factor. PCR Tr. p. 269. Dr. Venn also could not define an "average risk to re-offend." PCR Tr. pp. 269-70. He admitted that under today's law, Hughes would automatically be in General Sessions for these crimes. PCR Tr. pp. 271-72.

Dr. Venn admitted that he would not have been the DJJ psychologist who would have evaluated Hughes in 1994. PCR Tr. pp. 273-74. Despite his earlier statements about lack of violent acts (PCR Tr. p. 260), Dr. Venn admitted that the principal had told him that there were several fights. PCR Tr. p. 274. Dr. Venn was also aware that Hughes possessed a weapon previously. PCR Tr. p. 275. He also considered the weapon possession a "negative factor." PCR Tr. p. 276.

**a) Law/Analysis.**

**9(a) Due Process.**

In the first allegation, 9(a), Hughes claims that there was a due process violation because the Family Court did not do a "full investigation." The record reveals the State presented evidence about his culpability in the crimes, his admissions to law enforcement, a briefing on his school record and history with the Department of Juvenile Justice. Although a request at the conclusion of the transfer hearing was made by counsel for a delay to have a pre-transfer evaluation by DJJ, no claim was made that the Family Court judge did not comply with "full investigation," set forth in § 20-7-430. Ground 9(a) is a free-standing "due-process" claim.

In Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), the Court reaffirmed the doctrine enunciated in Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), that errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. S.C. Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981); see also Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Sellers v. Boone, 261

S.C. 462, 200 S.E.2d 686 (1973). Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983).

In 9(a), he claims the Family Court erred in rejecting any potential for rehabilitation in the juvenile justice system when no evidence was presented, heard inaccurate information about the facts of the crime, and impermissibly considered factors such as "send a message" to other youth. These claims, as presented, as a "due process" violation are not appropriate for state post-conviction relief under the Drayton-Simmons doctrine. These are matters that could have been raised at the hearing and then in the direct appeal. His due process claim, relying upon Hicks v. Oklahoma, is, therefore, barred from consideration in this state post-conviction relief action.[16] This Court notes that this does not prevent a similar claim set forth as a Sixth Amendment violation from being raised as in 9(b). Foye v. State, 335 S.C. 586, 588, 517 S.E.2d 265, 266 (1999).

**9(b) Ineffective Assistance - Transfer Hearing.**

In this claim, he must show that his counsel was deficient prior to and during the transfer hearing and that there is a reasonable probability that but for counsel's deficient performance, the result of the transfer hearing would have been retention in the Family Court. The "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Respondents submit that Hughes has failed in his burden of proof in showing either deficient performance or prejudice under Strickland. Foye, supra. This Court finds that Hughes ha failed in his burden of proof.

The focus of the Applicant's Sixth Amendment argument is based upon the alleged failure of defense counsel Martin Banks to request an evaluation and recommendation from the Department of Juvenile Justice. Here, the Family Court concluded that the seriousness of the offenses that Hughes was charged with, the strength of the prosecution's case, and the fact that Hughes was almost seventeen required him to use his discretion to transfer jurisdiction to the General Sessions Court. As stated above, the South Carolina Supreme Court, relying upon the Kent factors, determined in Corey D. that transfer was required, emphasizing the "serious nature of the offense" as a major factor in a transfer and that

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[16] However, when asserting a violation of a constitutional right or other errors in a proceeding, the PCR applicant must generally frame the issue as one of ineffective assistance of counsel to be cognizable in state PCR. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (S.C. S. Ct., Feb. 14, 2000).

"the best interests of the public or of the juvenile may require the juvenile be held accountable as an adult for his criminal conduct."

As in State v. Kelsey, Hughes was determined by the Family Court to have less chance of rehabilitation in the juvenile justice system because his sentence under that system would be brief.[17] As in In Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980), the Family Court received information from DJJ about Hughes' schooling and criminal history sufficient to comply with the "investigation" requirement of § 20-7-430.

First, Respondents submit that counsel was not constitutionally deficient in failing to request a discretionary "Preadjudicatory Transfer Evaluation" by the Department of Juvenile Justice prior to the hearing. Under Hughes' theory, minimally competent counsel must always request for such an evaluation. This is not the correct standard. Such evaluations are not mandated either by state statute or the Constitution. There is no per se ineffective assistance in failing to request one prior to the hearing.

Second, under these circumstances, taken from counsel's perspective at the time, he acted competently in making the request for the evaluation (and the request to delay) during the transfer hearing. R. pp. 1780-81. Counsel, at the transfer hearing, stated that the quick time constraints in setting the hearing worked in favor of delay and the evaluation. Id. The Family Court, aware that DJJ was not making an affirmative recommendation, rejected the need for any delay and proceeded to order the transfer. There is no showing that the Family Court would have ordered the DJJ evaluation if requested earlier by counsel. To the contrary, when presented with the matter, the Family Court chose to proceed without it. Counsel cannot be deemed constitutionally deficient in making the request at the time of the hearing. See PCR Tr. pp. 272-73 (request for transfer evaluations come in court orders).

Assuming arguendo that the request to DJJ would have been granted prejudice under Strickland has not been shown. Assuming a presentation similar to the testimony of Dr. Venn would have occurred it is reasonably likely that transfer would have occurred under the Strickland test. First, Dr. Venn's findings of no prior adjudications in Family Court was already known by the Court. Although the Court did not know that at one time he was placed in a special education class and the school concluded he was not learning

[17] In Kelsey, the court found that if convicted of murder in Family Court, Kelsey would get only twenty-four to fifty-four months – "this was not in the community's best interest due to the seriousness of the crime." 331 S.C. 50, 66, 502 S.E.2d 63, 71.

disabled, the Court correctly knew that he had been attending regular classes prior to his expulsion. However, certain additional negative factors were found by Dr. Venn that included 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. Although Dr. Venn had an opinion that Hughes would not re-offend, he admitted that his testing suggested an "average risk of re-offending."

Further, it was developed at the PCR hearing that Hughes' version of the crime to Dr. Venn was different than the versions expressed by Hughes to his trial counsel in 1994 (admitted shooting three times) (PCR Tr. pp. 423-25) [Presley, Hoffman, then Presley again] or the version revealed at court where Ms. Hoffman testified. Contrary to that earlier testimony, Hughes presented a new version to Dr. Venn that attempted to remove blame from him for the shootings and place it solely on his co-defendant. Even under Dr. Venn's version, this would suggest that transfer would be more appropriate based upon the "locus of control." PCR Tr. pp. 261-62, 268-69. As Dr. Venn stated: "if, in fact, he does have external locus of control, then that would be one more negative factor. PCR Tr. p. 269. Further, information was revealed through Dr. Venn that not only did Hughes have possession of a gun previously that he carried a weapon to protect others that he also considered a negative factor. PCR Tr. pp. 275-76.

In viewing whether transfer should occur, the Family Court determined the following were important factors:

- Existence of probable cause that Hughes committed the offenses in a cold-blooded manner.

- Strong evidence of guilt, including his admission to shooting Hoffman.

- Being almost seventeen, with the intent to use the gun.

- Level of maturity and sophistication sufficient to be held accountable for his actions.

- More adequate time in General Sessions for detention and rehabilitation compared with limited time in Family Court not to exceed his twenty-first birthday. R. p. 1783.

R. pp. 1781-85. Although Dr. Venn listed some "positive" factors, combined with his new negative factors, this Court finds that "prejudice under Strickland has not been proven by this alleged deficiency.[18] Therefore, even if it is assumed counsel was deficient, post-conviction relief is not required. As noted in Corey D., the transfer court was focused on the serious criminal nature of the event - here a planned robbery and the violent assaults on two individuals. Further, one of the individuals was necessarily in General Sessions court. The factors the Family Court relied upon were not undermined by the presentation in this Court.

Further, prior counsel was challenged in the transfer hearing for not accumulating school records that revealed his low IQ and substandard test scores. Although this can be done, the record reveals that the DJJ counselor at the transfer hearing revealed that information about Hughes' educational background, as well as the fact of his expulsion and the school disciplinaries. Further, Dr. Venn opined that the low IQ, that was not specifically revealed, was a "negative" factor weighing in favor of transfer.

Respondents argue that the problem the Family Court was faced with was this case based upon the crime committed and Hughes' role in it required it to be in the jurisdiction of General Sessions Court as much as it was required in the situation of Corey D., supra. Further, Respondents note the dichotomy where the testimony of Dr. Marty Beyer revealed that DJJ, in 1994, was deficient in education and mental health services. PCR Tr. pp. 38-39. The fact that the Family Court concluded that indeterminate commitment until twenty-one (or a mere 24-52 months as revealed in Kelsey) was inadequate to provide the necessary detention or rehabilitation that was required under Hughes' acts. The Respondents stated that the Applicant has ignored the Kent factors in the argument.

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[18] Respondents submit that Dr. Venn's post-death sentence recommendation that Hughes should be retained in Family Court is an irrebuttable product of his own personal moral bias - his moral opposition to the death penalty. Dr. Venn conceded as much in his declaration that he was opposed to sixteen or seventeen year olds being sentenced to death. PCR Tr. p. 268. As such, his opinion must be discounted.

Each of the eight (8) Kent factors continues to weigh in favor of the exercise of General Sessions jurisdiction.

(1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver. YES - THEN AND NOW.

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner. YES - THEN AND NOW.

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(3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted. YES - OFFENSE AGAINST PERSONS.

(4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney). YES - THEN AND EVEN GREATER NOW.

(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 (ADULT COURT). YES - KELSEY PEARCE TRIED IN ADULT COURT.

(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. YES - THEN; CHALLENGED NOW - *But evidence reveals his understanding of the event and his role in it through the testimony of his counsel.*

(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. *Revealed no prior adjudications, only charges THEN AND NOW.*

(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. *Rejected by COURT based on his age (16) and the limited detention law related to juvenile in 1994. NOW - same concerns must exist despite expert opinion that juveniles can be rehabilitated, the question remains whether*

*it can be done in 24-52 months*
*or until he is 21.*

This Court finds that while the Applicant has made a presentation of evidence and opinion that was not specifically revealed to the Family Court, under the facts of this case, he has failed to show "prejudice" under Strickland. He has failed to show a reasonable probability that if counsel had provided this information the result would have been to remain in the Family Court. This allegation must be dismissed.

In summary, as to allegations 9(a) and 9(b), this Court concludes that Applicant's constitutional rights have not been violated. Applicant failed to satisfy both prongs of the *Strickland* standard of review for post conviction relief. Applicant failed to show that trial counsel's trial performance was defective. Even if trial counsel's performance were found deficient, Applicant failed to show a reasonable probability that but for the errors on the part of trial counsel, the Family Court would not have transferred the Applicant to General Sessions.

S.C. Code § 20-7-34 governs the transfers from Family Court to Circuit Court. § 20-7-430(6) authorizes the Family Court to determine whether transfer is appropriate. Kent v. United States, 383 U.S. 541 sets forth the criteria for determining whether or not transfer is appropriate."Any" evidence of probative value to support the court's findings is sufficient to uphold the findings on appeal. Griffin v. Warden, 277 S.C. 288 (1982).
This Court finds that:

1. Family Court did not abuse its discretion in ordering a transfer in this case, that a transfer is reasonably supported based upon an application of the *Kent* factors to the factual findings in the case. State v. Corey, 2000 WL 254026 (S.C. S.Ct. March 6, 2000).

2. This Court finds that transfer was appropriate in that Applicant was 16 years old, charged with a felony and that the transfer was made after a full investigation including inspection of Applicant's school records and criminal history.

3. The Family Court's order reflects the evidence presented and that the evidence was duly considered by the court

prior to its determination that transfer was appropriate. Judge Watson specifically considered:

(a) Applicant made a signed confession that he shot Hoffman and stole the car;

(b) Hoffman identified him as the shooter;
( c ) "hand of one = hand of all";
(d) Applicant committed a "serious" crime based on the *Kent* factors;
(e) General Sessions is more appropriate for detention and rehabilitation where the Family Court is limited to indeterminate detention and where Applicant needs more rehabilitation than Family Court could provide;
(f) Applicant has a level of maturity and sophistication necessary to be held accountable for his actions; and
(g) trying this type of criminal case in public is a matter of public interest.

4. Evidence sufficient to uphold the Family Court's order exists in this case.

5. Applicant failed to show a reasonable probability that but for counsel's performance, the result of the transfer hearing would have been a retention in Family Court.

6. Applicant further failed to show any prejudice to the Applicant caused by counsel's performance.

*Hughes v Moore, December 6, 2000 Order, p. 36-64.*

Respondents submit that this determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to request an evaluation as part of the transfer process prior to be transferred as an adult. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*).

**V.**

The Respondents requests that the Court summarily dismissed this Application for PCR both as successive.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

**VI.**

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

B #91.

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina.
August 27, 2007

RECEIVED
OCT 22 2007
GENERAL COUNSEL

| | |
|---|---|
| **STATE OF SOUTH CAROLINA )**<br>**)**<br>**COUNTY OF CALHOUN )** | **IN THE COURT OF COMMON PLEAS** |
| **Herman Lee Hughes, Jr., #206816,)**<br>**)**<br>**Applicant, )**<br>**)**<br>**v. )**<br>**)**<br>**STATE OF SOUTH )**<br>**CAROLINA, )**<br>**Respondent. )**<br>**)** | **2007-CP-09-00103**<br><br>**CONDITIONAL ORDER OF DISMISSAL AS A SUCCESSIVE APPLICATION TO HUGHES V. MOORE, 98-CP-09-101.** |

RECEIVED
JUL 23 2010
S.C. SUPREME COURT

FILED
2007 OCT 18 A 11:17

This matter comes before this Court by a Motion to Dismiss by the Respondents State of South Carolina dated August 27, 2007 to the pro se application for post-conviction relief filed June 26, 2007. In his present application, he challenges his 1995 convictions claiming his retained counsel, Phil Newsom, was ineffective in three specifications. The Respondent submits that the entire application must be dismissed as successive under S.C. Code Ann. § 17-27-90 (1985) to his 1998 application for post-conviction relief which challenged the same convictions which was dismissed on December 8, 2000, as amended May 9, 2005 by the Honorable Paula Thomas after a hearing on the merits. *See Hughes v. Moore, 98-CP-09-101, Order, December 8, 2000.* As set forth below, this Court must conclude that the Respondents motion is well founded and conditionally dismiss where the claims sought to be raised in this 2007 action were raised and ruled upon in the prior action and no showing can be made that they were inadequately raised in the earlier action when a full evidentiary hearing, depositions and post-hearing briefing were done prior to the adjudication. This Court finds and concludes as follows:

ATTEST: TRUE COPY
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

RECEIVED
JUL 26 2010
S.C. SUPREME COURT

I.

The Applicant, Herman Lee Hughes, # 206816, is challenging his 1995 murder conviction which was previously the subject of an application for post-conviction relief. In that action, Hughes v. Moore, et al, 1998 -CP-09-101, the Applicant was represented by court-appointed counsel, John H. Blume, Cornell Law School, Myron Taylor Hall, Ithaca, New York 14853-4901 (607-255-9653) and initially Pamela A. Wilkins formerly of the Center for Capital Litigation, P.O. Box 11311, Columbia, South Carolina 29211 (803-765-0650). The matter was assigned exclusively to the Honorable Paula Thomas because it was a death penalty post conviction relief action. The Respondents were represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211. The Respondents made a return and motion to make more definite and certain dated July 21, 1998. Subsequently, other amended applications were filed. An evidentiary hearing was convened in Horry County from October 11-13, 1999. The Applicant was present and represented by counsel. The Respondents were represented by above-named counsel. Evidence was presented in the form of testimony, depositions, and affidavits. Subsequent to the hearing further submissions were made. On May 17, 2000, the Applicants made their Post-Hearing Memorandum of Law In Support of the Third Amended Application For Post-Conviction Relief. The Respondents made a Memorandum Of Law In Opposition to the Application for Post-Conviction Relief on May 27, 2000.

The initial Application was dated June 22, 1998. In the third amended application, dated October 7, 1999, he made the following claims pertinent to his 2007 application:

**9(a) Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.**

**10(a) Although South Carolina law in 1994 required a "full investigation" prior to a decision to transfer a juvenile from family court to General Sessions Court, the State arbitrarily failed to comply with this statutory obligation. Hicks v. Oklahoma. Additionally, the hearing itself did not satisfy minimum standards of due process as delineated in Kent v. United States, 381 U.S. 902 (1965). The defects in the waiver hearing include, but are not limited to, the following:**

(1) The Family Court lacked information concerning Applicant's mental retardation/borderline intellectual functioning and other cognitive limitations.

(2) The Family Court heard no evidence about Applicant's potential for rehabilitation within the juvenile system, yet concluded (without any evidentiary basis) that the Applicant could not be rehabilitated within the juvenile justice system.

(3) The Family Court heard incomplete and inaccurate information concerning the facts of the offenses and the Applicant's degree of culpability.

(4) The Family Court based its decision to transfer the Applicant to General Sessions Court based on impermissible considerations. such as the desire to "send a message" to other juveniles.

**9(b) Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.**

**10(b) Applicant's counsel at the Family Court waiver hearing failed to provide adequate representation.**

**Counsel's deficiencies include, but are not limited to, the following:**

> **(1) Counsel failed to secure necessary records and testimony to demonstrate Applicant's mental retardation or borderline intellectual functioning and to show Applicant's potential for rehabilitation within the juvenile justice system. See, e.g., State v. Bryant, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988)(finding counsel at waiver hearing ineffective for failing to introduce evidence regarding potential for rehabilitation), rev'd in part on other grounds, 569 A.2d 770 (N.J. 1989).**
>
> **(2) Counsel's failure to adequately prepare and secure records prevented counsel from effectively cross-examining the State's witnesses, who testified (wrongly) that Applicant had never been in special education.**
>
> (3) Counsel failed to present evidence that Kelsey Pearce, not Herman Hughes, planned and was the primary perpetrator of the crimes.
>
> **(4) Counsel failed to make a timely motion for an evaluation by the Department of Juvenile Justice.**
>
> (5) Counsel also failed to object to the Family Court's improper reasons for transferring Applicant to General Sessions Court, which included the desire to "send a message" to other young people and the belief that DJJ "provides no rehabilitation."
>
> Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984). ...

**...9(d) Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.**

**10(d) Trial counsel failed to conduct an adequate *voir dire*. Counsel's deficient performance includes, but is not limited to, the following:**

> **(1) Counsel failed to challenge for cause (*or use a peremptory challenge*) a number of jurors who were acquainted with the families of the victims and who had actually spoken with them about the crimes and about their loss. See Morgan v. Illinois, 504 U.S. 719 (1992)(defendant has right to impartial jury).(*Involves juror William Barron and Brenda Wise as stated in October 10, 1999 Letter from Counsel Wilkins*)**
>
> (2) Counsel failed to rehabilitate a number of jurors who expressed reservations about the death penalty, see Witherspoon v. Illinois, 391 U.S. 510 (1968)(jurors with reservations about death penalty may not be excluded for cause if they are able to fulfill their oath as jurors), and failed to challenge for cause jurors who indicated that they were unable to consider mitigating circumstances or would automatically vote for death upon a finding of guilt. See Morgan v. Illinois, 504 U.S. 719 (1992)(jurors who would automatically vote for death are excludable for cause).
>
> Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

**9(e) Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.**

10(e) Applicant's trial counsel failed to conduct an adequate and independent investigation of Applicant's case in order to develop and present testimony to create a reasonable doubt as to Applicant's guilt, to effectively cross-examine the State's witnesses, or to contradict the State's theory of the case. Counsel's deficient performance includes, but is not limited to:

(1) Counsel failed to adequately prepare and present evidence impeaching the credibility of Henry Daniel Owens, Jr. Steinkuehler v. Meschner, ___ F.3d ___, 1999 WL 274826 (8th Cir. May 6, 1999). Williams v. Washington, 59 F.3d 673 (7th Cir. 1995).

(2) Counsel failed to adequately prepare and present evidence regarding Kelsey Pearce's planning of, and involvement in, the offenses. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984). . . .

. . .9(s) Applicant was denied due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments in that the state elicited testimony during direct examination of a witness that the solicitor either knew or should have known to be false.

10(s) During direct examination of State's witness Henry Daniel Owens, Jr.--who was facing charges of misprision of a felony, accessory before the fact of murder, and accessory before the fact of armed robbery relating to the same incident for which Applicant was charged – the solicitor elicited testimony from the witness with respect to his plea agreement. The witness divulged that he pled guilty to misprision and had agreed to testify in exchange for the State's dismissal of the other charges against him. ROA 823. The witness further stated that for the misprision charge he was facing "up to fifteen" years in prison. ROA 823. Specifically, the following colloquy occurred:

Q. Would you tell the jury what that plea agreement is?

A. I plead guilty to misprision [sic], and they won't charge me with the accessory charges.

Q. All right. And do you know how much time you're facing on the misprision charge?

A. Up to 15.

Q. Okay....

ROA 823.

The solicitor knew or should have known that the witness was not facing up to fifteen years for the offense of misprision of a felony. Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As codified by federal statute § 18 U.S.C. 4 (1994), the offense is a misdemeanor not punishable by more than three years in prison. Although, under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term), the witness's claim that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., (court asking Owens, "[d]o you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "[y]es, sir").

By not only eliciting but affirming the witness's misstatement, the solicitor improperly and intentionally created a false and misleading impression and, thereby, denied Applicant due process of law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968), Napue v. Illinois, 360 U.S. 264 (1959), Mooney v. Holohan, 294 U.S. 103 (1935), see also Johnson v. Mississippi, 486 U.S. 578 (1988).

9(t) Applicant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by counsel's failure to object to the solicitor's elicitation of false testimony during the direct examination of a witness.

10(t) The relevant facts in support of this claim are set forth in 10(d) above. Defense counsel raised no objection to the solicitor's elicitation and affirmance of the false testimony. Defense counsel's failure to object to the

**introduction of that evidence was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).**

On December 8, 2000, the Honorable Paula Thomas entered a one-hundred and eighty-nine (189) page order denying state post-conviction relief in its entirety. Subsequently, the Applicant, through appointed counsel, had filed various motion to alter or amend and motions to stay pending resolution of constitutional questions involving mental retardation as well as juvenile execution matters. On May 9, 2005, Judge Thomas entered an Order which granted a new sentencing proceeding due to the intervening decision in Roper v. Simmons, 125 S.Ct. 1183 (2005) involving the constitutional prohibition of the execution of offenders under the age of eighteen which abrogated and reversed its prior holding in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Neither party appealed this order on the motion to alter or amend. The Applicant through counsel Blume advised the court that this resolved all matters.

On October 10, 2006, the Applicant appeared before the Honorable Howard P. King. The Applicant was represented by John Blume. Judge King sentence Hughes to a life sentence on murder. No appeal was taken from the sentencing proceeding.

### *A. PRIOR PROCEDURAL HISTORY*

Hughes is currently confined at Broad River Correctional Institution pursuant to orders of commitment of the Clerk of Court for Calhoun County. On May 26, 1994, the Grand Jury of the Court of General Sessions for Calhoun County indicted the Petitioner, Herman Lee Hughes, Jr., for murder (involving the March 18, 1994 death of Kenneth Presley), assault and battery with intent to kill (involving the March 18, 1994 shooting in the chest and face of Kelly Hoffman), armed robbery (involving the March 18, 1994 robbery of the Blue Diamond Casino), and grand larceny of a vehicle (94-GS-09-0154, 0155, 0156). He was represented by retained counsel,

Phillip F. Newsom, of the Richland County Bar. The prosecution was initially handled by First Circuit Solicitor Walter M. Bailey, Jr.

The prosecution had previously filed petitions in the Family Court of Calhoun County on March 21, 1994 and March 24, 1994 requested the actions be transferred to the Court of General Sessions so that Hughes could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered a written order waiving jurisdiction to the Court of General Sessions.

On October 31, 1994 the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

The Honorable Edward B. Cottingham was assigned to handle the matter. Pre-trial motions were heard on August 22, 1995. The matter was called for trial on September 5, 1995. At the outset, a competency hearing was held and the court entered a written order on September 7, 1995, finding Hughes competent to stand trial. Jury selection concluded on September 7, 1996.

The guilt phase began on September 7, 1996. The Petitioner was present and represented by retained counsel Newsom. Hughes was found guilty of all four (4) charges. On September 11, 1995, the sentencing hearing began. After deliberations, the jury found the existence of all three (3) submitted statutory aggravating circumstances and sentenced Hughes to death. R. pp. 1710-1711. After the jurors were polled, Judge Cottingham found as an affirmative fact the death sentence was appropriate. R. p. 1713. After providing Hughes the opportunity to express why the sentence should not be pronounced, Hughes was sentenced to death for murder, twenty-five

(25) years consecutive for armed robbery, twenty-five (25) years consecutive for assault and battery with intent to kill, and five (5) years concurrent for grand larceny. R. p. 1714.

**The Direct Appeal before the Supreme Court of South Carolina.**

The Petitioner made a timely appeal to the Supreme Court of South Carolina. In the appeal, counsel raised the following question presented:

> The judge erred by refusing to require co-defendant Kelsey Pearce, whose involvement in the crimes was the key defense issue at trial, to assert his privilege against self-incrimination before the jury, a procedure mandated by firmly established state law. In particular, this ruling denied appellant the opportunity to present relevant evidence in mitigation of punishment under the Eighth Amendment and S.C. Code § 16-3-20 and to rebut the state's case under the due process clause of the Fourteenth Amendment.

Final Brief of Appellant, p. 3. After briefing of this issue, the Supreme Court of South Carolina entered its order affirming the judgment of the trial court, over dissent, on October 27, 1997. The Supreme Court held that a witness may not be called by either the state or the defense solely for the sake of having the witness invoke his or her Fifth Amendment privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from the assertion; prospectively modifying State v. Perry, 279 S.C. 539, 309 S.E.2d 9 (1983). 493 S.E.2d at 823-24. The state appellate court then further concluded that any error in the trial court's refusal to do so in this case was harmless beyond a reasonable doubt. 493 S.E.2d at 824-825. A Petition for Rehearing was denied on November 20, 1998.

The Petitioner next made a Petition for Writ of Certiorari to the United States Supreme Court. The Petition was docketed as Hughes v. South Carolina, No. 97-8043 on February 24, 1998. In the Petition, Hughes, through appellate counsel Savitz raised the following issue:

> Does the harmless error standard South Carolina applies to the exclusion of mitigating and rebuttal evidence from capital sentencing comport with Chapman v. California, 386 U.S. 18 (1967)?

The Respondents made a Brief in Opposition on March 26, 1998. On April 27, 1998, the United States Supreme Court entered its Order denying the Petition for Writ of Certiorari. Hughes v. South Carolina, 523 U.S. 1097, 118 S.Ct. 1674, 140 L.Ed.2d 798 (U.S. April 27, 1998).

## II. ATTACHMENTS

This Court takes judicial notice of the December 8, 2000 Order in Hughes v. Moore, 98-CP-09-101 consisting of 188 pages and the May 2005 Order granting limiting post-conviction relief of a new sentencing proceeding. *This Court further takes judicial notice of the Court records in Hughes v. Moore, 98-CP-09-101 which includes:*

1. *Record of Appeal, State v. Herman Hughes.*
2. *State Postconviction Relief Hearing Transcript, October 11-13, 1999, Hughes v. Moore, 98-CP-09-101.*
3. *Deposition of Jeffrey Bloom.*

This Court also takes judicial notice of the records of the Clerk of Court in State v. Hughes, 98-GS-09-154, 155, 156 including the indictments and sentencing records in 1996 and 2006.

## III. ALLEGATIONS IN THE 2007 SECOND APPLICATION FOR POST-CONVICTION RELIEF

In the second application for post-conviction relief, Hughes makes the following allegations:

I. Ineffective Assistance of Counsel:

1. Trial counsel failed to strike jurors that had personal knowledge of the case I was on trial for.

2. Trial counsel failed to have witness testimony impeached for perjury.

3. Trial counsel failed to have petitioner evaluated for psychological evaluation before being tried as an adult.

**III. The entire Application must be dismissed as successive.**

First, this Court is constrained to conditionally hold that the current Application for PCR must be summarily dismissed because it is successive to the Applicant's prior application for PCR. The Uniform Post Conviction Procedure Act (the Act) provides that:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (1985). Successive applications are disfavored and the burden is on the Applicant to establish that any "new" ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) (prior state PCR application); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981)

(PCR may be deemed successive to earlier federal habeas corpus petition that was denied). More importantly, and applicable to the present scenario in the 2007 application, "**[A]ny ground finally adjudicated** . . . in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application unless the court finds a ground for relief asserted which for sufficient reason . . . was inadequately raised in the original, supplemental or amended application." Since the grounds presented in the 2007 application appear to have been adequately raised and adjudicated in the 1998 proceedings, Respondents submits that the entire application must be dismissed.

In Aice, the South Carolina Supreme Court dealt with the issue of whether an applicant may maintain an application for PCR based on ineffective assistance of previous PCR counsel. The Aice court stated, "It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view. Aice protests that only those new arguments of true merit would be advanced in successive applications and that hence our fears are unfounded. Yet, the very arguments Aice advances lack merit and demonstrate that our fears are real." Aice, supra at 394. The court reasoned, "Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." Id. at 394.

The court held the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17-27-90. Id. See also Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application). The Aice court further held that its decision in Austin was limited to its particular factual situation and that the holding in Austin was consistent with its holding. The court set forth its rationale as follows:

> In Austin the petitioner expressed his desire to seek review of the denial of his PCR application pursuant to his state law rights as set forth in S.C.Code Ann. § 17-27-100 and in Supreme Court Rule 50(9). Supreme Court Rule 50(6) expressly provides for the appointment of counsel to an indigent to seek appellate review of a denial of PCR. Austin's counsel failed to timely seek review. This Court is not empowered to expand its jurisdiction and grant Austin additional time to petition for review. Hence, merely as a method of enforcing Rule 50(6), and of enforcing Austin's entitlement to a PCR proceeding, complete with a petition for certiorari to this Court, we held that Austin could attack his PCR counsel as ineffective.
>
> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, Austin stands harmonized with the instant case.

Aice, supra at 395.

This Court conditionally submits that the Applicant has failed to establish the "sufficient reason" why the allegations in his 2007 application were inadequately raised in the previous application for PCR in 1997. Therefore, he has failed to meet the burden imposed upon him.

Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Alice v. State, supra; Arnold v. State/Plath v. State, supra. Therefore, the Court must summarily dismiss the Application for PCR as successive.

**IV. The Presents Claims Were Adequately Raised and Ruled Upon in the 1998 Postconviction Relief Proceedings before Judge Thomas.**

***1. Claim that Counsel Failed to strike jurors who had personal knowledge of the case I was on trial for.***

In his first specification in his 2007 application, Hughes asserts that his counsel was ineffective in failing to strike jurors who had personal knowledge of the case I was tried on. Hughes fails to specify with any particularity which particular jurors he is referring to concerning this omission by counsel Newsom. However, a similar issue was raised and rejected by Judge Thomas in the 1997 proceeding in her December 8, 2000 Order of Dismissal. In that action, with the assistance of counsel Blume and Wilkins, and subject to a full evidentiary hearing, Hughes claimed that counsel should have struck William Barron and Brenda Wise based upon their acquaintance with the Applicant and the victims family. In denying relief in the December 8, 2000 Order, Judge Thomas addressed the issue within allegation 9(a) set out above in the Order at pages 74-92. This portion of the Order, further set forth in the Respondents Return and Motion is incorporated herein by reference. *Hughes v. Moore, Order, December 8, 2000, p. 74-92.*

This Court concludes that this determination of the same issue by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to strike jurors Wise and Barron based upon their knowledge of the case. Since there can be no viable "sufficient reason" under

Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*).

***2. Claim that Counsel Failed to have witness testimony impeached for perjury.***

In his second specification of ineffective assistance of counsel in his 2007 application, Hughes contends that his counsel failed to impeach unnamed witness or witnesses "for perjury." Like the above issue, similar issues were raised in the 1998 proceeding as amended allegation 9(e) concerning state witnesses Henry Owens and Kelly Hoffman and denied by Judge Thomas within her 2000 Order of Dismissal at pages 92-103, and 9(s) and 9(t) within the Order at page 180-188, which are also incorporated herein by reference. This Court finds, as Respondent has moved, that the previous showing and denial requires dismissal of the similar claims with this application as successive.

Respondents submit that this determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to have witnesses impeached. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*).

***3. Counsel failed to have defendant evaluated for psychological evaluation before allowing petitioner to be tried as an adult.***

In his third allegation in the 2007 application, Hughes contends that he received ineffective assistance of counsel because he claims that his trial counsel was ineffective in failing "to have petitioner evaluated for psychological evaluation before allowing petitioner to be tried as an adult. This issue was adequately presented in the 1997 PCR proceedings and adjudicated in

Judge Thomas's 2000 Order of Dismissal in amended allegations 9(a) and 9(b). *Hughes v Moore, December 6, 2000 Order, p. 36-64.*

This Court finds that the determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to request an evaluation as part of the transfer process prior to be transferred as an adult. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*).

## V. CONCLUSION.

The Court finds that the current allegations were (or could have been) raised in the 1998 proceedings based on Applicant's prior amended Application for Post-Conviction Relief and Judge Paula Thomas thorough Order. The current Application is therefore deemed legally "successive" and barred under S.C. Code §17-27-90. The Applicant has failed to establish that he could not have raised his current allegations in his previous Application for Post-Conviction Relief. Therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, supra.

Based upon its review of the pleadings in this matter, this Court expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. **The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final.**

**AND IT IS SO ORDERED** this 27 day of Sept., 2007.

Diane S. Goodstein

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**
Post Office Box 21787 – Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRCP, the Director of the South Carolina Department of Corrections has designated C Lewis (*Server*) as his duly authorized agent for the purpose of making service on the below named individual.

**STATE OF SOUTH CAROLINA** )
) **AFFIDATIVE OF PERSONAL SERVICE**
**COUNTY OF** Richland )

07-CP-09-00103

On this 9 day of July, 2010, I served the Final Order of Dismissal, on *Inmate* Herman Hughes, *SCDC Inmate #* 206816, by delivering personally and leaving a copy of same at 4460 Broad River *Correctional Institution*, Richland

I am not a party to this action.

s/ C Lewis
*SCDC Server*

**SWORN TO AND SUBSCRIBED BEFORE ME**
this 9th day of July, 2010.
Jacqueline Murrell
*Notary Public for South Carolina*
My commission expires: 3/15/16.

**ACCEPTANCE OF SERVICE**

Service of a copy of the within Legal Pleadings is accepted at the S.C. Department of Corrections (4460 Broad River *Correctional Institution*), Richland County, SC this 9 day of July, 2010.

s/Herman Hughes 206816
*Inmate* SCDC#

SCDC 9-12 (Rev. 5-2010)

STATE OF SOUTH CAROLINA )
)
COUNTY OF CALHOUN ) IN THE COURT OF COMMON PLEAS

HERMAN L. HUGHES, 206816 ) 2007-CP-09-00103
APPLICANT, )
V. ) REPLY TO CONDITIONAL ORDER OF DISMISSAL AS A SUCCESSIVE
STATE OF SOUTH CAROLINA, ) APPLICATION TO HUGH E. MOORE,
RESPONDENT, ) 98-CP-09-101

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, S.C.
2007 NOV 20 P 2:21

I HERMAN HUGHES, PRO SE, NOW MAKES A RETURN TO THE CONDITIONAL ORDER OF DISMISSAL, RECEIVED BY THE APPLICANT ON NOVEMBER 9, 2007 AT BROAD RIVER PRISON. FOR THE FOLLOWING REASONS THIS COURT SHOULD NOT SUMMARILY DISMISS THE APPLICANT'S CASE:

THE ISSUES RAISED BY THE APPLICANT WERE RULED UPON BY A PRIOR JUDGE. BUT EACH ISSUE WAS INADEQUATELY RAISED, FUTHERMORE THE APPLICANT'S RIGHT TO APPEAL THESE ISSUES TO A HIGHER COURT WAS INVOLUNTARILY WAIVED. UPON THE PRIOR PCR JUDGE'S RULING ON THE ISSUES IN THIS CASE, THE APPLICANT'S CASE WAS PLACE ON HOLD, FOR A RULING FROM THE UNITED STATES SUPREME COURT, REGARDING CHILDREN BEING PUT TO DEATH IN THIS COUNTRY. UPON A FAVORABLE RULING, THE APPLICANT WAS REMOVED FROM DEATH ROW AND RESENTENCED. WHAT THE APPLICANT PLACES EMPHASIS ON HERE IS THAT HE NEVER WAIVED HIS RIGHT TO CONTINUE CHALLENGING HIS CONVICTION. THEREFORE THE APPLICANT SHOULD HAVE A REHEARING ON THE ISSUES PRESENTED, AND FOR THIS COURT TO RULE ON WHETHER OR NOT THE APPLICANT SHOULD BE ALLOWED TO PURSUE AN APPEAL FROM THE PRIOR PCR RULING OR FROM A NEW RULING OF THIS COURT. ALL THE APPLICANT SEEKS IS HIS FULL ONE BITE AT THE APPLE.

HERMAN HUGHES, #206816 Herman Hughes
4460 BROAD RV. RD
COLUMBIA SC 29210

CERTIFICATE OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND IN THE COURT OF COMMON PLEAS

2006-CP-09-00103

HERMAN HUGHES, #206816
APPLICANT,

V.
STATE OF SOUTH CAROLINA
RESPONDENT,

2007 NOV 20 P 2:24
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

1. I AM THE APPLICANT IN THE ABOVE MATTER

2. I HAVE THIS DAY DEPOSITED THE "REPLY TO CONDITIONAL ORDER OF DISMISSAL" IN THE MAIL BOX OF SCDC FOR DELIVERY TO THE FOLLOWING:

SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE
P.O BOX 11549
COLUMBIA S.C 29211-1549

HERMAN HUGHES
Herman Hughes
DATED 11-13-07

| | |
|---|---|
| **STATE OF SOUTH CAROLINA )**<br>**)**<br>**COUNTY OF CALHOUN )** | **IN THE COURT OF COMMON PLEAS** |
| **Herman Lee Hughes, Jr., #206816,)**<br>**)**<br>**Applicant, )**<br>**)**<br>**v. )**<br>**)**<br>**STATE OF SOUTH )**<br>**CAROLINA, )**<br>**Respondent. )**<br>**)** | **2007-CP-09-00103**<br><br>**FINAL ORDER OF DISMISSAL AS A SUCCESSIVE APPLICATION TO HUGHES V. MOORE, 98-CP-09-101.** |

KENNETH H. LAST
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC
2008 JAN 10 P 3:35
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 26, 2007. In the application, he raised three specifications for relief:

I. Ineffective Assistance of Counsel:
   1. Trial counsel failed to strike jurors that had personal knowledge of the case I was on trial for.
   2. Trial counsel failed to have witness testimony impeached for perjury.
   3. Trial counsel failed to have petitioner evaluated for psychological evaluation before being tried as an adult.

The Respondent (the State) made its Return and Motion to Dismiss on August 27, 2007, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated September 27, 2007 and filed October 18, 2007, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated November 9, 2007, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In an attached document captioned " Reply to Conditional Order of Dismissal as a Successive Application to Hughes v. Moore, 98-CP-09-101 " received on November 16, 2007, the Applicant argues the issues were ruled upon by the judge in the prior PCR action, but were inadequately raised and that the right to appeal the matters were involuntarily waived. He asserts that the application had been put on hold based upon an intervening case in the United States Supreme Court based upon whether a defendant under 18 years old could be sentenced to death and upon that ruling was removed from death row and re-sentenced on the same conviction. He asserts that he never waived his right to challenge his conviction and should be allowed a rehearing on the issues presented and the PCR court should determine if he should be allowed to pursue an appeal from, the prior PCR ruling or from a new ruling by this court and a full bite at the apple.

This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 7 day of January, 2008.

Honorable Diane S. Goodstein
Presiding Judge
First Judicial Circuit

St George, South Carolina.

# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 11, 2013

Mr. Robert M. Pachak
1330 Lady St., Ste 401
Columbia SC 29201

Re: Hughes, Herman Lee Jr. v. The State
Appellate Case No. 2010-167667

Dear Counsel:

The Court is requesting that you provide a supplemental appendix pursuant to the South Carolina Appellant Court Rules (SCACR). The Supplemental Appendix is to include the following documents:

(1) Initial PCR application dated June 22, 1998 & all subsequent amended applications.
(2) The PCR hearing transcript, October 11-13, 1999, Hughes v. Moore, 98-CP-09-101.
(3) The December 8, 2000 order in Hughes v. Moore, 98-CP-09-101.
(4) Post-PCR motions to alter or amend and motions to stay.
(5) The May 9, 2005 order, which amended the 12/8/2000 order.
(6) The October 10, 2006 sentencing hearing transcript.
(7) Deposition of Jeffrey Bloom.

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Very truly yours,

V. Claire Allen

DEPUTY CLERK

cc: Donald J. Zelenka
Herman Lee Hughes, Jr., 00206816

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

---

MOTION TO FILE
SUPPLEMENTAL APPENDIX

---

Counsel for Herman Lee Hughes, Jr., petitions the Court to allow filing of the supplemental appendix in this case, pursuant to Rule 243(e), SCACR. In support of this petition he shows:

1. On June 11, 2013, counsel was requested by the Court of Appeals provide a supplemental appendix.

2. The supplemental appendix has been prepared and is being filed simultaneously with this petition.

WHEREFORE, the undersigned counsel petitions the Court to allow filing of the supplemental appendix.

_____
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

August 21, 2013

I consent:

_____
Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Supplemental Appendix in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of August, 2013.

_____
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .

# The South Carolina Court of Appeals

Herman Lee Hughes, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-167667

RECEIVED
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SC OFFICE OF
APPELLATE DEFENSE

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ORDER

---

Petitioner's Motion to File Supplemental Appendix is GRANTED. The Supplemental Appendix has been received and is accepted as filed.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

cc: Robert M. Pachak
Donald J. Zelenka

FILED
August 27, 2013

# VOLUME ONE OF FIVE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

---

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

---

SUPPLEMENTAL APPENDIX

---

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MEGAN HARRIGAN
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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Re 4218722198.1

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CALHOUN | ) | No. 98-CP-__-____ |
| **HERMAN LEE HUGHES, JR.,** | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| v. | ) | APPLICATION FOR |
| | ) | POST-CONVICTION RELIEF |
| **MICHAEL MOORE,** Commissioner, Department of Corrections, and **CHARLES M. CONDON,** Attorney General, State of South Carolina | ) | |
| | ) | |
| Respondent. | ) | |

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

2. The sentence was imposed by the Calhoun County Court of General Sessions.

3. Applicant was indicted by indictment numbers 94-GS-09-153 and 94-GS-09-154, 94-GS-09-155, and 94-GS-09-156, and convicted and sentenced for assault and battery with intent to kill, murder, armed robbery, and grand larceny of a vehicle.

4. On September 12, 1995, applicant was sentenced as follows:

(a) Murder - Death by electrocution or lethal injection;

(b) Armed Robbery - 25 years;

(c) Assault and Battery with Intent to Kill - 25 years;

(d) Grand Larceny of a Vehicle - 5 years.

5. A finding of guilty was made after a plea of not guilty.

6. The applicant appealed from the judgment of conviction and sentence.

7. (a) The Courts to which applicant appealed:

(i) The South Carolina Supreme Court.

(ii) The United States Supreme Court.

(b) The result in each Court to which applicant appealed:

(i) Convictions and sentence of death were affirmed.

(ii) Petition for Writ of Certiorari denied.

(c) The date of each result:

(i) Convictions and sentence affirmed on October 27, 1997. Rehearing denied November 20, 1997.

(ii) Petition for Writ of Certiorari denied on April 27, 1998.

(d) Citations of any written opinion or orders entered pursuant to such results:

(i) State v. Hughes, ___ S.C. ___, 493 S.E.2d 821 (1997).

(ii) Hughes v. State, ___ U.S. ___, 118 S. Ct. 1674 (1998).

8. Not applicable.

9 & 10. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9(a) *Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(a) Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt, to effectively cross-examine the state's witnesses, or to contradict the state's theory of the case. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(b) *Applicant was denied the effective assistance of counsel at the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(b) Defense counsel failed to thoroughly investigate and present evidence in mitigation of punishment although such evidence was available. Counsel failed to adequately prepare for the sentencing phase and failed to prepare and present adequate defenses to the aggravating

circumstances presented by the state. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(c) *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances.*

10(c) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis

added). In addition, the trial court's written instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

11 & 12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been previously presented to this or any other Court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was previously represented by counsel.

Applicant was represented at trial by Phillip F. Newsome.

On direct appeal and for the Petition for Writ of Certiorari Applicant was represented by Joseph L. Savitz, III, of the S.C. Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia,

SC 29201.

18. Applicant seeks the vacation of his convictions and sentences.

19. Applicant is not under sentence from any other court.

Respectfully submitted,

TERESA L. NORRIS
PAMELA A. WILKINS
Center for Capital Litigation
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

DOROTHY L. FORT, ESQ.
P.O. Box 250
Mt. Pleasant, SC 29465
(803) 856-4601

ATTORNEYS FOR PETITIONER

June 19, 1998.

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF CALHOUN ) | IN THE COURT OF COMMON PLEAS |
| **HERMAN LEE HUGHES, JR.,** )<br>)<br>Applicant )<br>)<br>v. )<br>)<br>**MICHAEL MOORE,** )<br>Commissioner, S.C. )<br>Department of Corrections, and )<br>**CHARLES M. CONDON,** )<br>Attorney General, State of )<br>South Carolina, )<br>Respondents. ) | **CERTIFICATE OF SERVICE** |

I do hereby certify that I have served upon the attorney for the Respondent an Application for Post-Conviction Relief in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Robert E. Bogan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 19th day of June, 1998, in Columbia, South Carolina.

Pamela A. Wilkins

Pamela A. Wilkins

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF CALHOUN ) | IN THE COURT OF COMMON PLEAS |
| **Herman Lee Hughes, Jr.,**<br><br>Applicant,<br><br>v.<br><br>**Michael Moore**, Commissioner, South Carolina Department of Corrections; and **Charles M. Condon**, Attorney General, State of South Carolina,<br><br>Respondents. | 98-CP-09-101<br><br>RETURN AND MOTION FOR STATUS HEARING PURSUANT TO § 17-27-160 AND MOTION TO MAKE MORE DEFINITE AND CERTAIN PURSUANT TO 12(e) |

The Respondents, above-named, hereby make a Return to the initial Application for Post-Conviction Relief received on June 22, 1998. The Applicant is represented by court-appointed counsel, Teresa L. Norris of the Center for Capital Litigation, P.O. Box 11311, Columbia, South Carolina 29211 [(803) 765-0650] and Dorothy L. Fort, P.O. Box 250, Mt. Pleasant, South Carolina 29465 [(803) 856-4601] pursuant to an Order of this Court filed on May 26, 1998. Pamela A. Wilkins of the Center for Capital Litigation is also appearing on the pleadings.

This matter is assigned, pursuant to a May 8, 1998 Order of the South Carolina Supreme Court to Judge Paula H. Thomas. A status hearing was previously held on May 26, 1998. Pursuant to §17-27-160, Respondents request that a status hearing be scheduled within thirty (30) days of the filing of this Return for purposes of scheduling an evidentiary hearing in this matter. The Respondents would show this Court the following:

I.

**RESPONDENT'S STATEMENT OF THE CASE**

Herman Lee Hughes, Jr., #5018, is currently a safekeeper at the Lieber Correctional Institution pursuant to orders of commitment of the Clerk of Court for Calhoun County. On May 26, 1994, the Grand Jury of the Court of General Sessions for Calhoun County indicted the Petitioner, Herman Lee Hughes, Jr., for murder (involving the March 18, 1994 death of Kenneth Pressley), assault and battery with intent to kill (involving the March 18, 1994 shooting in the chest and face of Kelley Hoffman), armed robbery (involving the March 18, 1994 robbery of the Blue Diamond Casino), and grand larceny of a vehicle (94-GS-09-0154, 0155, 0156). He was represented by retained counsel, Phillip F. Newsome, of the Richland County Bar. The prosecution was handled by First Circuit Solicitor Walter M. Bailey, Jr.

The prosecution had previously filed petitions in the Family Court of Calhoun County on March 21, 1994 and March 24, 1994 requested the actions be transferred to the Court of General Sessions so that Hughes could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered an order waiving jurisdiction to the Court of General Sessions.

On October 31, 1994 the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

The Honorable Edward B. Cottingham was assigned to handle the matter. Pre-trial motions were heard on August 22, 1995. The matter was called for trial on September 5, 1995. At the outset, a competency hearing was held and the court entered a written order on September 7, 1995, finding Hughes competent to stand trial. Jury selection concluded on September 7, 1996.

The guilt phase began on September 7, 1996. The Petitioner was present and represented by retained counsel Newsome. In the opening statement, counsel for the Petitioner conceded that "Mr. Hughes does not deny involvement" in the matter. R. p. 808, ll. 5-7.[1] Counsel for the defense further stated in his opening:

> This young man, you will find the evidence, is involved. His guilt under the law ... you will hear about the felony murder rule. HIS GUILT IS CLEAR. It does not matter who had the gun. It does not matter who pulled the trigger. If you combine to commit a crime and people's lives are taken, you're guilty.

R. p. 809, ll. 10-16. (Emphasis added). Counsel further stated that they had entered a plea of "not guilty" in order to have an opportunity to have a jury decide the case rather than a judge. R. p. 807, l. 15 - p. 808, l. 7; p. 809, ll. 17-19.

**(a) Summary of the Guilt Phase**

During the guilt phase of the trial, evidence was presented that Hughes' fingerprints were found on pieces of paper in the cash drawer of the Blue Diamond Casino. R. p. 116, ll. 2-13. The

---

[1] The "Record on Appeal" before the Supreme Court of South Carolina is designated as "R.".

critical testimony was presented by Kelly Hoffman, a survivor of Hughes' violent assaults on March 18, 1994. She testified that Kenneth Pressley, the decedent, had been her boyfriend for a number of years. On March 18, 1994, she went with him to his job at the Blue Diamond Casino to keep him company. R. pp. 1153-1154. They arrived there at 10 til 8 p.m. in Pressley's grey Mazda RX-7. R. p. 1154. Judy Osborne was still there working when they showed up. Hoffman described seeing a person that she identified as Herman Hughes enter the store alone. R. p. 1158. He asked Pressley how to play the poker machines, and he gave him a demonstration. R. p. 1159. He then told Ken he was going outside to get some money. R. pp. 1159-60. Ten (10) minutes later, Hughes returned when Hoffman was sitting behind the desk on the telephone. R. p. 1160. Hughes then asked Pressley for change for a fifty-dollar bill. R. p. 1162. Ken opened the cash drawer and when Kelly looked up, Hughes had his gun pointed at them and said, "get off the phone." R. p. 1162. Hughes then said, "give me the money" and Ken said, "O.K., no problem," and started setting the money on the desk while the gun was pointed at him. R. p. 1163. Hughes then asked for the car keys and Ken set them on the desk. Next, as Ken was reaching back in the drawer to get more money, Hughes shot Pressley in the head. R. p. 1165. He fell to the floor and Hoffman said, "Oh, my God," and Hughes turned and shot her in the chest. R. p. 1165. Hughes then returned a few steps back to where Ken was and shot him a second time while he was lying on the floor. R. p. 1166. As Kelly was slumped over, Hughes walked back over to her and shot her

again, this time in the face. R. p. 1167. Ms. Hoffman then described that Hughes then went over and shot Pressley again. She thought that Hughes was going to shoot her again, but he stood a few seconds, gathered up his things and cut off the lights and then left. R. pp. 1167-1168. She was clear that Hughes was the only person inside the Blue Diamond. R. p. 1168.

Hoffman testified that Hughes was a total stranger to her. She was positive that Hughes shot her and Pressley. R. pp. 1169, 1175, ll. 13-25. She further declared Hughes shot all five (5) shots. On cross-examination, she acknowledged that she had given a statement at the hospital. Further, she went to school with Kelsey Pearce, but did not know him. R. p. 1181.

The record also revealed that Hughes had gotten the gun he used from Kelsey Pearce's uncle, Henry Owens, after Pearce had gotten the keys to the trunk from Owens where the gun was located. R. pp. 828-830. The state's version had Pearce and Hughes then going to the Blue Diamond Casino together. According to Owens, Pearce stated that he remained outside the store when Hughes first went in, then came out and borrowed some money from Pearce. R. p. 840. Pearce watched as Hughes re-entered the store and pulled out the gun, asked Hoffman to get off the telephone, asked for the car keys, and then heard shots. R. pp. 850-51. They then stole Pressley's Mazda RX-7. See also Statement of Owens, R. pp. 1069-1074.

Evidence revealed that while Hoffman survived the assault, Ken Pressley died on March 18, 1994. R. pp. 882-83. Pressley had

three (3) gunshot wounds to the head which had exited the left side of the head. R. pp. 892-899. The gunshot wounds to the brain were the most probable cause of death. R. pp. 896-97. Two (2) of the wounds were fatal and the injury from the third shot was potentially fatal. R. p. 899.

The evidence revealed that when help came to the store, they could not enter because the door was locked. No money remained in the cash register except for some change, and there should have been between $400-$450. R. pp. 939-40. Testimony was also received that co-defendant Kelsey Pearce was the first suspect because he had been indicted in several auto thefts. R. p. 949. Pearce was also described as being more of a talker and more aggressive than Hughes. R. pp. 950-951. Philip Wright testified that Herman Hughes told him that he was not in trouble and Hughes told Wright that "Kelsey said in the Waffle House that he's the one that did the crime." R. p. 1038, ll. 714.

Hughes did not testify at the trial. The trial judge declared co-defendant Pearce "unavailable to testify." R. p. 1235, ll. 6-8. Hughes was found guilty of all four (4) charges.

**(b) Summary of the Penalty Phase**

On September 11, 1995, the sentencing hearing began. In the penalty phase, the State presented various witnesses on aspects of Mr. Hughes' character. Virginia Hill, an administrative assistant at John Ford Middle School in Calhoun County, testified about Hughes' school records. R. 1322-28. The records revealed that Hughes was suspended on February 2, 1994 for the remainder of the

school year and expulsion was recommended. R.p. 1327. While conceding other students have disciplinary problems, none are any worse than Hughes. R.p. 1328.

Myrtis Sally, the custodian of Special Education, records and put into evidence the psychological testing of Hughes dated January 7, 1986 (second grade) and May 5, 1991. R.p. 1330-31. (Exhibits 45, 46). She testified that in second grade he was placed in one learning disability class only for that year. Testing also revealed that when Hughes was thirteen (13) years old and six (6) months, his "mental age" was nine (9) years old and his Schlossen screening test revealed in 1986 a full scale IQ of 80 as administered by a school psychologist and in 1991 a full scale IQ of 74. R.p. 1336-37.

Kala Byrd testified that in December 1992, she saw Hughes in front of her house with others and heard a gunshot and Hughes was under the shed. She stated that she had seen Hughes in possession of a gun before a couple of times. R. 1341.

Capers Wannamaker testified that he saw Hughes in December 1992 in his sole as Deputy Sheriff. R.p. 1346-47. He removed a pistol from Hughes that day. R. 1347-48. He declared he filed an incident report on the matter and referred it to D.Y.S. R. p. 1348-49.

Anthony Brown of the Calhoun Detention Center testified that he observed Hughes on December 14, 1994 at 1:35 p.m. hitting the door lock with a broom handle. He stated that when he told Hughes to stop Hughes stated "it was going to take more than just me to

put him in his room" and placed Hughes in lock-down for three (3) days. R. 1354. On cross-examination, he described Hughes as quiet and keeps to himself, although he has been attached. R.p. 1355. Further, he denied that Hughes was a dangerous inmate, but was childlike and mischievous. R.p. 1355.

J.D. McCord, a detention officer, testified about the November 27, 1994 jail incident between inmate Duane Beckett and Tyrus Glover who were in a fight. He stated that after Beckett was locked in his cell, Hughes was caught attempting to open the cell with a toothbrush and placed on lock-down for five (5) days. R. 1358-59.

#8

Steven Derrick of SLED testified and presented crime scene photographs from the Blue Diamond Casino. R.p. 1361-67. Exhibit 56 showed an indention on the side of a refrigerator consistent with bullet contact. Exhibit 51 showed a bullet found on the floor consistent to the area of the indention mark on the refrigerator. R.p. 1368. Exhibit 50 showed a shell casing on the floor in the same area. Exhibit 54 showed 2 shell casings. Exhibit 52 shows the area where the first shell casing and bullet was found. Exhibit 55 showed a pool of blood on the desk indicating an open would and presence of a victim with blood also on the calculator on the desk. Exhibit 53 showed the refrigerator base with blood running down. R.p. 1369.

Gary Pressley, the father of victim Kenneth Pressley, testified about his family, his divorce, and the time he spent with his son. R.p. 1374-75. He stated that after his divorce, his ex-

wife retained custody of the children and moved from Michigan to South Carolina. He would speak with his children by telephone a number of times and Kenneth spent a year with him in school in Michigan when he was 13. R. p. 1374-75. He described his son as an average student and that he did normal things with him. R.p. 1375. He stayed with him again when he was 15. He stated they did a lot more things at that time such as ball games and go to work with him. Gary Pressley was an electrician and his son showed an interest in it. R.p. 1376-77. He described his son dropping out of school, then getting a GED and enlisting in the Navy for two (2) years. R.p. 1377-78. Exhibit 49 a photograph of his boot camp graduation was introduced. After he joined the Navy, his father found that his son had matured, becoming very responsible, and outlined his goals in life to go to college. R.p. 1379. He also introduced a letter Kenneth left when he was 15 giving his father some advice and encouragement. R.p. 1380-81. The last time he saw him alive was in December 1992 when he was helping his grandmother. R.p. 1381. He learned that Kenneth had died from his ex-wife and found the news has made him an angry person, and affected the way he looked at things. R.p. 1381-82. The hardest part of the loss is "the way that he died" and that he never had a chance to have a life and do the things he wanted to do. R.p. 1382.

James Pressley, the victim's older brother, testified about his relationship with his brother which became closer as they got older. He stated he was in the process of getting to South Carolina when his brother was killed. He described the loss as

hard to put into words, sending flowers to the grave, the birth of his daughter who cannot know Kenneth, but was named after him. He stated he felt anger and cheated wondering why it happened. R.p. 1385-86.

Lynell williamson, the victim's mother, testified that he had lived in Calhoun County since 1977 after the divorce. Kenneth was her youngest and was 4 years old and lived with her. She described him as "her sweetheart" who was initially picked on by his older sisters who eventually started to look out for and after him is the close family. R.p. 1388. She said in high school, Kenneth would listened to music, work in the yard, ask to do things for her or others. Kenneth dropped out of school because he was bored. R.p. 1389. It was his dream to join the Navy and become a Navy seal. R.p. 1390. He worked to get himself into shape so he could be accepted. R.p. 1390. He signed up for a 2 year stint. She introduced various photographs including 1990 family picture for the church (R.p. 1391), a picture of their last Christmas together, photos of him in the Navy, and a picture with her before he went up to Michigan. R.p. 1394-95. She also introduced letters he wrote to her when they were apart from 1984, 1991, and while he was in the navy. R. p. 1395-1403. Also a letter of appreciation from the Navy was published. R.p. 1403-05. She stated he got out on December 31, 1993 and intended to go to U.S.C. on a military grant. Kenneth moved in with her daughter's fiancé and he worked part-time for her husband in construction and part-time at the Blue Diamond Casino. He was working for school money, car insurance. She

described Kenneth telling her that he sometimes felt fear and thought about a gun which she said that he would probably get hurt. R.p. 1407.

Ms. Williamson said she learned of her son's death after her husband received a call from her son-in-law. She was told there had been an accident and to go to the hospital where she learned they had been shot. R.p. 1409-1410. When she was sent to the counseling room, she learned of his death. She said it will always affect her, that she was in a fog and could not concentrate and would hear his voice. She said that since his death, her marriage is suffering, her children are suffering and she suffers with them. R.p. 1409-10.

#11

**1. <u>The Defense Case In Mitigation</u>**

The defense called Dennis Jones, James McKinney, Kathy Link, Lucille Hughes, Dr. Harold C. Morgan, Dr. John DeWitt, and Annette Boette as witnesses. Sheriff Dennis Jones of Calhoun County testified that on March 18, 1994, he spoke with Hughes. He went with Hughes' mother and picked up Hughes. At a conference in his mother's presence, Hughes confessed and stated that he went with Kelsey Pearce to the Blue Diamond Casino, walked inside and asked for money and shot the woman while Kelsey stood outside and looked. R.p. 1427. He further testified that from information Hughes provided he recovered the weapon and placed him under arrest. He did <u>not</u> get statements from the other co-defendants. R.p. 1426-27.

James McKinney, guidance counselor at Ford Middle School testified that Hughes attempted school there in the 6th grade and

was two (2) years behind and was a quiet, cooperative, well-mannered student. R.p. 1429. He had difficulty in reading and math. Testifying found his IQ to be low. He was cooperative, tried hard in class, and appeared to be a follower and loner. R.p. 1431-33. He was in a remedial and chapter one class at Ford. R.p. 1432. The next year after he was held back in 6th grade, his behavior was more aggressive, hostile and disrespectful toward teachers with poor classroom performance. R.p. 1434. In 1994, he was in the eighth grade when the incident occurred. He also testified on cross-examination that Hughes was expelled after a history of infractions including destruction of school property, cursing, disrespect to teachers, and sexual misconduct. R.p. 1439-40.

M
#12

Kathy Link, a 6th grade teacher at Ford Middle School, found that Hughes had difficulty in subjects and recommended that he be tested with the Schlossen IQ screening test. R.p. 1442-43. He was described as a quiet, not disrespectful student who was a follower. She was not surprised that he was found to be a slow learner. R.p. 1444.

Lucille Hughes, Hughes' grandmother, testified that she adopted him when he was 3 years old. R.p. 1449. She agreed to raise him when he was in the 6th grade, his mother did not want him to go to counseling because he was not crazy, but he was having problems learning. R.p. 1451. She said he was not a bad boy, quiet and easy. Her husband had a stroke when Hughes was 12 and he helped take care of him. R.p. 1453-54. She found Herman to be

sweet. Herman's father would call other and his mother was able to see him. R.p. 1455. She said she got along with Herman's mother and he would stay with her on the weekend. Lucille said she would go to school often about the counseling Herman needed. There were more problems in school when he was kept in the 6th grade. She asked the police to talk to Herman when he was running with the wrong people. R.p. 1458. Herman was never disrespectful or violent to her. He also had no problem with his father.

She described a gun incident where a boy was beating little Charlie, who was 9, and Herman went and got a pistol and shot it. The police investigated the shooting, but Herman was not arrested. R.p. 1460. She described Herman as not lying to her, that she had not had any problem with the six (6) children she raised, but he got in with the wrong crowd. R.p. 1461. On cross-examination, she declared that Hughes had plenty of love and support from the family. R.p. 1462.

Dr. Harold Morgan, a forensic psychiatrist, testified that He evaluated Hughes on August 21, 25 and September 4. He studied medical records, school records, and Ms. Boette's social history report. He learned that Hughes had a normal birth, was raised by his grandparents who adopted him at age 4. He found the reports to reveal that Hughes was "right on the borderline of retardation." R.p. 1472. He found school records to show observations of attention deficit and hyperactivity disorder. R.p. 1473. He had problems paying attention in class, had nuisance behavior, resulting in expulsion. The consistent father figure was his

grandfather until the stroke. R.p. 1474. Herman's behavior took a downward spin the same time the grandfather was placed in a nursing home.

Dr. Morgan found Hughes to not show much feeling and flat. His mental slowness was the main observation, but he also found him to probably have a personality disorder. R.p. 1475-76. He found him to be sensitive and passive, but he drank too much. R.p. 1476. He found mental retardation or borderline mental ability, the learning disability, attention deficit, hyperactivity disorder, the personality disorder, and potential alcohol problem. R.p. 1476-77. Dr. Morgan further described his opinion as to how his mental status impact on the March 18, 1994 events. R.p. 1477-1482.

Dr. John DeWitt, another psychiatrist, testified generally consistent with Dr. Morgan's findings. He found intellectual limitations, possibly attention deficit disorder, and traits of passivity and dependency. R.p. 1511. These traits could lead a person in stressful situations to be influenced by another and alcohol would lower his ability to analyze the situation and become impulsive. R.p. 1513. He found that Hughes has the ability to conform his behavior, but the traits would lead him in some circumstances to act impulsively. R.p. 1515.

Annette Boette, a social worker, testified about her psychosocial assessment of Hughes. R.p. 1525-33. She described her interviews of the Applicant, his mother Miranda, father, grandmother Lucille, and grandfather Charles. She also interviewed Dr. Morgan and Dr. DeWitt, and the penalty phase investigator.

R.p. 1535. She summarized the documents she reviewed. She described his normal birth with both parents involved who then lived with his parents until Herman was four (4) years old. R.p. 1537. The mother was unhappy in the marriage and Herman was adopted by the grandparents in 1981. He had a sister ten (10) months after he was born who died four (4) months after her birth and another brother, Charlie, who was 14 at the time. The real parents remained in an out of his life, although there was disagreement on how the adoption happened; whether the mother was tricked or willing to give up the child. R.p. 1539. In the second grade, Hughes had "severe problems" and developed an individualized lesson plan. He was determined to be in need at that time of placement in learning disabled classroom where he remained the rest of the semester. R.p. 1541. Ms. Boette found deterioration of skills from testing in 1986 to 1991. His middle school scores were found to not improve and suggested a consistent pattern of failure, acceleration of some infractions, and being expelled three (3) times after Christmas. R.p. 1543. In the eighth grade she found a significant number of infractions leading up to being expelled again in February 1994. R.p. 1544.

Ms. Boette's conclusions are:

(I) The first conclusion is that Herman Junior was born into a family with very little formal schooling and very few skills and being able to meet the needs of a child with the limitations that he had.

(II) The second one is that Herman Junior's family, and particularly the two mothers, bickered over the adoption and never allowed him to

resolve the trauma of this kind of open adoption.

(III) Number three, Herman Junior has borderline intellectual ability.

(IV) Number four, there was a failure on the part of the education system to intervene and meet his needs.

(V) Five, the context of the crime shows a rapidly deteriorating situation. He had been expelled from school again. His grandfather, adopted father, had a stroke and required nursing care.

(VI) ..., the sixth one is really a composite of all of these. Because of his many intellectual impairments, Herman Junior was easily influenced by others and fell prey to those who did not have his best interest at heart. Herman Junior was a child who went along with others for approval and a sense of belonging, and he was unable to judge who was safe and who was not.

R.p. 1544-45. Ms. Boette said Miranda Hughes, the birth mother, has unresolved conflict about the adoption and is denial and not seen as a positive move. R.p. 1546-47. She saw the school records revealed Hughes never scored above 84 on IQ testing. She considered the expulsion from school in December 1993 and stroke of his grandmother combined to put him on the streets. R.p. 1548. She also found that he would be more influenced by people who are older and do not have his interest at heart. R.p. 1549.

On reply, Dr. Richard Frierson, the Hall Institute forensic psychiatrist, testified that he evaluated Hughes. He found the physical examination revealed no evidence of physical abnormality. R.p. 1567-68. He did have a blood test that was positive with an exposure to syphilis. R.p. 1568. He opined that his review of

tests scores and examination revealed that Hughes does not suffer from mental retardation. R.p. 1570. He found Hughes had a good capacity concentrate, that he did not suffer from attention deficit disorder, that he had capacity to distinguish right from wrong and had capacity to conform his conduct. R.p. 1573. Dr. Frierson did conclude, however, that he had a "conduct disorder" that is based on his history of prior misconduct. R.p. 1573.

Dr. Lester Finuf, a psychologist with the Department of Disabilities and Special Needs, testified that he examined Hughes and found that he was competent to stand trial, criminally responsible, no evidence of attention deficit disorder, and had normal attention span. R.p. 1586-87.

#17

After the presentation of testimony in aggravation and mitigation, closing arguments were heard from the prosecution, defense, and the Petitioner.

The judge instructed the jury on three (3) statutory aggravating circumstances:

1. The murder of Kenneth Pressley was committed while in the commission of robbery while armed with a deadly weapon;

2. The murder of Kenneth Pressley was committed while in the commission of larceny while armed with a deadly weapon; and

3. The offender, by his act of murder of Kenneth Pressley, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device

which normally would be hazardous to the lives of more than one person.

R. p. 1596, ll. 5-21; p. 1693, l. 25 - p. 1694, l. 10. Then he charged the following mitigating circumstances:

1. Defendant has no significant history of prior criminal conviction involving the use of violence against another person;

2. Murder was committed while defendant was under the influence of mental or emotional disturbances;

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

4. The age or mentality of the defendant at the time of the crime;

5. The defendant was below the age of eighteen at the time of the crime;

6. The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly sub-average general intellectual functioning existing with deficits in adaptive behavior and manifested during the developmental period;

7. The defendant acted under duress or under the domination of another person; and

8. Furthermore, you may consider any other mitigating circumstances which are supported by the evidence in this case.

R. p. 1596, l. 22 - p. 1597, l. 21; p. 1698, l. 15 - p. 1700, l. 12. After deliberations, the jury found the existence of all three (3) submitted statutory aggravating circumstances and sentenced Hughes to death. R. pp. 1710-1711. After the jurors were polled,

Judge Cottingham found as an affirmative fact the death sentence was appropriate. R. p. 1713. After providing Hughes the opportunity to express why the sentence should not be pronounced, Hughes was sentenced to death for murder, twenty-five (25) years consecutive for armed robbery, twenty-five (25) years consecutive for assault and battery with intent to kill, and five (5) years concurrent for grand larceny. R. p. 1714.

**(c) The Appeal before the Supreme Court of South Carolina**

The Petitioner made a timely appeal to the Supreme Court of South Carolina. In the appeal, current counsel before this Court raised the following question presented:

> The judge erred by refusing to require co-defendant Kelsey Pearce, whose involvement in the crimes was the key defense issue at trial, to assert his privilege against self-incrimination before the jury, a procedure mandated by firmly established state law. In particular, this ruling denied appellant the opportunity to present relevant evidence in mitigation of punishment under the Eighth Amendment and S.C. Code § 16-3-20 and to rebut the state's case under the due process clause of the Fourteenth Amendment.

Final Brief of Appellant, p. 3. After briefing of this issue, the Supreme Court of South Carolina entered its order affirming the judgment of the trial court, over dissent, on October 27, 1997. The Supreme Court held that a witness may not be called by either the state or the defense solely for the sake of having the witness invoke his or her Fifth Amendment privilege against self-

incrimination, for the purpose of permitting the jury to infer wrongdoing from the assertion; prospectively modifying State v. Perry, 279 S.C. 539, 309 S.E.2d 9 (1983). 493 S.E.2d at 823-24. The state appellate court then further concluded that any error in the trial court's refusal to do so in this case was harmless beyond a reasonable doubt. 493 S.E.2d at 824-825. A Petition for Rehearing was denied on November 20, 1998.

The Petitioner next made a Petition for Writ of Certiorari to the United States Supreme Court. The Petition was docketed as Hughes v. South Carolina, No. 97-8043 on February 24, 1998. In the Petition, Hughes, through appellate counsel Savitz raised the following issue:

> Does the harmless error standard South Carolina applies to the exclusion of mitigating and rebuttal evidence from capital sentencing comport with Chapman v. California, 386 U.S. 18 (1967)?

The Respondents made a Brief in Opposition on March 26, 1998. On April 27, 1998, the United States Supreme Court entered its Order denying the Petition for Writ of Certiorari. Hughes v. South Carolina, ___ U.S. ___, 118 S.Ct. 1674, 140 L.Ed.2d 798 (U.S. April 27, 1998).

**II.**

**Attachments**

Respondents attach to the Return and incorporate herein by reference the following documents:

1. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997)
2. Final Brief of Appellant
3. Final Brief of Respondent
4. Final Reply Brief of Appellant
5. Record of Appeal (seven (7) volumes).

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III.

In the initial Application, Hughes makes the following allegations through counsel as to why he believes he is being held in custody unlawfully:

I. 9(a) Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution. (Ineffective assistance of counsel - Guilt Phase Investigation and Presentation).

10(a) Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt, to effectively cross-examine the state's witnesses, or to contradict the state's theory of the case. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(b) Applicant was denied the effective assistance of counsel at the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution. (Ineffective assistance of counsel - Sentencing Phase Investigation and Presentation).

10(b) Defense counsel failed to thoroughly investigate and present evidence in mitigation of punishment although such evidence was available. Counsel failed to adequately prepare for the sentencing phase and failed to prepare and present adequate defenses to the aggravating circumstances presented by the state. Counsel's omissions were both

unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(c) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances. (Ineffective assistance of counsel - Penalty Phase - Failure to object to instructions).

10(c) 1) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. 2) The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. 3) Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). 4) In addition, the trial court's written instructions refer only to statutory mitigating circumstances. 5) These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

## IV.

## Ineffective Assistance of Counsel - Guilt Phase Investigation and Presentation

In his first allegation, Hughes asserts that retained trial

counsel Philip Newsome was ineffective in his presentation and investigation to create and present evidence to create a reasonable doubt as to his guilt, inadequately cross-examined witnesses, and failed to contradict the state's theory of the case.

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To prove a constitutional claim of ineffective assistance of counsel, a petitioner must show that his counsel's representation was deficient and that he was actually prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668 (1984). The review of counsel's performance under Strickland is highly deferential and there is a strong presumption that counsel's performance was within the wide range of professionally competent assistance. Id. at 689. Stated another way, there is a presumption that counsel rendered adequate assistance and exercised reasonably professional judgment in making all significant decisions in the case. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The burden of proof is on the applicant in state post-conviction relief cases. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must show that his counsel's performance fell below an objective standard of reasonableness, and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different. Strickland, supra, Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1977). A reasonable probability is a probability sufficient to undermine confidence in

the outcome. Johnson v. State, supra. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Mazzell v. Evatt, 88 F.3d 263, 288 (4th Cir. 1996). As the Fourth Circuit recently stated, a reviewing court must "declare to allow a situation of ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with full-benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

The record before this Court reveals the presumption of effective assistance in counsel Newsome's representation is well-founded. The record reveals that the evidence of Hughes' involvement in the death of Kenneth Pressley and assault on Kelly Hoffman was overwhelming. Hughes' fingerprints were found on paper in the cash drawer and the surviving victim identified Hughes. R.p. 1168-69. Also, counsel had information about Hughes admissions of involvement. R.p. 1427. (statement made to Sheriff Jones). The Applicant has failed to allege, with any specificity, what further investigation, counsel Newsome needed to pursue or what unidentified evidence counsel should have presented. Absent greater specificity, the allegation must be dismissed under SCRCP,

Rule 12(b)(e). To the extent the applications bare conclusions state a claim for relief because it fails to "state concisely and in the same order facts which support each of the grounds." Form 5, Question 9, SCRCP, Rule 71.1. The initial allegation must be dismissed.

Similarly, he asserts a bare conclusion that counsel failed to present evidence to create a reasonable doubt, but presents no facts in his pleading to support this conclusion. Under Rule 12(b)(e), this ground, absent greater factual specificity must be dismissed.

Also, he asserts that counsel should have more effectively cross-examined state witnesses. The record reveals that counsel cross-examined many, but not all guilt phase witnesses. His allegation, however, is so vague and ambiguous that Respondents cannot be expected to frame a responsive pleading when it is wholly unaware and it is not factually clear what the nature of the deficient cross-examination is. Under 12(b)(e), the claim must be dismissed.

In his second ground, he claims counsel was ineffective in the sentencing phase by failing to investigate and present (unidentified) available evidence. As set forth above, counsel presented evidence in mitigation including two (2) psychiatrists, a social worker, school employees, the sheriff, and his grandmother, the primary caregiver. As in the first allegation,

counsel's performance on the record reveals "reasonableness" and clearly supports a presumption of competence. The Applicant has failed to state with particularity errors or omissions in the investigation, preparation or presentation of evidence in mitigation. Under Rule 12(e), this failure and the presentation of a vague and ambiguous claim requires further specificity or dismissal. The Applicant must clearly state what "available" evidence was not presented. The allegation, otherwise must be dismissed.

He also claims counsel failed to present available defenses tot he statutory aggravating circumstance. This vague and ambiguous claim does not state factual specificity and must be rejected under Rule 12(e) unless he plainly sets forth the facts to support the claim. The record reveals the three (3) statutory aggravating circumstances were found to have overwhelming factual support in the record. There is no showing of any defense to these findings. Under Rule 12(e), the matter must be dismissed.

In his final claim, he contends counsel erred by failing to object to certain portions of the penalty phase instructions. For the reasons set forth below, Respondents submit that trial counsel's performance was reasonable and that there was no Sixth Amendment violation proven under Strickland, supra:

> a) Mitigating circumstances could be considered "only if the defendant has proven [the existence of statutory mitigating circumstances] by any evidence." R. 1698.

In his first claim, he challenges counsel's failure to object to the use of the phrase "by any evidence". The charge given in this case mirrors the instruction somewhat considered and not invalidated in Boyde v. California, 494 U.S. 370, 373 (1990). Accord, State v. Charping, 313 S.C. 147, 175, 437 S.E.2d 88, 103 (1993) (concurring and dissenting opinion). Here, the jury was not precluded from considering any relevant evidence in mitigation. His counsel's conduct was within the range demanded in Strickland, supra. The Applicant has failed to allege any specific error to the contrary.

b) "reduce the degree of moral culpability"

In this complaint he asserts counsel erred in failing to object to the instruction that defined statutory mitigating circumstances as "reducing the degree of moral culpability." This instruction was upheld in State v. (William) Bell, 305. S.C. 11, 20, 406 S.E.2d 165, 171 (1991). The court, relying upon Boyde, found from the context of the charge, "there is no reasonable likelihood the charge prevented the jury from considering any mitigating evidence in fairness and mercy." Id. The allegation fails to show counsel's failure to object to a charge upheld by the court was either unreasonable or prejudicial. There was no Sixth Amendment violation.

c) "A nonstatutory mitigating circumstance is one which is not provided for by statute but is one which the defendant claims served the same purpose; that is to reduce the degree of his punishment for the offense." R. 1700.

The Applicant also claims that this instruction diminished the role of nonstatutory mitigation and trial counsel should have objection. The record reveals that the jury was advised "to consider any other mitigating circumstances which are supported by the record" R.p. 1700 and "while there must be some evidence which supports a finding by you that a statutory or nonstatutory mitigating circumstance exist, you need not find its existence of such a mitigating circumstance beyond a reasonable doubt." R.p. 1700. Also, R.p. 1702, ll. 21-22 ("in your deliberations, you will consider any statutory or non-statutory mitigating circumstances that are supported by the record"). Further, in the written instructions, the jury was advised "Furthermore, you may consider any other mitigating circumstances which are supported by the evidence." R.p. 1908. there is no reasonable likelihood that the jury applied the challenged instruction in a way to preclude consideration of relevant mitigating circumstances. State v. Bell, supra, Boyde, supra. There was no ineffective assistance.

**d. Written Instructions**

In the final claim, he contends counsel erred in the failure to object to the written instructions. As set forth above, contrary to his factual assertion, the written instructions did apprise the jury to consider "any other mitigating circumstances supported by the evidence", as well as the seven (7) designated statutory mitigating circumstances. R.p. 1908. Under Boyde and

Bell, he has failed to show a "reasonable likelihood" of misinterpretation. Counsel was never deficient nor prejudicial under Strickland. The claim must fail.

V.

Respondents respectfully having made a Return would respectfully request this Court grant Respondents' motion for a more definite statement in order that Respondents can frame an appropriate responsive pleading as to grounds I and II.

P 429.

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July 21, 1998

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| STATE OF SOUTH CAROLINA<br>COUNTY OF CALHOUN | ) | IN THE COURT OF COMMON PLEAS<br>No. 98-CP-09-101 |
| **HERMAN LEE HUGHES, JR.**,<br>Applicant,<br>v.<br>**MICHAEL MOORE**, Commissioner, Department of Corrections, and **CHARLES M. CONDON**, Attorney General, State of South Carolina<br>Respondents | ) | AMENDED APPLICATION FOR POST-CONVICTION RELIEF |

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[Note: This application follows SCRCP ~~Appendix of Forms, Form 5~~, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber ~~Correctional Institution~~, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

2. The sentence was imposed by the Calhoun County Court of General Sessions.

3. Applicant was indicted by indictment numbers 94-GS-09-153 and 94-GS-09-154, 94-GS-09-155, and 94-GS-09-156, and convicted and sentenced for assault and battery with intent to kill, murder, armed robbery, and grand larceny of a vehicle.

4. On September 12, 1995, applicant was sentenced as follows:

(a) Murder - Death;

(b) Armed Robbery - 25 years;

(c) Assault and Battery with Intent to Kill - 25 years;

(d) Grand Larceny of a Vehicle - 5 years.

5. A finding of guilty was made after a plea of not guilty.

6. The applicant appealed from the judgment of conviction and sentence.

7. (a) The courts to which applicant appealed:

(i) The South Carolina Supreme Court.

(ii) The United States Supreme Court.

(b) The result in each court to which applicant appealed:

(i) Convictions and sentence of death were affirmed.

(ii) Petition for Writ of Certiorari denied.

(c) The date of each result:

(i) Convictions and sentence affirmed on October 27, 1997. Rehearing denied November 20, 1997.

(ii) Petition for Writ of Certiorari denied on April 27, 1998.

(d) Citations of any written opinion or orders entered pursuant to such results:

(i) State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997).

(ii) Hughes v. State, 118 S. Ct. 1674 (1998).

8. Not applicable.

9 & 10. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9(a) *Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(a) Applicant's trial counsel failed to conduct an adequate and independent investigation of applicant's case in order to develop and present evidence to create a reasonable doubt as to applicant's guilt, to effectively cross-examine the state's witnesses, or to contradict the state's theory of the case. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(b) *Applicant was denied the effective assistance of counsel at the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(b) Defense counsel failed to thoroughly investigate and present evidence in mitigation of punishment although such evidence was available. Counsel failed to adequately prepare for the sentencing phase and failed to prepare and present adequate defenses to the aggravating circumstances presented by the state. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(c) *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering*

*mitigating circumstances.*

10(c) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). In addition, the trial court's written instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

*9(d) Applicant was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina*

*law by appellate counsel's failure to appeal the trial court's ruling that the South Carolina Constitution permits the imposition of the death penalty upon a defendant who was a juvenile at the time of the alleged crime.*

10(d) Trial counsel moved to bar the State from seeking the death penalty against applicant, arguing that imposition of the death penalty for a crime committed while the defendant was a juvenile violates both the United States Constitution and the South Carolina Constitution. After hearing oral argument, the trial court concluded that "the appropriate case law, including that of South Carolina, does not suggest that one . . . who was sixteen at the time of the alleged commission of the crime cannot suffer supreme penalty if a jury of 12 find it is warranted." (emphasis added). Appellate counsel failed to appeal the trial court's finding on the state constitutional issue, despite the lack of any controlling South Carolina Supreme Court decision concerning the issue. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

*9(e) Alternatively, in the event the court finds that the issue concerning the South Carolina Constitution in Ground 9(d) was not preserved for appeal, applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and relevant South*

*Carolina law by trial counsel's failure to obtain a ruling regarding whether the imposition of the death penalty upon a person who was a juvenile at the time of the crime violates the South Carolina Constitution.*

10(e) Although trial counsel's written Motion to Bar Imposition of the Death Penalty against applicant relied, in part, on state constitutional grounds, applicant failed to argue the state constitutional issue at the hearing on the motion. Furthermore, by failing to obtain a ruling from the trial court, he did not preserve the issue for appellate review. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

*9(f) Applicant was denied his statutory right to the appointment of two attorneys to represent him at his capital trial.*

10(f) Despite applicant's indigence, the trial court failed to appoint a second lawyer to assist in his representation, as required by S.C. Code Ann. § 16-3-26 and Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

*9(g) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina law by trial counsel's failure to move for the appointment of a second attorney and by*

*the court's failure to appoint a second attorney.*

10(g) Because of his indigence, applicant was entitled under S.C. Code Ann. § 16-3-26 to the appointment of a second attorney. Nevertheless, upon information and belief, applicant's trial counsel failed to move for the appointment of a second attorney, and the court did not appoint a second attorney. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984); see also Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

*9(h) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to object to the trial court's instruction on accomplice liability.*

10(h) The trial court instructed the jury that "[w]hen several people pursue a common design to commit an unlawful act and each takes a part agreed upon or assigned to him in an effort to ensure the success of the common understanding, the act of one is the act of all, and all are presumed to be present and guilty." ROA at 1255. This charge failed to include all the elements of accomplice liability, see, e.g., Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973), and also suggested to the jury that it must presume guilt even absent proof beyond a reasonable doubt of all the elements of the crime. Cf. In re Winship, 397

U.S. 358 (1970) (prosecution must prove all essential elements of crime); Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidating instruction that arguably shifted burden of proof away from prosecution). Trial counsel failed to object to this charge. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

*9(i) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to request a specific jury instruction regarding accomplice credibility.*

10(i) Accomplice Daniel Owens testified at the guilt phase of applicant's trial, stating, *inter alia*, that applicant had admitted shooting both victims. Mr. Owens was a relative of another alleged accomplice, Kelsey Pearce, and also had been offered a deal by the State in exchange for his testimony against applicant. Despite these facts, trial counsel failed to request a specific cautionary instruction concerning the assessment of accomplice credibility. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

11 & 12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for

post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been previously presented to this or any other court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was represented at trial by Phillip F. Newsome. On direct appeal and for the Petition for Writ of Certiorari Applicant was represented by Joseph L. Savitz, III, of the S.C. Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, SC 29201.

18. Applicant seeks the vacation of his convictions and sentences.

19. Applicant is not under sentence from any other court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

September 15, 1998.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CALHOUN | ) | |
| **HERMAN LEE HUGHES, JR.,** | ) | |
| | ) | |
| Applicant | ) | |
| | ) | **CERTIFICATE OF SERVICE** |
| | ) | |
| v. | ) | |
| | ) | |
| **MICHAEL MOORE,** | ) | |
| Commissioner, S.C. | ) | |
| Department of Corrections, and | ) | |
| **CHARLES M. CONDON,** | ) | |
| Attorney General, State of | ) | |
| South Carolina, | ) | |
| Respondents. | ) | |
| | ) | |

I do hereby certify that I have served upon the attorney for the Respondent an Amended Application for Post-Conviction Relief in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 15th day of September, 1998, in Columbia, South Carolina.

Pamela A. Wilkins

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CALHOUN<br><br>**HERMAN LEE HUGHES, JR.,**<br><br>Applicant,<br><br>v.<br><br>**MICHAEL MOORE**, Commissioner, Department of Corrections, and **CHARLES M. CONDON**, Attorney General, State of South Carolina,<br><br>Respondents. | IN THE COURT OF COMMON PLEAS<br>No. 98-CP-09-101<br><br>SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF |

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

2. The sentence was imposed by the Calhoun County Court of General Sessions.

3. Applicant was indicted by indictment numbers 94-GS-09-153 and 94-GS-09-154, 94-GS-09-155, and 94-GS-09-156, and convicted and sentenced for assault and battery with intent to kill, murder, armed robbery, and grand larceny of a vehicle.

4. On September 12, 1995, applicant was sentenced as follows:

(a) Murder - Death;

(b) Armed Robbery - 25 years;

(c) Assault and Battery with Intent to Kill - 25 years;

ATTORNEY GENERAL'S OFFICE
RECEIVED 9-21-99
ADMINISTRATIVE INSTRUCTIONS
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(d) Grand Larceny of a Vehicle - 5 years.

5. A finding of guilty was made after a plea of not guilty.

6. The applicant appealed from the judgment of conviction and sentence.

7. (a) The courts to which applicant appealed:

(i) The South Carolina Supreme Court.

(ii) The United States Supreme Court.

(b) The result in each court to which applicant appealed:

(i) Convictions and sentence of death were affirmed.

(ii) Petition for Writ of Certiorari denied.

(c) The date of each result:

(i) Convictions and sentence affirmed on October 27, 1997. Rehearing denied November 20, 1997.

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(d) Citations of any written opinion or orders entered pursuant to such results:

(i) State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997).

(ii) Hughes v. State, 118 S. Ct. 1674 (1998).

8. Not applicable.

9 & 10. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9(a) *Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.*

10(a) Although South Carolina law in 1994 required a "full investigation" prior to a

decision to transfer a juvenile from family court to General Sessions Court, the State arbitrarily failed to comply with this statutory obligation. Hicks v. Oklahoma, Additionally, the hearing itself did not satisfy minimum standards of due process as delineated in Kent v. United States, 381 U.S. 902 (1965). The defects in the waiver hearing include, but are not limited to, the following:

(1) The family court lacked information concerning Applicant's mental retardation/borderline intellectual functioning and other cognitive limitations.

(2) The family court heard no evidence about Applicant's potential for rehabilitation within the juvenile system, yet concluded (without any evidentiary basis) that the Applicant could not be rehabilitated within the juvenile justice system.

(3) The family court heard incomplete and inaccurate information concerning the facts of the offenses and the Applicant's degree of culpability.

(4) The family court based its decision to transfer the Applicant to General Sessions Court based on impermissible considerations, such as the desire to "send a message" to other juveniles.

9(b) *Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

10(b) Applicant's counsel at the family court waiver hearing failed to provide adequate representation. Counsel's deficiencies include, but are not limited to, the following:

(1) Counsel failed to secure necessary records and testimony to demonstrate

Applicant's mental retardation or borderline intellectual functioning and to show Applicant's potential for rehabilitation within the juvenile justice system. See, e.g., State v. Bryant, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988)(finding counsel at waiver hearing ineffective for failing to introduce evidence regarding potential for rehabilitation), rev'd in part on other grounds, 569 A.2d 770 (N.J. 1989).

(2) Counsel's failure to adequately prepare and secure records prevented counsel from effectively cross examining the State's witnesses, who testified (wrongly) that Applicant had never been in special education.

(3) Counsel failed to present evidence that Kelsey Pearce, not Herman Hughes, planned and was the primary perpetrator of the crimes.

(4) Counsel failed to make a timely motion for an evaluation by the Department of Juvenile Justice.

(5) Counsel also failed to object to the family court's improper reasons for transferring Applicant to General Sessions Court, which included the desire to "send a message" to other young people and the belief that DJJ "provides no rehabilitation."

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(c) *Applicant was denied the effective assistance of counsel at the hearing to determine his competency to stand trial, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

10(c) Despite evidence that Applicant was both mentally retarded and developmentally

immature, trial counsel conceded, without presenting any argument or testimony, that Applicant was competent to stand trial. State v. Johnson, 395 N.W.2d 176 (Wis. 1986) (affirming 374 N.W.2d 637 (Wis. Ct. App. 1985)) (finding counsel ineffective for failing to raise viable issue concerning defendant's competence to stand trial). Counsel's concession was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(d) *Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

10(d) Trial counsel failed to conduct an adequate *voir dire*. Counsel's deficient performance includes, but is not limited to, the following:

(1) Counsel failed to challenge for cause a number of jurors who were acquainted with the families of the victims and who had actually spoken with them about the crimes and about their loss. See Morgan v. Illinois, 504 U.S. 719 (1992)(defendant has right to impartial jury).

(2) Counsel failed to rehabilitate a number of jurors who expressed reservations about the death penalty, see Witherspoon v. Illinois, 391 U.S. 510 (1968)(jurors with reservations about death penalty may not be excluded for cause if they are able to fulfill their oath as jurors), and failed to challenge for cause jurors who indicated that they were unable to consider mitigating circumstances or would automatically vote for death upon a finding of guilt. See Morgan v. Illinois, 504 U.S. 719 (1992)(jurors who would automatically vote for death are excludable for cause).

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(e) *Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.*

10(e) Applicant's trial counsel failed to conduct an adequate and independent investigation of Applicant's case in order to develop and present testimony to create a reasonable doubt as to Applicant's guilt, to effectively cross-examine the State's witnesses, or to contradict the State's theory of the case. Counsel's deficient performance includes, but is not limited to:

(1) Counsel failed to adequately prepare and present evidence impeaching the credibility of Henry Daniel Owens Jr. Steinkuehler v. Meschner, ___ F.3d ___, 1999 WL 274826 (8th Cir. May 6, 1999); Williams v. Washington, 59 F.3d 673 (7th Cir. 1995).

(2) Counsel failed to adequately prepare and present evidence regarding Kelsey Pearce's planning of, and involvement in, the offenses. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(f) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(f) Applicant's trial counsel failed to adequately develop and present expert and lay

testimony in mitigation and in rebuttal to the aggravation evidence presented by the state. In addition, counsel failed to object to the State's introduction of inadmissible evidence, failed to object to prejudicial portions of the State's closing argument and to certain aggravating circumstances submitted by the State, and failed to ensure that the jury was properly charged. Counsel's deficient performance includes, but is not limited to:

(1) Counsel failed to adequately prepare and present evidence to the retained defense experts in order to ensure a competent, complete, and thorough evaluation, an accurate diagnosis, and adequate preparation for their testimony. See, e.g., Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 1856 (1998).

(2) Counsel failed to secure necessary expert testimony supporting applicant's developmental, mental, and social impairments. Adbur' Rahman v. Bell, 999 F. Supp. 1073 (M.D. Tenn. 1998)(finding counsel ineffective for failing to seek needed expert assistance).

(3) Counsel failed to present evidence that Applicant's school failure stemmed, in large part, from the school system's failure to provide appropriate special education and remediation.

(4) Counsel failed to adequately cross-examine the State's witnesses or to object to the admission of Applicant's school disciplinary records.

(5) Counsel failed to object to, or move to limit, the excessive and otherwise inadmissible victim impact evidence presented by the State.

(6) Counsel failed to object to the solicitor's prejudicial and inflammatory closing argument during the sentencing phase of trial. Christy v. Horn, 28 F. Supp. 2d 307 (W.D.

Pa. 1998)(finding counsel ineffective for, *inter alia*, failing to object to solicitor's improper arguments during sentencing).

9(g) *Applicant was denied the effective assistance of counsel under South Carolina law and the Sixth and Fourteenth Amendments by trial counsel's failure to argue that international treaties and customary international norms binding upon the United States forbid the execution of juvenile offenders.*

10(g) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders. Despite this binding international law, which applies to the States through the Supremacy Clause of the United States Constitution, trial counsel failed to raise the illegality of the death penalty for Applicant. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(h) *Applicant's death sentence violates international treaties and customary international norms binding upon the United States.*

10(h) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders.

9(i) *Applicant was denied the effective assistance of appellate counsel in violation of*

*South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(i) Appellate counsel failed to raise on appeal any proportionality argument concerning the propriety of a death sentence for a sixteen year-old defendant with mental retardation or borderline retardation. Appellate counsel's failure was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(j) *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances.*

10(j) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). In addition, the trial court's written instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293

S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

9(k) *Applicant was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the trial court's ruling that the South Carolina Constitution permits the imposition of the death penalty upon a defendant who was a juvenile at the time of the alleged crime.*

10(k) Trial counsel moved to bar the State from seeking the death penalty against applicant, arguing that imposition of the death penalty for a crime committed while the defendant was a juvenile violates both the United States Constitution and the South Carolina Constitution. After hearing oral argument, the trial court concluded that "the appropriate case law, including that of South Carolina, does not suggest that one . . . who was sixteen at the time of the alleged commission of the crime cannot suffer supreme penalty if a jury of 12 find it is warranted." (emphasis added). Appellate counsel failed to appeal the trial court's finding on the state constitutional issue, despite the lack of any controlling South Carolina Supreme Court decision concerning the issue. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(l) *Alternatively, in the event the court finds that the issue concerning the South Carolina Constitution in Ground 9(k) was not preserved for appeal, applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and relevant South Carolina law by trial counsel's failure to obtain a ruling regarding whether the imposition of the death penalty upon a person who was a juvenile at the time of the crime violates the South Carolina Constitution.*

10(l) Although trial counsel's written Motion to Bar Imposition of the Death Penalty against Applicant relied, in part, on state constitutional grounds, applicant failed to argue the state constitutional issue at the hearing on the motion. Furthermore, by failing to obtain a ruling from the trial court, he did not preserve the issue for appellate review. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

*9(m)* *Applicant was denied his statutory right to the appointment of two attorneys to represent him at his capital trial.*

10(m) Despite applicant's indigence, the trial court failed to appoint a second lawyer to assist in his representation, as required by S.C. Code Ann. § 16-3-26 and Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

*9(n)* *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina law by trial counsel's failure to move for the appointment of a second attorney and by the court's failure to appoint a second attorney.*

10(n) Because of his indigence, applicant was entitled under S.C. Code Ann. § 16-3-26 to the appointment of a second attorney. Nevertheless, upon information and belief, applicant's trial counsel failed to move for the appointment of a second attorney, and the court did not appoint a second attorney. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984); see also Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

*9(o)* *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by*

*trial counsel's failure to object to the trial court's instruction on accomplice liability.*

10(o) The trial court instructed the jury that "[w]hen several people pursue a common design to commit an unlawful act and each takes a part agreed upon or assigned to him in an effort to ensure the success of the common understanding, the act of one is the act of all, and all are presumed to be present and guilty." ROA at 1255. This charge failed to include all the elements of accomplice liability, see, e.g., Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973), and also suggested to the jury that it must presume guilt even absent proof beyond a reasonable doubt of all the elements of the crime. Cf. In re Winship, 397 U.S. 358 (1970) (prosecution must prove all essential elements of crime); Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidating instruction that arguably shifted burden of proof away from prosecution). Trial counsel failed to object to this charge. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

*9(p) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to request a specific jury instruction regarding accomplice credibility.*

10(p) Accomplice Daniel Owens testified at the guilt phase of applicant's trial, stating, *inter alia*, that applicant had admitted shooting both victims. Mr. Owens was a relative of another alleged accomplice, Kelsey Pearce, and also had been offered a deal by the State in exchange for his testimony against applicant. Despite these facts, trial counsel failed to request a specific cautionary instruction concerning the assessment of accomplice credibility. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

11 & 12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the

United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been previously presented to this or any other court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was represented at trial by Phillip F. Newsome. On direct appeal and for the Petition for Writ of Certiorari Applicant was represented by Joseph L. Savitz, III, of the S.C. Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, SC 29201.

18. Applicant seeks the vacation of his convictions and sentences.

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Respectfully submitted,

Pamela A. Wilkins

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ATTORNEYS FOR PETITIONER

September 20, 1999.

| | | |
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| COUNTY OF CALHOUN | ) | |
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| | ) | |
| Applicant | ) | |
| | ) | **CERTIFICATE OF SERVICE** |
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| v. | ) | |
| | ) | |
| **MICHAEL MOORE,** | ) | |
| Commissioner, S.C. | ) | |
| Department of Corrections, and | ) | |
| **CHARLES M. CONDON,** | ) | |
| Attorney General, State of | ) | |
| South Carolina, | ) | |
| Respondents. | ) | |

I do hereby certify that I have served upon the attorney for the Respondent a Second Amended Application for Post-Conviction Relief in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 20th day of September, 1999, in Columbia, South Carolina.

Pamela A. Wilkins

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

IN THE COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR.,

Applicant(s),

vs.

CASE NO.: 98-CP-09-101

MICHAEL MOORE, Commissioner, South Carolina Department of Corrections; and CHARLES M. CONDON, Attorney General, State of South Carolina,

Respondent(s).

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D E P O S I T I O N

WITNESS: JEFFREY BLOOM

DATE: Thursday, September 30, 1999

TIME: 4:02 p.m.

LOCATION: Center for Capital Litigation
1247 Sumter Street
Columbia, SC

TAKEN BY: Attorneys for the Applicant(s)

REPORTED BY: LISA D. JETER
Court Reporter

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(INDEX AT REAR OF TRANSCRIPT)

# Lawyer's Notes

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STIPULATION: It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, and that the deponent waives the right to read and sign the deposition transcript.

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JEFFREY BLOOM, being first duly sworn, testified as follows:

EXAMINATION

BY MR. BLUME:

Q. Will you state your name for the record?

A. Jeffrey Bloom, B-l-o-o-m.

Q. Are you an attorney, Mr. Bloom?

A. I'm an attorney licensed in both North Carolina and South Carolina. I was licensed in North Carolina in 1983, and South Carolina in 1985. I'm currently in private practice, with my place of business here in Columbia, South Carolina.

Q. Just to clarify for the record, you and I are not related in any way?

A. That's absolutely correct.

Q. Were you ever the public defender in

Horry County?

A. I was in the public defender's office in Horry County from 1985 through 1992. I was the chief public defender there roughly from about 1988 or '89 until '92.

In 1992, I became the chief public defender in Richland County and served in that capacity until April of 1999.

Q. And you're now in private practice?

A. That's correct. And I handle primarily criminal cases, with an emphasis in capital litigation.

Q. Have you ever been retained to serve as a jury consultant?

A. Yes, I have, in South Carolina in several cases.

Q. And as a jury consultant in capital cases?

A. Yes, jury consultant in strictly capital litigation.

Q. I'll come back and ask you a little bit more about that.

In your capacity as the public defender in Horry County and Richland County, have you ever been counsel of record in a case

in which the state is seeking the death penalty?

A. Yes. I've handled approximately more than 40 capital cases during my time, both in Horry County, as well as Richland County, with the public defender offices there, and approximately 15 or so have been trials. I've not kept an exact count. Those are round figures, if I may, and those have been at the trial level.

Q. Over the years, have you attended any conferences on capital litigation?

A. I've attended almost annually a conference focused strictly on death penalty litigation that is sponsored by the NAACP Legal Defense Fund. I've also attended instate conferences when they've been available here in South Carolina on capital litigation, and I've also been on the faculty at such conferences, both instate and out-of-state.

In fact, this past year I was on the faculty at a national conference on death penalty litigation, specifically in the area of jury consulting and jury research in capital jury trials.

Q. In your capacity as public defender in Richland County, did you ever have the occasion to speak with a Mr. Phillip Newsom about the Herman Hughes case?

A. Yes, I did.

Q. Can you please relate the circumstances of that meeting?

A. It was a very casual conversation. I have to acknowledge I didn't take notes. In fact, it occurred in the hallway of the Richland County Courthouse where family court is, what we call the family court corridor or wing of the courthouse.

It was a casual conversation. He let me know he had just been retained or was about to be retained in a capital case. He wanted to know if I had any form motions that would help. I told him we didn't really use form motions in such cases. We had designed them to be case-specific.

Then secondly, I also advised him, since he had mentioned he had been retained, that he probably ought to ask the court to assign a second attorney to the case, even though he had been retained.

I know Phil Newsom. He's both a personal and professional friend of mine, and a colleague. I see him at the Richland County Courthouse quite a bit or did when I was the public defender there for seven years. I had personal and professional knowledge that he had never, at least in the Richland County courthouse, handled a capital trial. I also knew that he didn't handle many major felony trials in my seven years there at the courthouse.

So I knew this would be a different experience for him. So I really encouraged him at the time to ask the court to appoint a second attorney.

He asked me if he could come by sometime and just talk about his case and get some ideas from me, and I told him, sure, I'd be glad to do that.

Q. Did he ever come talk to you?

A. I've been thinking about that. He did actually come by just one afternoon. I think we spent 15, 30 minutes, maybe, time. Again, I didn't take notes of it because it wasn't a formal file I had at the PD office.

The only thing I really remember from that brief meeting is I again urged him he really needed to get a second attorney appointed to the case who had had some capital trial experience, that that was just very, very important.

Q. Well, in your opinion, is any lawyer competent to handle a capital case by himself?

MR. ZELENKA: I object.

BY MR. BLUME:

Q. You can answer the question.

MR. BLUME: Your objection is noted for the record.

THE WITNESS: That's a pretty broad question. So let me give a broad answer. Then if I need to define it further, feel free to ask me. Given the complexity of capital litigation today, I would not recommend any attorney, including myself -- and I've handled a number of capital trials -- to handle a death penalty trial by themselves. There's usually just too many issues going on in a case that should be handled, but I hesitate to say any attorney should never do that.

BY MR. BLUME:

Q. Let me ask you this: Assume that the lawyer has never been to trial in a capital case, has never been involved in a capital case which has gone to trial.

A. In Mr. Newsom's case, certainly. No lawyer who has never -- who has not handled a capital trial before should handle a capital trial by themselves.

Again, Phil was a friend of mine, but I also was aware that he had not been to any of the instate CLE's we had had during this time frame that focused on capital litigation, because I had been at those. He had not been, to my knowledge, to any national CLE on capital trial litigation.

So someone in that situation, who did not even have the background or the experience, I would think it would almost be mandatory that they would have to have someone helping them who had experience in that area.

Q. Mr. Bloom, I want to go back and ask you a few questions. You said that you now currently are in private practice and work as a jury consultant?

A. That's correct.

Q. What does a jury consultant in capital litigation do?

A. Very briefly, a jury consultant in capital litigation, which is specifically, I should add, provided for in the Bailey case in our state, can assist the trial attorneys in several ways. One, in terms of helping them understand how to construct their case, particularly the mitigation case and the appropriate themes for the case for presentation in a trial.

A second thing a jury consultant can do is actually help the lawyers at trial in terms of voir dire, framing appropriate voir dire questions, framing appropriate legal motions and objections during voir dire, not to build profiles of jurors. I want to be very emphatic. I do not help lawyers at any time build profiles of jurors. I think any jury consultant who does is probably trying to sell you Doc Holiday's spider medicine.

What I do try to do, and I think what other good jury consultants can do, is help those lawyers frame proper voir dire

questions, proper voir dire motions and objections to elicit the jurors' own responses and build proper information to make intelligent choices about who you want to select on the jury and who you don't.

Q. In how many of the capital cases that you mentioned -- do you have any idea approximately how many jurors you have conducted voir dire yourself as counsel in capital cases?

A. Oh, my goodness. As I've said, I've done about 15 capital trials, somewhere around that number.

Q. That's 15 which have actually gone to trial?

A. Yes, gone through jury selection. Some of them ended prior to sentencing.

Q. But 15 times is what you have actually engaged in the process of individual voir dire in a capital case?

A. Right. So I would say I've voir dired literally hundreds. It may be close to a thousand. That's hard for me to estimate with any accuracy, but certainly hundreds of jurors I have voir dired.

Q. Have you reviewed literature about jurors in capital cases and methods of jury selection in capital cases?

A. Yes, I have. I've tried to keep up to date on current research regarding jurors in capital litigation.

Q. Have you reviewed the decisions of the United States Supreme Court and the South Carolina Supreme Court on jury selection of capital cases?

A. Yes, of course. I'm familiar with Witherspoon and Witt, as well as numerous other decisions, both in the U.S. Supreme Court and South Carolina Supreme Court. I haven't memorized them all, but, yes, I'm familiar with them.

MR. BLUME: Well, for purposes of the record -- we don't have a judge here -- I would offer Mr. Bloom as an expert in capital jury selection.

MR. ZELENKA: I would object. Can I voir dire him a little bit?

MR. BLUME: Yes.

VOIR DIRE

BY MR. ZELENKA:

Q. Mr. Bloom, did you represent James Whipple?

A. Yes, I did.

Q. Has a judge recently found that you were ineffective in the Whipple case in your representation in that case?

A. Yes, he has. That would be the Honorable Victor Rawl.

Q. That issue is now on appeal, though, however; isn't that not also correct?

A. That's my understanding.

Q. The state is claiming, in fact, that you were competent in the handling of that case; is that correct?

A. That's correct.

Q. In the Whipple case, though, did you assert and concede that you were ineffective in your handling of that case?

A. Yes, I did. If I may explain, or at some point if I may explain.

Q. Did you have a jury consultant in the Whipple case?

A. No.

Q. Did you have a jury consultant in any of the other 15 cases that you handled?

A. I began using jury consultants in capital -- in my first capital jury trial in Richland County, full trial, which was State versus Lavar Bryant, and that was tried in approximately spring of 1996, I believe. I want to say '96 or '97, but I'm fairly certain it was 1996.

Q. So how many of those 15 cases have you had the assistance of a jury consultant?

A. The last three cases I've tried, State versus Lavar Bryant, State versus Felix Cheesboro, State versus Max Knoten. Those were all post-Bailey cases.

MR. ZELENKA: Well, we would object to his qualifications as an expert in jury consulting by his own actions. He has taken the position that he needs to hire an additional expert to assist him as a jury consultant in those cases, and we would oppose that he possesses the expertise in that area to qualify under the Rules of Evidence 703, 704.

MR. BLUME: Just --

MR. ZELENKA: But I understand.

CONT. EXAMINATION

BY MR. BLUME:

Q. Let me ask you to clarify. You felt like you had something you wanted to say about the Whipple case?

A. The Whipple case -- if I can characterize my testimony and, of course, my testimony is in the record in that case and will speak for itself, but as I recall --

Q. First, did the ineffectiveness found by the trial court, to your knowledge, have anything to do with the manner in which you handle jury selection?

A. No. My testimony in that case is to -- my own ineffectiveness was based primarily on a pretrial motion I had made in that case, where I informed the court months in advance of trial that I would be ineffective primarily because the court would not appoint another experienced attorney to assist me at that period of time.

I won't go through all the details. It's in my testimony in that case as to why I felt I needed another experienced attorney. But what the court had done was appoint an attorney in that case who had never tried a capital case, never tried a murder case

involving any type of scientific evidence, and who had a number of other deficiencies in his professional experience, which were needed -- which affected that case.

The primary attorney who had been assisting me had been relieved because of a conflict of interest. So when the court appointed a less experienced attorney, I made a pretrial motion in Whipple where I asserted we would be ineffective if we were forced to go forward in the time frame we had.

So I tried to alert the court prior to the trial in Whipple of the ineffectiveness issues, and that was the essence I recall of my own ineffectiveness, the PCR issue in the Whipple case.

MR. BLUME: Anything else on qualifications?

MR. ZELENKA: No.

BY MR. BLUME:

Q. At my request, did you review the voir dire in this case?

A. Yes, I did.

Q. And by, In this case, I mean the voir dire that was conducted in the case of

Herman Hughes.

A. Yes, I did.

Q. The voir dire, in fact, that was conducted by Mr. Newsom at the trial of the case in the State versus Herman Hughes in Calhoun County?

A. That's correct. Yes, I did.

Q. I want to ask you, based upon your experience in capital jury selection and your review of this record, have you reached any opinions in this case?

A. Yes, I have.

Q. I'd like to start and ask you -- I guess I'd like to ask you some questions about the individual voir dire that was conducted. And just for the purposes of the record, and so opposing counsel will know where I'm going, the only thing I'm asking you about is voir dire in this case. That's the only thing I asked you to you review.

A. That's correct.

Q. First, in your opinion, was the mode of questioning used by counsel sufficient to identify jurors who were properly qualified under the law?

MR. ZELENKA: I object. It goes to speculation. Second, the objection would also be, this testimony goes to an area that a witness need not be qualified or need not provide information to the trier of fact. The trial judge will have the same information in front of him, based upon the questions that are asked in the voir dire itself.

BY MR. BLUME:

Q. His objection is for the record; but for your purposes, I want to go back and ask a question, because my question was a little general.

My question was: In your opinion, were the questions asked by counsel and the voir dire as a whole sufficient to identify jurors who were qualified or not qualified?

First can you say it's your understanding of the Supreme Court -- what is your understanding of the laws defined by the United States Supreme Court on who is permitted to sit in a capital case?

A. Well, generally it has to be a juror who we say is, in essence, death qualified. That means they can vote for death under

appropriate circumstances, but they can also vote for life under the appropriate circumstances. I can go on if you need me to, or if that answers your question.

Q. This was a process called death qualification?

A. Correct. That's why I used the term death qualified.

Q. And the standard for that is set forth by the United States Supreme Court?

A. Yes, in Witherspoon and Witt cases.

Q. That's Witherspoon versus Illinois and --

A. Correct. I'm using the shorthand, if I'm permitted.

Q. So your testimony is that the juror has to be able to consider both a life sentence and a death sentence?

A. Right. The juror has to be able to first, of course, be qualified to consider all the evidence in the first phase of the trial and then follow the law and render an appropriate verdict, guilty, not guilty, or something lesser than guilt.

Secondly, the juror has to be

properly qualified to consider the state's evidence in aggravation, to be able to consider a death verdict if the state proves beyond a reasonable doubt its evidence in aggravation, and to be able to render a death sentence if all of that is proven beyond a reasonable doubt and the juror feels that's the appropriate sentence.

The juror also has to, in South Carolina, be able to sign the death sentence verdict form.

Likewise, the juror also has to be able to consider and give meaningful consideration to all appropriate mitigating circumstances, both statutory and nonstatutory mitigating circumstances.

While those don't have to be considered unanimously by the jurors, the jurors at least have to give meaningful consideration to both statutory and nonstatutory mitigators and, if appropriate, render a life sentence after being instructed on the law, of course, and hearing all the evidence.

Q. I had asked you before whether, in

your opinion, the questions which were -- the mode of questioning used by counsel was, in your opinion, sufficient to identify whether jurors were properly qualified under the standards you mentioned.

A. Right.

Q. Can you provide a more detailed response than that?

A. Sure.

MR. ZELENKA: Objection. Same objection.

THE WITNESS: Sure. Of course I've enunciated the standards that are at play in jury selection, but it takes some skill and experience and actually practice to ask jurors those kinds of appropriate questions.

For example, it really doesn't help to explain to a juror and ask a question such as, Ma'am, after listening to all of the evidence and being instructed by the judge on the law, can you consider all of the appropriate mitigating circumstances and aggravating circumstances and, you know, render a verdict accordingly?

Jury research, as well as my

experience and the experience of other capital litigators, including solicitors, I might add, understand that that is gobbledygook to jurors. It takes a certain level of skill and experience to take those technical death qualification legal issues and ask them in very plain English to jurors.

At a first level, again, while Mr. Newsom is a professional and personal friend of mine, the voir dire transcript tells me that he was simply in over his head in many of the attempts he made to elicit responses from jurors.

One example, and then I'll finish here, and you can ask me specific questions if you need to. One example is that he failed to ask any of the jurors selected in this case their simple opinion about the death penalty, except for one juror, and that would be juror Patricia Wise, who begins on page 499. He does ask her what's her view of the death penalty, but he doesn't follow up with any of it. It is kind of a basic premise in this type of voir dire to ask that simple question of each and every juror, What's your opinion of the death

penalty, or your view of the death penalty, or your attitude of the death penalty?

Our South Carolina Supreme Court has a plethora of cases which allow both sides, the solicitor and defense counsel, to ask those simple kinds of questions about their opinions on capital punishment. That was not done here.

BY MR. BLUME:

Q. So that's one area, which you think the failure to ask jurors the question about their opinion or views about the death penalty?

A. Right.

Q. Also, you indicated that the concepts of aggravation and mitigation and that are concepts which many jurors don't understand?

A. Correct.

Q. From your review of the voir dire in this case, is that something that counsel ever attempted to explain to the jurors?

A. He did in a few parts; but overall, never really asked the jurors just very simple questions concerning mitigating circumstances.

For example, the transcript will reflect that he did ask several jurors could

they consider, after listening to all the evidence, any mitigating circumstances that might apply.

Well, that may be an okay question if the juror has some sense through your other questions or you've laid a groundwork of what it is you're talking about.

Jurors do not come into a capital voir dire case having been through Law 101. They don't really understand the terms aggravators and mitigators, and there's a lot of ways to have that explained. You can ask the trial judge to do it. You can give them examples.

One thing I can refer to, for example, Solicitor Bailey asked each and every juror could they give death to a 16-year-old. There are some judges who, if you object, will not let you ask specific mitigators.

What Mr. Newsom failed to do here is a couple things. He, one, never objected to Solicitor Bailey asking that question; two, didn't ask the reverse question, such as, could they also consider life for a 16-year-old; and three, never followed that up with an

explanation of other mitigators, such as, can you consider a person's background, how they were raised, things that have nothing to do with a crime.

The danger there is some jurors think that accident or self-defense are mitigators. You can't find that out if you don't ask them in plain language.

So that was the second thing, that there was also a failure to ask and explain very simple questions about mitigators and aggravators.

I would note, with an exception, he did ask a couple jurors if they could consider alcohol, and that would be Juror Patricia Wise on page 499; and an alternate juror, Juror Rast, on page 544.

Q. I'm going to come back and ask you about that.

In your opinion, is it an essential component of an adequate voir dire that you ask jurors what their opinions and views about the death penalty are?

A. Absolutely. At a minium, you've got to be able to ask that one question, in terms

of what their opinion or their view or their attitude is about the death penalty. That was not done here, with the exception of one juror, who I've noted, page 499.

Q. And in your opinion, is it an essential component of an adequate voir dire that you ask a question or questions designed to ensure that the jurors understand in common sense lay terms what aggravation and mitigation really mean?

A. Absolutely. You've got to be able to ask the jurors if they can consider mitigating circumstances, with the threshold being that they understand what you're talking about when you use that term. That was not done here with the exception of the couple of jurors I've noted.

There are other things he did in that vain, too, where he failed to ask just very simple probative and relevant questions, which would have made this an effective voir dire.

Q. What is a challenge for cause?

A. A challenge for cause where either side, the solicitor or the defense attorney,

move to have the juror excused for some legal reason so that that lawyer does not have to exercise a peremptory or a discretionary challenge.

Q. From your review of the records in this case, did Mr. Newsom make a single challenge for cause in this process?

A. He did not, according to my recollection, from what I read in the transcript, make a single challenge for cause.

Q. In your experience, is that unusual?

A. It's extremely unusual.

Q. In fact, are you aware of any case in which you tried which you did not make a single challenge for cause?

A. Not only -- I've never had a capital case where I didn't make at least one challenge for cause of a juror. I've reviewed transcripts of other attorneys. I've also recently, since I've been in private practice, began doing capital PCR work, and I've seen other transcripts where other attorneys make challenges for cause. It was remarkable in that there was not a single challenge for cause in this voir dire transcript.

Q. When people speak of the term rehabilitation of a juror, what does that mean?

A. That's a fairly common term. In fact, judges during capital voir dire, will even ask the solicitor or defense counsel, depending how the jurors answer, if they want to attempt to rehabilitate.

Quite simply, all that means is the juror has given some responses which indicate they may not be death qualified. By that I mean the juror has either said that they would vote for death in virtually all circumstances; or on the other hand, the juror has said they would never vote for death and would always vote for life in virtually all circumstances.

So the court usually extends an opportunity to either side to get up and rehabilitate the juror, meaning the lawyer gets up and tries to clarify the juror's responses, makes sure the juror understands the procedure and the law, to see if they can basically win that juror back.

For example, if a juror initially says I could never give the death penalty, well, ordinarily defense counsel is going to

make an attempt to try to get that juror to understand the procedure and the law, to see if they can at least state that in some circumstances they may consider and give death. The reason for that is the perception is that's essentially a pro-life juror.

You see it repeated in other transcripts and in this transcript, as well, where the solicitor rehabilitates jurors on the other side of the fence, those jurors who would say, I'd give death all the time, and the solicitor makes an attempt to rehabilitate that juror by asking several questions, explaining the procedure, explaining the law, to see if the juror can say, Well, I would consider life in some circumstances. That's basically a pro-death juror.

The reason for all of that is, both sides want a juror leaning their way on the sentence so they can force the other side to use a strike on that juror or maybe get that juror on the actual jury.

Q. From your review of the record in this case, were there instances in which defense counsel made no attempt to rehabilitate

jurors who initially indicated their opposition to the death penalty?

A. There are numerous instances where defense counsel made no attempt to rehabilitate.

Again, I think that comes from -- not out of -- if I can use some plain terms here. I don't think it comes from laziness or --

MR. ZELENKA: I object. It calls for speculation.

THE WITNESS: I can rephrase it. That probably was a speculative answer. I would acknowledge that.

My knowledge of Mr. Newsom, in my reading of the transcript, reaffirms my initial statements to him that he didn't have the proper experience or training or skill. So his failure to rehabilitate does not appear from the transcript and my knowledge of his personal and professional ethics to be something that he intentionally ignored, but there are numerous instances where he failed to rehabilitate any pro-life jurors at all.

One would be Juror Howell, which

begins on page 251. Another Juror Void, page 450. There are a couple of other instances where he attempts to rehabilitate a juror and basically errs in the attempt.

BY MR. BLUME:

Q. What do you mean, errs in the attempt?

A. With Juror Wadford, who begins on page 484, he attempts to rehabilitate that juror, but basically gives the juror an open-ended question that allows him to wiggle out of it. One of the skills you learn and is taught to you if you attend capital litigation seminars is, when you're trying to rehabilitate a juror, you don't ask open-ended questions. You ask very straightforward leading questions, and you try to lead them into answering in a fashion which will rehabilitate them. Solicitors do it, too.

Solicitor Bailey in this transcript is very good at it. When he rehabilitates essentially pro-death jurors, he does it with leading questions and gets them to answer in the fashion that he needs to rehabilitate them.

Unfortunately, Mr. Newsom did not do

that with Juror Wadford on page 496 and 97 of the transcript. He basically asked open-ended questions, and erred in that attempt to rehabilitate.

Q. In your opinion, is there any downside to attempting to rehabilitate a juror?

A. None, because if the juror is going to get excused, you're losing that juror anyway. So most experienced capital litigators will at least make an attempt to rehabilitate a pro-life juror; and most solicitors, I have seen in my experience, and in this transcript Solicitor Bailey did it well, will always try to rehabilitate a pro-death juror. There's no negative to it.

If you fail in your attempt to rehabilitate, you haven't lost anything; but if you can win that juror back, then you've got a death qualified juror leaning in your direction, whichever side you're on.

Q. So in your opinion, can you conceive of a strategic reason for attempting or at least failing to attempt to rehabilitate a juror?

A. Not at all. The few rare instances

where I have seen defense counsel not ask any rehabilitation, for example, in the case of a pro-life juror, is where the juror right out of the box says, Judge, I just want to tell you my religion tells me I can never vote for death. I will never do it. I just can't do it under any circumstances, and I base that on a longly-held and deeply-held religious faith.

An example I can use is a Jehovah's Witness. I've seen instances where defense counsel do not attempt to rehabilitate a Jehovah's Witness because it's fairly widely known that that is a particular religion that ordinarily in its teaching opposes judging, including capital punishment, of others. So that is a rare exception.

Q. When people talk about capital jury selection, you sometimes hear the term ADP or automatic death penalty juror.

A. That's right.

Q. What does that mean?

A. An ADP is a juror who kind of comes out of the box and says the reverse of the example I've just given. I gave the example where the juror comes out and says, Judge,

because of my religion, I can never vote for death.

On the other hand is the ADP or the automatic death penalty juror, and I've heard defense attorneys, judges, and even solicitors use that acronym for them. It's just an easy handle to describe them.

That's the type of juror that comes right out and says, I would give death in all cases. You see it most often in those jurors who say or feel once guilt has been established beyond any doubt, they would always vote for death.

There were some jurors here who from the bare bones of questioning --

Q. Well, first let me ask you, has the United States Supreme Court said in any decision that those type of people are not qualified?

A. Right. Just as in the Witherspoon and Witt cases, you have to have death qualified jurors, such that jurors who would always vote for life under all circumstances and never vote for death aren't qualified, likewise automatic death penalty jurors are

also not qualified because they could never consider life.

Q. And that case is Morgan versus Illinois?

A. Right. I didn't know you were going to ask me the case name.

Q. Now, if you are a capital defense lawyer in the trial of a capital case and you believe someone or someone's answers indicate that they are pro-death, what, in your experience, are you trying to do with that juror?

A. If you're defense counsel and the juror gives responses that are seemingly pro-death, you're trying to do exactly what the solicitor has been trying to do to you when jurors come out and are leaning towards pro-life. You're trying to get that juror disqualified; because otherwise, you're going to have to use a strike on that juror.

There's some very simple ways to do that, if you have attended conferences, had experience, done voir dire before, and have practiced and learned those skills. Those simple ways aren't always automatic, not always

successful, but at least they begin to discern from the jurors those who are still death qualified and eligible to serve and those who aren't.

One example is to make sure that the juror understands a guilty verdict does not automatically equal a death sentence. Through leading questions, if you can ask the juror if they would always find for death after making a verdict of guilt and they have no doubt, that's one way to do it.

An example in this case is Juror Platt, page 333. Now, I would note that Juror Platt didn't actually serve on Mr. Hughes' jury. So I'd just use this as an example.

He starts out saying in every case if he found someone guilty and was convinced beyond all doubt of their guilt, he would vote for the death penalty. That is someone who seems to fit the ADP model.

Mr. Newsom tries to qualify his answers to show that he should be challenged for cause and excused, but basically goes back and asks again an open-ended question, and asks him on page 344, Would you consider some

circumstances for life or consider some mitigating circumstances, something to that effect.

When you're questioning an ADP juror, again, you never ask open-ended questions. That's one of the skills you learn. You ask leading questions.

Solicitor Bailey did it with great effect in rehabilitating jurors, as well as getting some pro-life jurors excused.

Q. Is it also important in this process to make sure that the jurors understand that you're talking about murder?

A. That's the second part of it. It's not only making sure that the juror knows that -- or finding out if the juror thinks that they would always vote death penalty once they found the person guilty, but defining murder.

That's one of the areas where Mr. Newsom did not touch upon at all. And again, that comes from my personal and professional knowledge of him, he didn't know. He didn't know how to do it. It's a very simple way to do it. You can do it as counsel or ask the judge to do it. All you do is

define murder, tell them the legal definition of murder, and make sure you tell them what it's not, that it's not accident, self-defense, or manslaughter. And I've seen cases where judges have been glad to do that.

In a recent case I attended, Judge Schuler offered to define murder and tell the jurors what murder is not.

That's important because some jurors don't understand what the definition of murder is. They may be thinking, Well, I can consider life in some circumstances, for example. I can consider life if it were an accident. Well, you know, that's not necessarily a mitigating circumstance, or that's something the jury would have already discarded by the mere verdict of guilty of murder. So yes, that's also an important area of general voir dire that was not done here. Again, Mr. Newsom just didn't know.

Q. Now, you were talking about questions that were asked by the solicitor about, could you give the death penalty to a 16-year-old. You were talking earlier about that question and what it raised. Can you

elaborate on that a little more?

A. Yes. That concerns me in this case. I used it as a brief example earlier, but let me explain that more. That is troublesome in several respects. First, normally the trial judge will not let either side ask about specific aggravators or mitigators. You can give juries general examples so they understand those terms, but you cannot ask about specific aggravators and mitigators that apply to your case. Here the solicitor was allowed to do that unchallenged.

Q. That's called qualifying on the facts?

A. That's qualifying on the facts. Solicitors love to object to defense counsel when we attempt to do that in terms of saying, Judge, he's staking out the juror. He's trying to build the juror profile. There are South Carolina cases that don't allow that.

So first off, there is no objection to the solicitor doing it. But secondly, if there's no objection to the solicitor qualifying the jurors on the facts, there was very little attempt by trial counsel in this

case to turn that to his advantage and ask about specific mitigators to get the jurors' responses to those. I would note the exception as --

Q. Why would that be important?

A. Well, what it does is, what Mr. Bailey, the solicitor, was able to do here was basically not only get death qualified jurors, but get jurors who, in essence, through voir dire were ruling out one of the primary mitigators Mr. Hughes had, his age.

MR. ZELENKA: Object. Calls for speculation. The record will speak for itself on that.

THE WITNESS: Mr. Bailey was allowed to ask each and every juror could you give the death penalty to a 16-year-old. I would note it's apparent even to the trial judge that this is a troubling question, because after several jurors are qualified, the trial judge interjects.

On page 251, the trial judge asks that the question be rephrased. It may be inappropriate for me to say the trial judge was troubled by that. That's how I read the trial

judge's suggestion, because the trial judge interjects that the question should now be phrased -- instead of saying, Could you give death to a 16-year-old, the question should be, Could you give death to a 16-year-old, but who is an 18-year-old at the time of trial.

So that's kind of the first issue in that regard, is the solicitor is allowed to fact qualify jurors.

The second thing is, there is no reverse use of that question. Trial counsel, at a minimum, should have been asking jurors could they vote for a life penalty for a 16-year-old, to find out if they could give meaningful consideration to that type of mitigator.

BY MR. BLUME:

Q. Well, is it your understanding of the law that a juror who says they cannot consider death for a mitigating circumstance is qualified to serve?

A. No, if a juror can't consider a mitigating circumstance, then they aren't qualified.

Q. Is that something you want to know

as defense counsel?

A. Absolutely. And just as the trial judge excused some jurors who said, No, I couldn't give death to a 16-year-old, the converse of that question is, if someone responded, No, I couldn't consider 16 years of age as a mitigator would also be a disqualifying question.

So once you go down that road, both sides are entitled to hoe it, and Solicitor Bailey -- I mean, you said that illustration, Hoed it very well, for the prosecution, there was no one farming that issue for the defense side.

Q. In your opinion, is it an essential component of an adequate voir dire in a capital case to ensure that jurors can consider all the statutory mitigating circumstances and those which, if permitted to ask, are relevant to your case?

A. Absolutely, because a juror who cannot consider mitigating circumstances and specific mitigating circumstances in your case aren't qualified. Since the solicitor was being allowed to ask that question, the defense

should have asked the question in the reverse.

Q. And if a juror indicates they couldn't consider it, then, in your opinion, should a challenge for cause be made?

A. There could have been a motion for challenge for cause, and an objection to that juror, just as the solicitor objected to those jurors who said they could not vote for death for a 16-year-old. None of that was done, unfortunately.

Q. Let me ask you about a couple other areas.

Based upon your review of the voir dire, were there any jurors who had knowledge of the victim or the victim's family?

A. Yes. There were two jurors who had direct knowledge about the victim or the victim's family.

Q. I'm not talking about the panel as a whole. I'm talking about the 12 who actually sat.

A. Yes. Of the jurors -- if I understood your question correctly. I'm sorry.

Q. The jurors who were actually selected for jury service in this case.

A. Right. Two of the jurors actually selected knew the victims or the victims' family. That would be Juror Brenda Wise, who begins on page 193, and Juror Barron, who begins on page 295.

Q. Have you reviewed their voir dire?

A. Yes, I have.

Q. Would you have handled the voir dire in this case differently of these jurors?

MR. ZELENKA: Object. Irrelevant.

THE WITNESS: Absolutely.

BY MR. BLUME:

Q. What, in your opinion, was -- well, whether you would have handled it differently, in your opinion, would a reasonably competent trial attorney in a capital case have handled the voir dire differently?

A. Yes.

MR. ZELENKA: Object. It's beyond the scope of his expertise.

THE WITNESS: Yes. In order to render effective assistance of counsel, voir dire should have been done differently.

BY MR. BLUME:

Q. What would you have wanted to ask?

A. As to these two jurors?

Q. Yes.

A. Juror Wise and Juror Barron?

Q. Yes.

A. These two jurors really for me are the crux of what this voir dire in this case is about. These two jurors really, to me, demonstrate unfortunately, not only ineffective assistance of counsel, but incredible prejudice, because these two jurors, Ms. Brenda Wise and Mr. Barron, actually served on the jury.

Both of these jurors, in essence, could have been victim impact witnesses for the state at sentencing. How they served on the jury, I'm just astounded. And I say that, again, knowing Mr. Newsom is a personal and professional colleague of mine. He just missed it.

Q. What is it about it that troubles you?

A. Let me start with Ms. Wise first.

Well, what they both troubled me about is, they could have been victim impact witnesses because of their close ties and

direct knowledge of some of the serious victim impact issues in the case.

Let me start with Ms. Wise. Her qualification begins on page 193. Her daughter is a friend with the surviving female victim. Her daughter, she relates to the court, has been consoling this surviving female victim. And again, by surviving female victim, I mean, this is an eye witness. This is a victim who testified in the case who was not killed and survived the incident.

So this juror's daughter, Ms. Brenda Wise, has a relationship with the state's witness. That state's witness is the surviving eye witness female victim, and Brenda Wise's daughter is consoling this female victim on a regular basis between the time of the incident and the trial.

Ms. Wise states on page 205 that she knows about the pain that this female victim has and the hurt she and the family have suffered.

She could have testified, if the state had wanted to subpoena her, about how her daughter had had to console the victim on

repeated occasions, the female victim, from the time of the incident up until the trial.

How she can be a juror on the case is just astounding, because she has information that maybe the other jurors didn't have, and also has direct knowledge of that type of victim impact testimony.

I can add that we know, as capital litigators, both prosecutors and defense, that victim impact testimony is incredibly important to jurors in the sentencing to death. It is an important piece of evidence in any trial.

Q. Ms. Wise, do you remember -- did she also indicate that her knowledge of her daughter's relationship with Kelly Hoffman would make it difficult for her to serve on the jury?

A. Her exact quote is, Probably somewhat.

Q. When asked if it would make it uncomfortable for her to fulfill her role as juror?

A. Right. Her response, when asked by defense counsel if it would be uncomfortable for her to serve is, quote, Probably somewhat.

Defense counsel, at a minimum, should have then begun asking very narrow, specific leading questions to get her to -- or attempt to show the court that she was not qualified to serve. Instead, Mr. Newsom unfortunately asked again several open-ended questions, and allowed Ms. Wise to later say, Well, I could probably be fair.

At a minimum, though, trial counsel could have asserted to the court that, based on the response, that it would probably somewhat affect her role as a juror, could have challenged her for cause. There was no challenge for cause.

Next, he could have used a peremptory challenge to excuse her. That was not done. She was the very first juror seated. So it wasn't like trial counsel was out of strikes when she came up.

I would also note that if trial counsel needed to save strikes for other jurors, he only exercised seven strikes. There were three unused defense strikes. So Ms. Wise easily could have been stricken by the defense, given her direct knowledge and link to the

female victim in her family.

Q. Based upon your experience, can you conceive of a strategic reason for failing to move to disqualify --

MR. ZELENKA: Object. Calls for speculation.

THE WITNESS: There could be no strategic reason for failing to excuse a juror who has direct information and evidence about victim impact and has had direct contact with victim impact type evidence.

MR. ZELENKA: Move to strike, strike the response.

BY MR. BLUME:

Q. In your opinion, can you conceive of a reason why, even assuming your challenge for cause was unsuccessful, that you would not have used a peremptory challenge?

A. No. Same answer.

Q. Now, let's move to Mr. Barron. Is there anything else you want to say about Ms. Wise?

A. No. That's sufficient.

Q. Mr. Barron?

A. Mr. Barron is the second juror that

absolutely should not have sat on the jury, and I would note he does end up sitting on the jury. His voir dire begins at page 295.

One of the remarkable things about Mr. Barron is he asks the court on page 296 if he can, quote, Make a statement, unquote. And he goes on to tell the court and the solicitor and defense counsel that he has direct information and knowledge about the victim in this case.

The other victim in the case, the male victim, was killed. The sister of the deceased male victim is staying at Mr. Barron's farm when the incident occurs.

The police -- this is according to the juror's statement that begins on page 296. The police contact Mr. Barron, tell him about the sister's -- or the brother's death and ask him if he can please tell the sister that her brother has been killed, and he does that.

The state could have called him as a victim impact witness, because he is the first one who has to tell the sister that your brother has been killed at work.

He could have testified as to her

demeanor, her emotional reactions, the impact on her. He had all that as his own personal knowledge in the case.

How this juror gets seated is amazing to me. And again, that's one of the important reasons to have two attorneys, especially one experienced on a case, because sometimes even the most experienced attorney --

MR. ZELENKA: I object. Calls for speculation.

THE WITNESS: Because even sometimes the most experienced attorney can miss it.

In this case with Mr. Barron, Juror Barron, defense counsel doesn't ask him a single question about his knowledge of the deceased victim's sister, never asked him if that would cause him trouble to serve. He knows if it would cause him trouble to serve, all he would have to do is tell the judge, and he could be excused from the case, if he felt he was too close to the case. He never asks him what the sister's reaction was, to get that into the record, what his personal and direct knowledge were, the details of that, not a single question on that.

Again, there should have been a challenge for cause. I can think of no strategic reason that there was not a challenge for cause.

MR. ZELENKA: Object. Calls for speculation.

THE WITNESS: Next, Juror Barron was not even stricken with a peremptory challenge. I note that he was the fifth juror seated, if I have that correctly. If I can just check my information. Yes, Juror Barron was the fifth juror seated in the case, if I've counted correctly; and at the time he's seated, the defense had only used one strike. So it had nine strikes remaining. Even if the defense had stricken Brenda Wise, they would then be up to their third strike with Juror Barron.

As it is, I would repeat, the defense only used seven strikes, so they still would have had a strike for Juror Barron as well as Juror Brenda Wise, who I've mentioned previously.

Seating Jurors Brenda Wise and Barron is ineffective in my view and experience in that there can be no strategic reason for

putting Juror Barron, who has direct personal knowledge about victim impact evidence on the jury.

BY MR. BLUME:

Q. Just to summarize, it's your opinion that for both of these jurors, in addition to the fact that it's your opinion they weren't questioned very well, but there should have been a challenge for cause, and if that was unsuccessful, a peremptory challenge exercised?

A. Mr. Bloom, let me put it like this: If anyone can disagree with anything I've said about the general voir dire or trial counsel's lack of asking questions about opinions on the death penalty or explaining mitigators or defining murder or all those other things I've discussed, if nothing else, I don't see how any reasonable minds can disagree that Juror Brenda Wise and Juror Barron should not have been on this juror. That is just glaring.

You cannot put a juror on a capital trial to decide a person's life or death when that juror has direct personal knowledge of victim impact evidence.

We're not talking about two jurors

who read about victim impact evidence in the newspaper. We're not talking about two jurors who heard something in the community or the neighborhood or talked to their hairdresser. We're talking about two jurors who, through their own senses, had observed firsthand some of the victim's family's pain and suffering.

I mean, nothing, again, against my personal and professional colleague, Mr. Newsom, but I would suggest again -- and I respect Mr. Attorney General's objection -- that that's why you have two attorneys on a case like this, and that's why one of them needs to be experienced in capital litigation, because sometimes you just miss the obvious. Unfortunately in this case, trial counsel missed the obvious.

MR. ZELENKA: I object. Calls for speculation.

THE WITNESS: Trial counsel missed the obvious in not even simply exercising a peremptory challenge in excusing Juror Brenda Wise and Juror Barron.

BY MR. BLUME:

Q. Is there anything else about the

voir dire, any other things that I've failed to ask you about?

A. No.

Q. Just on your qualifications, I forgot to ask you a few things. Do you -- and also in addition to your private practice and your work as a lawyer, do you also serve as a professor at the College of Criminal Justice?

A. I'm also an adjunct professor at the College of Criminal Justice, University of South Carolina. I'm also a clinical assistant professor at the Department of Neuropsychiatry and Behavioral Sciences, USC School of Medicine. I've begun my own criminal practice and jury consulting practice beginning in April '99, of this year. I've used jury consultants in the past when I was with the public defender's office. I no longer do that. Let me explain that. I no longer employ jury consultants in cases. That is the -- one of the areas of expertise and professions that I now lend myself out to do.

Q. Have you ever been qualified before as an expert in criminal law and capital litigation?

A. Yes, I have.

Q. And that was in South Carolina?

A. Yes, I have. Yes, that's correct.

Q. Just to sort of clarify the answer before the last one, your testimony here about the way in which a voir dire is handled is not tied to the fact that he didn't obtain a jury consultant?

A. No, not at all; and if I gave that implication, I apologize. I don't think, you know, every capital litigator has to retain a jury consultant. I began doing it when I was a public defender, once the Bailey case came out, and it was one of these specific areas we were allowed to retain an expert in.

Then based on my experience in capital litigation, I desired to pursue that field myself.

So in order to quantify my answer -- and I appreciate you asking that -- no, I don't think every trial attorney in a capital case has to hire a jury consultant. I would like it if they did, and I would certainly be available to do that.

The transcript will reflect we're

all laughing at that remark, or some of us are laughing.

So no, that's not my testimony. Hopefully my testimony is characterized by some of the lack of necessary and reasonable questions that should have been posed in voir dire, some of the things that should have been done and particularly -- if I can emphasize this last part, particularly the failure to excuse Jurors Brenda Wise and Juror Barron. That, in my humble view, has no strategic reason and no reasonable explanation whatsoever.

Q. Sort of one just final question I forgot to ask. There was some discussion early on about the Whipple matter. Of all the capital clients that you've represented, other than Mr. Whipple, are any of the others on death row?

A. No. And again, if I wasn't clear before, the ineffectiveness assistance issues I testified to at the capital PCR hearing of Mr. Whipple were tied to my pretrial ineffectiveness motion, where I tried to alert the court to those issues prior to the trial of

the case.

Q. So the other capital case that you've been involved in through a plea or a jury verdict resulted in a life sentence?

A. That's correct.

EXAMINATION

BY MR. ZELENKA:

Q. Mr. Bloom, how many other qualified jury consultants are there in South Carolina?

A. There may be two others. I know of one by name. The other person I don't -- someone mentioned the name to me, and I cannot even recall now who it is. I know Dr. Diane Fallingstat has done it in the past, as well.

Q. What type of certification do you have to go through to be certified as a jury consultant?

A. None that I know of.

Q. Have you gone through any special jury consultant training or received any degrees in that?

A. No, sir. There is no licensing board or certification that's required in this state or any state that I'm aware, for that matter.

Q. So basically, all you have to do is put it on your business card?

A. I would hope someone would have more than that. I don't mean to be coy with you, but I would hope that someone would have the requisite experience before engaging in that.

Q. But is there a licensing agency?

A. No, sir. To answer your question, no.

Q. Is it a recognized area of specialization by the South Carolina Bar?

A. No, sir.

Q. Do you have a business card with you?

A. I may, sir.

Q. Could I see it, please?

MR. ZELENKA: I'd like to mark this as an exhibit.

(PLF. EXH. 1, Business Card, was marked for identification.)

BY MR. ZELENKA:

Q. So on your card, you hold yourself out to be a jury consultant, but it's not an area of expertise recognized by the South Carolina Bar; isn't that correct?

A. Other than it's specifically referenced in the Bailey case by the South Carolina Supreme Court. Other than that, no, sir.

Q. What's your bachelor's degree in?

A. Political science with a minor in English.

Q. Have you received any degrees in psychology?

A. Other than I'm a clinical assistant professor at the Department of Neuropsychiatry and Behavioral Sciences at the USC School of Medicine.

Q. What courses, undergraduate courses, did you take in psychology, if any?

A. Undergraduate courses?

Q. Yes.

A. Oh, goodness. That was so long ago. I honestly don't know if I can recall it off the top of my head. I'm not trying to be evasive. I haven't thought about college in a long time. I graduated in 1978 in a three-year baccalaureate program, an advanced program.

Q. Do you recall if you took any psychology courses?

A. Yes, I did. It's just a long time ago.

Q. But Dr. Diane Fallingstat is a forensic psychologist?

A. That's correct.

Q. A board certified forensic psychologist; is that not also correct?

A. That's correct.

Q. So basically, your experience is in the 15 death penalty cases that you have personally done; is that correct?

A. That's correct.

Q. You expressed an opinion, I'm assuming, not to put words in your mouth, that no lawyer can handle a South Carolina death penalty case as the only lawyer in that case. It would be, per se, ineffective assistance; is that what you're saying?

A. Not exactly; and if I gave that implication, I apologize. I said I would not recommend it. I cannot think of a case where I would think that that would be a wise thing for a lawyer to do, just because they're such complicated cases.

But if you gave me a certain fact

scenario and a certain lawyer, I might have to concede that in particular set of circumstances, a lawyer by himself on a capital case could be competent. If I implied otherwise, I didn't mean to. I would not recommend it, I think, is the essence of my opinion, if that answers your question.

Q. The statute provides for two appointed lawyers to be involved in the case?

A. That's correct.

Q. In reviewing the voir dire, did you also review Judge Cottingham's inquiry and presentations to each of the jurors?

A. Briefly. My focus was mainly on trial counsel's questions. So yes, I did read Judge Cottingham's colloquy with the jurors.

Q. What was the routine as to how voir dire was done in this case? Who asked questions first, second, third? How was that done?

A. The judge did what most judges in these cases do, in that he had the jurors read kind of a preliminary explanation of the three types of jurors. One type was what we call ADP, a second type was pro-life, and the third

is the type of juror who can listen to all the facts and circumstances. Then next, Solicitor Bailey was allowed to go first with each and every juror, which I also thought was unusual. In most situations, defense counsel and solicitors take turns going first.

Q. In most of your situations that's occurred?

A. Yes, in most -- in all of my cases that's occurred, and most other trials I'm aware of, the attorneys for each side took turns. But in this case, to answer your question, the sequence was that Solicitor Bailey went first with each and every juror.

Q. How many of those jurors did Solicitor Bailey ask them their opinion on the death penalty?

A. I didn't calculate that statistic. I can do that if you want me to. I think he asked most jurors if they could give death, if they could sign the verdict form voting for death. He asked every juror, I know, if they could specifically give death to a 16-year-old. I didn't count the number of times he asked them their opinion. He didn't ask it of every

juror.

Q. Did he also briefly describe, in addition to what the judge had done, generally aggravating factors and mitigating factors for the jury?

A. Yes, he did do that, to some degree.

Q. So that, in fact, was done before Mr. Newsom was required or allowed to ask questions; isn't that correct?

A. Well, he did it in the fashion that the solicitor wanted to do it, yes.

Q. But those responses were given under oath by the jurors; is that not also correct?

A. Yes, sir.

Q. Other than the two jurors who you pointed out, Juror Barron and Juror Wise, what other jurors should Mr. Newsom had moved to strike for cause, based upon your review of that record?

A. Well, to answer that forthrightly, I think the only answer I can give is I don't know, because part of the problem in the voir dire of the other jurors is there's insufficient information. It's kind of like I feel, Mr. Zelenka, we know each other pretty

well. You're asking me a trick law school question.

Q. No, sir, I'm not. You answered a question that you thought he was ineffective because this record revealed that he made no challenges for cause. You named two jurors that you say should have been challenged for cause. I'm asking you among the other jurors who were qualified, which one of those should have been challenged for cause based upon the record that you reviewed that you've already commented on.

A. Yes, sir. I didn't mean to be flip; and if I sounded that way, I apologize.

My answer is: We don't know, because an insufficient number of questions were asked of the other jurors by trial counsel.

As a foundation for my answer, I would note Juror Vernon, who starts on page 229, is only asked five questions by defense counsel, and only two of those have to do with the death penalty, specifically where he asks if the juror can consider other mitigation, or are some 16-year-olds more mature than others.

As to Juror Atkins, who begins on page 258, trial counsel -- and by trial counsel, I mean defense counsel -- asks only about 12 questions. Most of those are about residence in the county, and only three have to deal with the death penalty, mostly in the vain of, Can you generally consider mitigating circumstances.

As to Jury Edwards on page 288, trial counsel only asks five questions dealing with the death penalty such as unanimous verdict, holding out, consider mitigating.

Juror Hudson, page 356, trial counsel only asks four questions. Three of those are on the death penalty in terms of youth and consider mitigators.

Juror Pound, who begins on page 366, defense counsel asks no questions.

Juror Gunter, page 421, defense counsel only asks five questions. Only one of those on the death penalty in terms of, Does your church have any specific beliefs about the death penalty.

Juror Cheesboro, page 434, defense counsel asks only five questions, two of those

on the death penalty.

Juror Williams, who begins on page 465, trial counsel asks only five questions. None of those questions have to do with the death penalty.

Juror Patricia Wise, page 499, trial counsel asks a little over ten questions, and only three of those have to do with the death penalty. That is the one juror he asks what her views on the death penalty is -- excuse me, what her views are. He asked about her church and its views on the death penalty, and he asks alcohol.

Juror McVicker, page 509, he asks seven questions. Only one of those is on the death penalty dealing with the juror's church.

On the alternates, Juror Rast, page 524, he asks seven questions. Five of those are on the death penalty, in terms of church, whether they would give the death penalty for all murders, something to do with age, alcohol, and if the juror leans to the death penalty.

Juror Butler, another alternate, page 553, he has five questions, and only two of those are on the death penalty. Both of

those have to do with the juror's church.

I've skipped Juror Brenda Wise and Juror Barron in my summary here because I've already commented on those.

So with those types of limited questions, I can't surmise from the jurors' responses what their views really are on the death penalty and whether the challenge for cause might be available.

Q. Did any of those jurors, those other jurors that you've mentioned, indicate any inability to consider a life sentence either on the judge's questions or the prosecutor's questions?

A. The jurors were death qualified, if that's what you're asking me as a preliminary threshold basis.

Q. So there's nothing about any of those jurors that stands out that you can review right now and say counsel was ineffective in failing to move to strike, based upon your particular review of the questions and answers that were given at that time; isn't that correct, Mr. Bloom?

A. And I'm not trying to be evasive, so

I will try to answer your question first and explain it. There is nothing that appears from the record as to those ten other jurors, not including Juror Brenda Wise or Juror Barron, as well as the two alternates, that appears from the record that would give rise to a motion to challenge for cause. I honestly hope that answers your question. So I see nothing initially from the record.

But that is the purpose of voir dire and what I've tried to explain in terms of probing the jurors a little more thoroughly to see what does appear.

Q. Okay.

A. I hope that answers your question.

Q. That's speculation on your part, based upon your review of the record, because you do not know specifically that those jurors would not have answered the way that they answered while under oath during either the judge's questions or Solicitor Bailey's questions; is that not correct, Mr. Bloom?

A. That's correct. We don't know what they would have answered, and that is -- I hope I'm making the point, and I don't mean to

belabor it, but I hope I'm making the point. That's precisely the issue, because an insufficient number of questions were asked by defense counsel to probe the jurors in an adequate fashion.

Q. You also stated, despite your assertion that this defense counsel failed to adequately ask questions of the jurors, that the solicitor, however, had to rehabilitate the jurors after defense counsel's questions. Which of those jurors were required to be rehabilitated after defense counsel's questions?

A. Just so I'm clear, rehabilitated by the solicitor?

Q. Yes.

A. Okay.

Q. Which is the way you testified on direct.

A. Okay. One example would be Juror Jackson that begins on page 238, where the solicitor actually does a reverse rehabilitation, if I may phrase it that way, or shows the court that Juror Jackson is not death qualified and is a pro-life juror. That's one

example.

Juror Platt that begins on page 333, where the solicitor rehabilitates. Juror Platt starts out to be a potentially ADP juror. Those are two examples.

Q. Are you still answering?

A. No. I'm sorry.

Q. So those were the only two?

A. Those were two. Did you want me to try to find more examples of where Solicitor Bailey tried to rehabilitate?

Q. Absolutely. I thought you were --

A. I apologize. I thought you just wanted a couple examples. I'm sorry now. I've forgotten what else you wanted. If you can, ask me again. I apologize.

Q. Of the jurors that were voir dired, how many of those jurors did the solicitor have to rehabilitate after the defense counsel's questions?

A. Of the ones who were actually selected?

Q. Oh, no. I thought your voir dire considerations were the entire proceedings that this defense counsel was asking.

A. Yes.

Q. Did you review those other individuals that were --

A. Yes, sir.

Q. -- voir dired?

A. Yes, sir, I did. I did not make a total of how many jurors Solicitor Bailey rehabilitated. My focus was on jurors that trial counsel, defense trial counsel, failed to rehabilitate. I was not assessing Solicitor Bailey's performance, so I did not make a tally of his.

Q. So then you didn't -- did you review each and every of the jurors?

A. Yes, I did.

Q. In this case?

A. Yes, I did. But I didn't make a tally of everything Solicitor Bailey did.

Q. The record will speak for itself.

Did you provide any suggestive voir dire materials to defense counsel yourself?

A. To Mr. Newsom?

Q. Yes.

A. I have honestly tried to think back what Mr. Newsom and I discussed the one time he

met with me, and I don't think I gave him any materials. The one thing I recollect is telling him he really needed to get a second attorney on the case. I might have shared some motions we had made in Richland County cases with him. I do not specifically recall giving him anything on jury selection.

Q. Okay.

A. It was more a meeting of, he came to me asking specific questions, and I tried to respond to his specific questions.

Q. Okay. So then you have no knowledge of the fact that Mr. Newsom had obtained in his possession, reviewed materials from the --

A. I have no knowledge of that.

Q. -- defendant's proposed voir dire questions from defending a capital case, Texas Resource Center?

A. I have no knowledge of any materials he obtained. I would acknowledge that.

Q. So you also have no knowledge of any of the juror discussions that he had with the individuals who were involved in the particular proceedings with him who were assisting him in jury selection?

A. Juror discussions? You mean what he asked jurors?

Q. Discussions about the particular jurors as the questions were asked and answered?

A. Other than what's in the transcript, no, sir.

Q. Oh, okay. And the transcript certainly doesn't reveal demeanor, composure, cadence of response of the jury?

A. Certainly.

Q. Those are important factors for you to review in making the decision whether to seat the juror or not seat the juror; isn't that correct?

A. To some degree, and that's where I disagree with colleagues in terms of compiling juror profiles. That's why I don't do juror profiles, because I don't think you can judge someone in terms of the color of their tie or the color of their dress, or their tone or complete demeanor. I think you have to look at a totality of their actual word-for-word responses coupled, to some degree, with their demeanor, if that answers your question.

Q. But demeanor does play a part?

A. Certainly. Yes, sir.

Q. And you have no knowledge of that; correct?

A. Absolutely. I agree with that. I do not.

Q. You have no knowledge of any investigation that Mr. Newsom may have done, background information he may have received from individuals in the community or the individual assisting him; isn't that correct?

A. That's correct. I have no knowledge of that.

Q. When you have done jury selections in the past in death penalty cases, do you acquire material about jurors to assist you in that?

A. To some degree, yes.

Q. You just don't rely upon the questions that are asked and answered during that particular proceeding; isn't that correct?

A. That's correct.

Q. You don't know what material Mr. Newsom had?

A. No, sir, I do not.

Q. Why is that material important to you in your jury selection process?

A. That gives a context to the jurors' responses during voir dire in some situations.

Q. Do you have a written report?

A. No, sir.

Q. What is this you have in front of you?

A. I prepared an outline for myself. I'll be glad to let you look at it or make a copy for you. It is a four-page outline where I simply referenced some of the jurors and the page numbers, so that I did not have to commit those types of things to memory.

Q. I'd like to have a copy of this.

A. Yes, sir. And I personally prepared this.

Q. You are currently involved as co-counsel with some of the counsel in this case in another -- at least one other prior death penalty postconviction relief case against the state; isn't that correct?

A. That's correct. Pam Wilkins and I, along with Teresa Norris, of Ms. Wilkins' and Ms. Norris' office, just concluded a capital

PCR trial, the title of which is Von Dolen versus South Carolina.

Q. What other cases are you the opposing attorney to me in death penalty postconviction relief cases?

A. I've been appointed to the capital PCR case of Ricky George versus South Carolina, and I was recently appointed to the capital PCR case of James Michael Charping versus South Carolina.

MR. ZELENKA: I don't believe I have any further questions other than --

MR. BLUME: I've got some follow-up.

BY MR. ZELENKA:

Q. Mr. Bloom, you're aware that in South Carolina some individuals have retained counsel, single counsel, in a death penalty case; isn't that correct?

A. I'm aware that that occasionally happens. I don't have any statistics on the number of times that it's happened. In terms of just one attorney you're talking about?

Q. Yea.

A. Yes, I'm aware that has occurred.

Q. In your experience as a public

defender, other than capital cases, when an attorney has been retained by a family member to represent a capital defendant, in your experience, how often is a judge willing to also appoint the public defender's office to assist in non-capital settings?

A. I'm aware -- in non-capital settings?

Q. Yes.

A. I'm sorry. I was confused by your question, because first you asked me a single attorney hired in a capital case, but then the judge appoints a non-capital case --

Q. In a non-capital case, in your experience as a public defender, when an individual has had a family retain counsel, how often has the judge then also authorized appointment of the public defender's office?

A. Not very often, if it's a non-capital case.

Q. How often, in your experience, at Horry County?

A. Very rarely.

Q. How rare?

A. Very rare, if the person is

retained, and that's why I kind of paused. I know of situations where a private attorney has been appointed in a case, non-capital case.

Q. I'm not talking about --

A. But you're asking about retained counsel.

Q. Retained counsel.

A. I can't think of, to be fair to you, a single case where a private attorney has been retained in a non-capital case and the court has also appointed the public defender's office. There may be some. I may even have had some, but right now I can't think of any. It would be, if it happened, very rare.

Q. That also applies to your experience in Richland County, too?

A. That's correct, yeah. It would be very rare in a non-capital case.

Q. How often have you watched Phil Newsom try a case since his practice of law began in 1980?

A. I would have been familiar, not watching from beginning to end -- are you asking me from beginning to end or anything?

Q. We can start at anything.

A. Okay. Any case that any attorney tried in Richland County during the time period that I was here, I would have seen portions of it, and that would be from July 1992 through April 1999, because one of my responsibilities was to monitor court, see if the judge needed us. You know, I can describe those types of duties on and on.

So I am familiar with most attorneys who tried cases on a regular basis in Richland County during that time frame I was chief public defender, and I would have seen Mr. Newsom.

Q. So you're saying that every single lawyer who tried a general sessions case in Richland County in that period of time you saw them practicing in court?

A. To some degree. Clearly not from beginning to end. You know, I would see bits and pieces of it. The lawyers would often come down to the public defender's office, ask for everything, from using our library to bouncing a few questions off of us. But did I sit and watch every attorney who ever tried a case in Richland County, no, sir. I didn't mean to

imply that.

Q. And you began with Richland County in 1995?

A. No. July '92 through April 1999.

Q. But you don't have any idea whether Mr. Newsom practiced significantly or not at all in Richland County prior to that time; isn't that correct?

A. Prior to that time, no, sir.

Q. So where do you get your knowledge of Mr. Newsom's skill and experience?

A. He practiced on a routine basis, both in general sessions court during the time period I was there, from July '92 through April '99, and in family court. Most of that -- and I would see him, along with other attorneys, and I can tell you the attorneys who tried major felony cases, and those we would see on a routine basis doing other type of criminal defense work.

Mr. Newsom, when I would see him, did mostly guilty pleas. He had a few minor trials over that period of time, DUI's, that sort of thing. He practiced in family court a good bit, did both guilty pleas and trials in

family court here. So that's where my knowledge comes from.

Q. But you never were co-counsel with him on a case; correct?

A. Not specifically co-counsel. I may have had a case where he was appointed to represent a codefendant, but I was never co-counsel with him on a case that I can think of. No, sir.

So my familiarity comes with him as a general member of the Richland County Bar, his practice as I've explained it, what I've seen and known, and a friend of the public defender's office.

Q. You've never seen him select a jury, have you?

A. I don't know if I have. If it was, it would have been in certainly a non-capital case, and not a major felony case, and it would have been just in passing, the way you would see anybody, for example, picking a jury in a DUI case or resisting arrest case, that kind of thing.

Q. So basically, your knowledge of Mr. Newsom's skill was based upon your reading

this particular transcript, and that's all; isn't that correct?

A. In capital cases or skill generally?

Q. His skill in jury voir dire and selection of the jury is solely based upon your reading of this transcript; is that not correct?

A. No, sir. It also comes from the fact that for the time period I was chief public defender in Richland County, I had personal knowledge that he did not engage in any major litigation during that time period. Other than that, I relied on the transcript, if that answers your question.

Q. One final question. You're morally opposed to death penalty; is that not correct?

A. You know, I've been asked that question before, and I have to acknowledge that in some cases, I could listen to the evidence and render a verdict. I could give you a specific example, if you'd like.

Q. Name the case.

A. Timothy McVay. I am extremely bothered by that case, and I think I could sit as a fair and reasonable juror in that type of

case.

Q. And the McVay case is the Oklahoma bombing case?

A. That's correct.

Q. Name another.

A. Cases involving children. And I have to concede that I have represented recently a defendant accused of homicide of a child that caused me great personal and moral discomfort.

Q. How old was the victim in this case, or do you know?

A. That I don't know. I've not read anything beyond the voir dire transcript.

MR. ZELENKA: No further questions.

REEXAMINATION

BY MR. BLUME:

Q. I've got to cover a hodgepodge of things with you.

According to your knowledge of South Carolina law, how many lawyers are appointed normally in a non-capital case?

A. One.

Q. How many lawyers are appointed in a capital case?

A. Two.

Q. So you have a right to the appointment of two counsel in a capital case?

A. Correct, by state statute.

Q. In your opinion, is that indicative of the legislative presumption that two counsel in capital cases are the norm?

A. Absolutely.

Q. And would the fact that you're also appointed to one counsel in a capital case also explain the fact that in non-capital cases it's very rare for a judge to appoint a lawyer when you have a retained counsel?

A. Correct. In a non-capital case there would be no need for appointed counsel.

Q. In your opinion, do capital cases raise different issues for jury selection than non-capital cases?

A. Absolutely. We've, of course, discussed one today, voir dire. I would also note in South Carolina there is no attorney-conducted voir dire in non-capital cases.

Q. And there are different issues because of the question of death qualification?

A. Absolutely. Death qualification as well as, you know, the different issues present in a sentencing phase. We don't have in our state procedure any other type of case in South Carolina. Now on a capital case where the jury sentences, that is strictly a province of the judge in accordance with state law, some mandatory statutes, that sort of thing.

Q. So even if we assume that someone has experience in jury selection and other types of criminal cases, a capital case raises completely different issues of jury selection?

A. Right, because of death qualification, because there is attorney-conducted voir dire, which does not arise in non-capital cases, those types of issues.

Q. Okay. Let me ask you this: There was some question about the voir dire as a whole and what the judge asked. Based upon -- as I understood your testimony, you said that this is common, often common, the judge asks the jurors which one of the three broad categories they fit into?

A. Correct.

Q. In your opinion, is that a common practice in South Carolina, judges ask -- in your experience, judges routinely ask the jurors which categories?

A. Yes, judges have been doing that since I've been handling capital cases, beginning in 1986.

Q. Based upon your experience in capital litigation, is a juror's answer to that question definitive of whether they're -- which category they put themselves in definitive of whether they're able to serve?

A. Not at all. It's usually just kind of a basis for the court and really the attorneys to understand where the juror is beginning from. Jurors often move from one category to another.

For example, ADP jurors often come out as number three. They want to say they can consider all the evidence, but they don't understand unless they're properly questioned about a couple of the issues we discussed, such as that we're talking about someone who is already guilty of murder. It's not accident, it's not self-defense. You define murder,

things like that.

Q. Based upon your experience, have you ever had a juror who said that they could, one, consider all the evidence either turn out to be disqualified because they would automatically impose the death penalty or never impose the death penalty?

A. Absolutely. Often jurors come out number three, saying they can consider everything and give both verdicts. Then once you start -- both sides to question them further, you find out that they either can't impose it or they would impose it all the time.

A classic example, to give the solicitor his due, is those jurors who come out as a number three on the sheet the judge gives them, which means they can consider all the evidence and they can give life or death, but when they're asked by the solicitor, Can you sign your name to the death verdict form, they balk and say, No, I can't do that.

So that's why the initial questions the judge asks is really kind of a beginning inquiry, and the questions the solicitor asks are certainly not designed to help the

defendant probe for those jurors who may be pro-life.

Q. Based upon your experience, what's more common is that a juror who initially says they can consider all the evidence to turn out to be, upon adequate questioning, what you would call an ADP?

A. Certainly that can happen and has happened in my experience.

Q. So in your opinion, would it be appropriate for a reasonably competent attorney to rely upon a juror's response to the judge's broad category of questions, to rely upon that as a method of determining whether a challenge for cause should be made or whether the juror is good for that particular case?

A. A reasonably competent attorney cannot rely on just the judge's general inquiry, nor can he rely on answers to questions the solicitor poses. A reasonably competent attorney, to be effective in the voir dire, has to pose his own questions, as I've previously stated here, in a form to further probe the juror to get at the real heart of their views on the death penalty, as well as

other relevant issues.

Q. As I understand your testimony with Mr. Zelenka, you stated it's important how you ask the questions?

A. Very much so. Very much so. And that's why it was interesting here that Solicitor Bailey was the one designated to go first with each and every juror.

Q. I want to come back to that.

There was also a question about whether -- now, the questioning that Mr. Newsom made came after Solicitor Bailey had asked jurors questions, Could you consider the aggravation and mitigation in the case. That was essentially the question that was asked.

A. Right.

Q. In your opinion, is that question adequate to determine whether -- that question in that form adequate to determine whether a juror is competent to serve?

A. Not from a defense perspective, no, sir. Some of the questions Solicitor Bailey was asking does not really give any further indication of where the juror is on the fence, so to speak, than the judge's initial inquiry.

The solicitor's questions were mainly geared at ferreting out those jurors who, one, could not sign a death verdict, because he asked each and every juror that, and, two, those who would be reluctant to give a 16-year-old the death penalty. The rest of his questions are geared towards getting the jurors to feel comfortable with listening to the facts and evidence and rendering a verdict, generally.

Q. And also, I guess your answer to that in part is -- that question is inadequate, I believe, you indicated earlier because many jurors really don't understand what aggravation and mitigation mean when asked that question?

A. Right. And the solicitor didn't really explain what that was either, I should note, except for 16-year-old and having to do with age.

Q. You talked about who went first, and whether the -- who asked questions first.

A. Uh-huh.

Q. Based upon your experience and your opinion, is it important to at least attempt to -- for the defense to try and ask the

questions first, if possible?

MR. ZELENKA: Object. Calls for speculation. It's not part of the defense attorney's position to set that course.

BY MR. BLUME:

Q. Have you ever requested to go first? In your experience, have you ever asked the judge that you be allowed to conduct the voir dire first?

A. Yes. I never let just the solicitor go first with each and every juror.

Q. If you can help it?

A. Correct. And I've never had a judge deny that. There's a number of reasons for that.

Q. Can you explain?

A. The reasons for that is: One, very simply, you know, 12 of those people that get questioned are going to be on your jury. So both sides want to build some rapport with those jurors. So just by the law of chance if each side is taking turns going first, some of the jurors who ultimately get selected will have been questioned by the solicitor first, some by the defense first. So each side has

had an opportunity to build a little bit rapport and get comfortable with those jurors.

Secondly, the defense has its own interest in determining the jurors' views on the death penalty, and there are going to be some jurors that it's easier to rehabilitate, for example. We talked about rehabilitation with pro-life jurors, just as the solicitor tries to rehabilitate ADP jurors.

Sometimes it's a little easier if, when the juror first comes out, they're leaning against the death penalty, it's easier to rehabilitate them if the defense goes first.

And again, statistically and somewhat by chance, when you alternate who goes first, then each side kind of has a fair chance to rehabilitate jurors in a little bit different fashion than just one side going first.

Q. Now, you were asked a question which I thought was a mischaracterization of your testimony. I wanted you to clarify it.

You testified on direct examination that there were no challenges for cause in this entire voir dire; is that correct?

A. That's correct.

Q. But now, I just want to make sure. You did not say that that was, per se, ineffectiveness, as I understand it?

A. No, sir, I did not.

Q. You just noted that that was an unusual occurrence, and never occurred in any other case that you were aware of?

A. Correct.

Q. And then as I understand it, the essence of your testimony is that, one of the reasons it is difficult to say what other jurors should have been challenged for cause is that part of the problem here is --

MR. ZELENKA: Objection. It's a leading question.

MR. BLUME: Let me rephrase it.

BY MR. BLUME:

Q. Why, in your opinion, is it difficult to tell what other jurors should have been excused for cause?

A. Okay. As I answered Mr. Attorney General or attempted to, it's because there's an inadequate number of questions and inadequate number of substantive questions

posed by defense counsel to the jurors.

It would be speculation for me to sit here and say as to the ten other jurors, other than Brenda Wise and other than Juror Barron, the ten other jurors who were seated and the two alternates, whether we could have challenged them for cause, and the reason is we don't know. There was an insufficient number of questions asked. The questions weren't asked in an appropriate or trained or experienced manner, and a number of just issue type questions weren't asked.

For example, murder was never explained or defined, finding out what the juror would have as to an opinion once they knew the definition of murder.

Next, no questions were asked in terms of what the jurors views, opinions, or attitude would be, except for those jurors that I've already noted.

Next, there was no reverse use of the 16-year-old mitigator. I've listed other questions that could have been asked, other questions that should have been asked. That is kind of the essence of why we don't know with

those ten other jurors and the two alternates if aby of them could have been challenged for cause, because there wasn't a reasonable or proper or effective level of questioning of those jurors.

MR. BLUME: I don't have anything further.

REEXAMINATION

BY MR. ZELENKA:

Q. I've got a couple things, just some follow-up.

Do you recall the case State versus Cockerham.

A. Yes, I do.

Q. You were one of the lawyers in that case?

A. Yes, I was.

Q. I was one of the other lawyers in that case --

A. Yes.

Q. -- representing the prosecution?

Do you recall the manner of the voir dire in that case, who went first?

A. My best recollection is we alternated, but I would rely on the transcript.

I would also note that that trial was in 1989, I think, or '88, the retrial. I think it was certainly before 1990. So at that time I probably only had -- that might have only been my second or third capital trial. I had been public defender at that time for about three years, three or four years.

Q. But your plain recollection right now is that you did not go first -- at least your recollection is that you did not go first on all the jurors on that case?

A. Oh, no, I don't think I've ever gone first in any case. If I left that implication, I didn't mean to. I believe what I stated is I've always alternated with the solicitor, and I thought that's what he did in the Cockerham case too, but I would defer to the transcript.

Q. You mentioned something about building rapport with the jurors?

A. Yes. That's something both sides do, certainly, during voir dire.

Q. And rapport with the jurors is not reflected in a cold record; isn't that correct?

A. Well, it is when you ask no questions, as was done of Juror Pound on page

372. You can't build any rapport if you don't ask any questions.

So I would say there were some instances here were, while I concede, I don't see the juror's demeanor. I'm just reading a cold hard transcript when you're only asking someone a handful of questions or no questions, that is difficult to build rapport.

Another example I would use is Juror Hudson. Defense counsel begins on page 363. He asks four questions.

Q. Let me just follow up.

A. That would be my response, sir.

Q. Do you know what rapport Solicitor Bailey developed on his questions with either Juror Pound or Juror Hudson?

A. Well, he got a death sentence, so my initial response was his rapport must have been good, and I don't mean that to sound like a flip answer. I don't mean that.

Q. So you assume death sentences are based upon rapport jurors have with the lawyers --

A. No, sir.

Q. -- as opposed to the facts of the

case --

A. No, sir.

Q. -- or circumstances of the case?

A. No, sir, not at all, and I didn't mean to suggest that. Rapport is something both sides try to build with jurors, so jurors feel comfortable with those attorneys, so when those attorneys are doing cross-examination or direct, the jurors are comfortable and listening to them. It's kind of a getting-to-know stage.

And even trial judges, I've seen sometimes in voir dire, tell the jurors when they come out, This is our getting-to-know-you stage. So certainly, no, rapport is not something that will influence the case one way or the other.

MR. ZELENKA: I have no further questions.

FURTHER EXAMINATION

BY MR. BLUME:

Q. I have just a few.

Rapport -- based upon your experience, would you ever, even though you thought you had established a good rapport with

a juror, take an automatic death penalty juror because you had a good rapport with him?

A. No. Rapport is not something you use to either excuse or keep a juror.

Q. In fact, you might have good rapport with many people you disagree with about the death penalty?

A. That's right. And rapport, I didn't mean to imply is a basis for keeping someone or striking someone. It's not a basis of whether you're going to win or lose the case. It's really just something the attorneys for both sides can do to make the jurors feel comfortable with those lawyers.

Q. Would it be fair to say that, in your opinion and based upon your experience, what you want to know as trial counsel of a capital case, is what does this juror think about the death penalty?

A. That's the core issue, and that's why I come down in some that -- it just strikes me that reasonable minds could not disagree, in essence, that Brenda Wise and Juror Barron should not have been on this jury.

Q. Would it be fair to say the only

way -- based upon your experience and your opinion, the only way you can know what a juror's opinion is on death is to ask?

A. Absolutely. You've got to ask. You've got to find out. You can't make assumptions.

To use an example, I've had some attorneys suggest that they may not want to ask a juror a question because of stereotype assumptions, whether those stereotype assumptions be based on the juror's employment or gender or other attributes. And my humble advice is always, Don't make those stereotype assumptions. You've got to ask the juror in a basic threshold level what their opinion is. That wasn't done here.

MR. BLUME: That's it.

MR. ZELENKA: Nothing further.

(The deposition concluded at about 6:00 p.m.)

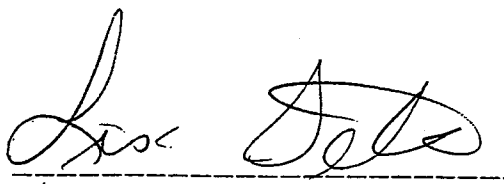
CERTIFICATE OF REPORTER

I, Lisa D. Jeter, Court Reporter and Notary Public in and for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on Page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth, and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 5th day of October, 1999, at Columbia, Richland County, South Carolina.



Lisa D. Jeter
Court Reporter, Notary Public
State of South Carolina at Large
My Commission expires
September 11, 2002

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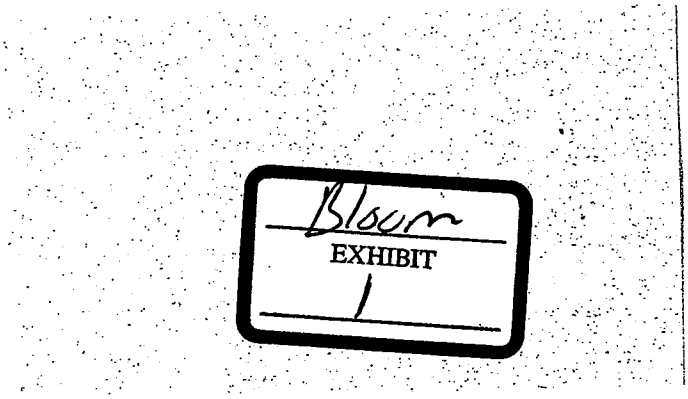

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CALHOUN | ) | No. 98-CP-09-101 |
| **HERMAN LEE HUGHES, JR.,** | ) | |
| Applicant, | ) | |
| v. | ) | THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF |
| **MICHAEL MOORE,** Commissioner, Department of Corrections, and **CHARLES M. CONDON,** Attorney General, State of South Carolina, | ) | |
| Respondents. | ) | |

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

2. The sentence was imposed by the Calhoun County Court of General Sessions.

3. Applicant was indicted by indictment numbers 94-GS-09-153 and 94-GS-09-154, 94-GS-09-155, and 94-GS-09-156, and convicted and sentenced for assault and battery with intent to kill, murder, armed robbery, and grand larceny of a vehicle.

4. On September 12, 1995, applicant was sentenced as follows:

(a) Murder - Death;

(b) Armed Robbery - 25 years;

(c) Assault and Battery with Intent to Kill - 25 years;

(d) Grand Larceny of a Vehicle - 5 years.

5. A finding of guilty was made after a plea of not guilty.

6. The applicant appealed from the judgment of conviction and sentence.

7. (a) The courts to which applicant appealed:

(i) The South Carolina Supreme Court.

(ii) The United States Supreme Court.

(b) The result in each court to which applicant appealed:

(i) Convictions and sentence of death were affirmed.

(ii) Petition for Writ of Certiorari denied.

(c) The date of each result:

(i) Convictions and sentence affirmed on October 27, 1997. Rehearing denied November 20, 1997.

(ii) Petition for Writ of Certiorari denied on April 27, 1998.

(d) Citations of any written opinion or orders entered pursuant to such results:

(i) State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997).

(ii) Hughes v. State, 118 S. Ct. 1674 (1998).

8. Not applicable.

9 & 10. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9(a) *Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.*

10(a) Although South Carolina law in 1994 required a "full investigation" prior to a decision to transfer a juvenile from family court to General Sessions Court, the State arbitrarily failed to comply with this statutory obligation. Hicks v. Oklahoma, Additionally, the hearing itself did not satisfy minimum standards of due process as delineated in Kent v. United States, 381 U.S. 902 (1965). The defects in the waiver hearing include, but are not limited to, the following:

(1) The family court lacked information concerning Applicant's mental retardation/borderline intellectual functioning and other cognitive limitations.

(2) The family court heard no evidence about Applicant's potential for rehabilitation within the juvenile system, yet concluded (without any evidentiary basis) that the Applicant could not be rehabilitated within the juvenile justice system.

(3) The family court heard incomplete and inaccurate information concerning the facts of the offenses and the Applicant's degree of culpability.

(4) The family court based its decision to transfer the Applicant to General Sessions Court based on impermissible considerations, such as the desire to "send a message" to other juveniles.

9(b) *Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

10(b) Applicant's counsel at the family court waiver hearing failed to provide adequate representation. Counsel's deficiencies include, but are not limited to, the following:

(1) Counsel failed to secure necessary records and testimony to demonstrate Applicant's mental retardation or borderline intellectual functioning and to show Applicant's potential for rehabilitation within the juvenile justice system. See, e.g., State v. Bryant, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988)(finding counsel at waiver hearing ineffective for failing to introduce evidence regarding potential for rehabilitation), rev'd in part on other grounds, 569 A.2d 770 (N.J. 1989).

(2) Counsel's failure to adequately prepare and secure records prevented counsel from effectively cross examining the State's witnesses, who testified (wrongly) that Applicant had never been in special education.

(3) Counsel failed to present evidence that Kelsey Pearce, not Herman Hughes, planned and was the primary perpetrator of the crimes.

(4) Counsel failed to make a timely motion for an evaluation by the Department of Juvenile Justice.

(5) Counsel also failed to object to the family court's improper reasons for transferring Applicant to General Sessions Court, which included the desire to "send a message" to other young people and the belief that DJJ "provides no rehabilitation."

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(c) *Applicant was denied the effective assistance of counsel at the hearing to determine his competency to stand trial, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

10(c) Despite evidence that Applicant was both mentally retarded and developmentally immature, trial counsel conceded, without presenting any argument or testimony, that Applicant was competent to stand trial. State v. Johnson, 395 N.W.2d 176 (Wis. 1986) (affirming 374 N.W.2d 637 (Wis. Ct. App. 1985)) (finding counsel ineffective for failing to raise viable issue concerning defendant's competence to stand trial). Counsel's concession was both unreasonable and prejudicial. Strickland v.Washington, 466 U.S. 668 (1984).

9(d) *Applicant was denied the effective assistance of counsel during jury selection, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.*

10(d) Trial counsel failed to conduct an adequate *voir dire.* Counsel's deficient performance includes, but is not limited to, the following:

(1) Counsel failed to challenge for cause a number of jurors who were acquainted with the families of the victims and who had actually spoken with them about the crimes and about their loss. See Morgan v. Illinois, 504 U.S. 719 (1992)(defendant has right to impartial jury).

(2) Counsel failed to rehabilitate a number of jurors who expressed reservations about the death penalty, see Witherspoon v. Illinois, 391 U.S. 510 (1968)(jurors with reservations about death penalty may not be excluded for cause if they are able to fulfill their oath as jurors), and failed to challenge for cause jurors who indicated that they were unable to consider mitigating circumstances or would automatically vote for death upon a finding of guilt. See Morgan v. Illinois, 504 U.S. 719 (1992)(jurors who would automatically vote for

death are excludable for cause).

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(e) *Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments.*

10(e) Applicant's trial counsel failed to conduct an adequate and independent investigation of Applicant's case in order to develop and present testimony to create a reasonable doubt as to Applicant's guilt, to effectively cross-examine the State's witnesses, or to contradict the State's theory of the case. Counsel's deficient performance includes, but is not limited to:

(1) Counsel failed to adequately prepare and present evidence impeaching the credibility of Henry Daniel Owens Jr. Steinkuehler v. Meschner, ___ F.3d ___, 1999 WL 274826 (8th Cir. May 6, 1999); Williams v. Washington, 59 F.3d 673 (7th Cir. 1995).

(2) Counsel failed to adequately prepare and present evidence regarding Kelsey Pearce's planning of, and involvement in, the offenses. Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(f) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to*

*the United States Constitution.*

10(f) Applicant's trial counsel failed to adequately develop and present expert and lay testimony in mitigation and in rebuttal to the aggravation evidence presented by the state. In addition, counsel failed to object to the State's introduction of inadmissible evidence, failed to object to prejudicial portions of the State's closing argument and to certain aggravating circumstances submitted by the State, and failed to ensure that the jury was properly charged. Counsel's deficient performance includes, but is not limited to:

(1) Counsel failed to adequately prepare and present evidence to the retained defense experts in order to ensure a competent, complete, and thorough evaluation, an accurate diagnosis, and adequate preparation for their testimony. See, e.g., Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 1856 (1998).

(2) Counsel failed to secure necessary expert testimony supporting applicant's developmental, mental, and social impairments. Adbur' Rahman v. Bell, 999 F. Supp. 1073 (M.D. Tenn. 1998)(finding counsel ineffective for failing to seek needed expert assistance).

(3) Counsel failed to present evidence that Applicant's school failure stemmed, in large part, from the school system's failure to provide appropriate special education and remediation.

(4) Counsel failed to adequately cross-examine the State's witnesses or to object to the admission of Applicant's school disciplinary records.

(5) Counsel failed to object to, or move to limit, the excessive and otherwise inadmissible victim impact evidence presented by the State.

(6) Counsel failed to object to the solicitor's prejudicial and inflammatory closing argument during the sentencing phase of trial. Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. 1998)(finding counsel ineffective for, *inter alia*, failing to object to solicitor's improper arguments during sentencing).

9(g) *Applicant was denied the effective assistance of counsel under South Carolina law and the Sixth and Fourteenth Amendments by trial counsel's failure to argue that international treaties and customary international norms binding upon the United States forbid the execution of juvenile offenders.*

10(g) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms binding upon the United States ban the execution of juvenile offenders. Despite this binding international law, which applies to the States through the Supremacy Clause of the United States Constitution, trial counsel failed to raise the illegality of the death penalty for Applicant. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(h) *Applicant's death sentence violates international treaties and customary international norms binding upon the United States.*

10(h) Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), a treaty which the United States ratified in 1992, bans the use of the death penalty for those under the age of eighteen at the time of the crime. Moreover, international customary norms

binding upon the United States ban the execution of juvenile offenders.

9(i) *Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

10(i) Appellate counsel failed to raise on appeal any proportionality argument concerning the propriety of a death sentence for a sixteen year-old defendant with mental retardation or borderline retardation. Appellate counsel's failure was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(j) *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law in that counsel failed to object to the trial court's sentencing phase charge which effectively prohibited the jury from properly considering mitigating circumstances.*

10(j) During the sentencing phase charge, the trial court instructed the jury that mitigating circumstances could be considered only if "the Defendant has proven [the existence of statutory mitigating circumstances] by any evidence." ROA at 1698. The court then instructed that statutory mitigating circumstances are only those which reduce the "degree of moral culpability for the commission of the act of murder." ROA at 1698. Moreover, the trial court diminished the important role of nonstatutory mitigating circumstances by charging the jury that "a nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the Defendant claims served the same purpose; that is, to reduce the degree of his punishment for the offense." R. at 1700 (emphasis added). In addition, the trial court's written

instructions refer only to statutory mitigating circumstances. These instructions effectively prevented the consideration of applicant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 484 U.S. 1020 (1988).

9(k) *Applicant was denied the effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by appellate counsel's failure to appeal the trial court's ruling that the South Carolina Constitution permits the imposition of the death penalty upon a defendant who was a juvenile at the time of the alleged crime.*

10(k) Trial counsel moved to bar the State from seeking the death penalty against applicant, arguing that imposition of the death penalty for a crime committed while the defendant was a juvenile violates both the United States Constitution and the South Carolina Constitution. After hearing oral argument, the trial court concluded that "the appropriate case law, including that of South Carolina, does not suggest that one . . . who was sixteen at the time of the alleged commission of the crime cannot suffer supreme penalty if a jury of 12 find it is warranted." (emphasis added). Appellate counsel failed to appeal the trial court's finding on the state constitutional issue, despite the lack of any controlling South Carolina Supreme Court decision concerning the issue. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(l) *Alternatively, in the event the court finds that the issue concerning the South Carolina Constitution in Ground 9(k) was not preserved for appeal, applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States*

*Constitution and relevant South Carolina law by trial counsel's failure to obtain a ruling regarding whether the imposition of the death penalty upon a person who was a juvenile at the time of the crime violates the South Carolina Constitution.*

10(l) Although trial counsel's written Motion to Bar Imposition of the Death Penalty against Applicant relied, in part, on state constitutional grounds, applicant failed to argue the state constitutional issue at the hearing on the motion. Furthermore, by failing to obtain a ruling from the trial court, he did not preserve the issue for appellate review. Counsel's omissions were both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

*9(m) Applicant was denied his statutory right to the appointment of two attorneys to represent him at his capital trial.*

10(m) Despite applicant's indigence, the trial court failed to appoint a second lawyer to assist in his representation, as required by S.C. Code Ann. § 16-3-26 and Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d 793 (1988).

*9(n) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina law by trial counsel's failure to move for the appointment of a second attorney and by the court's failure to appoint a second attorney.*

10(n) Because of his indigence, applicant was entitled under S.C. Code Ann. § 16-3-26 to the appointment of a second attorney. Nevertheless, upon information and belief, applicant's trial counsel failed to move for the appointment of a second attorney, and the court did not appoint a second attorney. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984); see also Diddlemeyer v. State, 296 S.C. 235, 371 S.E.2d

793 (1988).

9(o) *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to object to the trial court's instruction on accomplice liability.*

10(o) The trial court instructed the jury that "[w]hen several people pursue a common design to commit an unlawful act and each takes a part agreed upon or assigned to him in an effort to ensure the success of the common understanding, the act of one is the act of all, and all are presumed to be present and guilty." ROA at 1255. This charge failed to include all the elements of accomplice liability, see, e.g., Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973), and also suggested to the jury that it must presume guilt even absent proof beyond a reasonable doubt of all the elements of the crime. Cf. In re Winship, 397 U.S. 358 (1970) (prosecution must prove all essential elements of crime); Sandstrom v. Montana, 442 U.S. 510 (1979) (invalidating instruction that arguably shifted burden of proof away from prosecution). Trial counsel failed to object to this charge. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(p) *Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and relevant South Carolina law by trial counsel's failure to request a specific jury instruction regarding accomplice credibility.*

10(p) Accomplice Daniel Owens testified at the guilt phase of applicant's trial, stating, *inter alia*, that applicant had admitted shooting both victims. Mr. Owens was a relative of another alleged accomplice, Kelsey Pearce, and also had been offered a deal by the State in exchange for his testimony against applicant. Despite these facts, trial counsel failed to request a specific

cautionary instruction concerning the assessment of accomplice credibility. Counsel's omission was both unreasonable and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(q) *In violation of the Sixth and Fourteenth Amendments to the United States Constitution, applicant was denied effective assistance of counsel at his sentencing trial by counsel's failure to object to the State's introduction of Applicant's school disciplinary reports as evidence in aggravation of punishment.*

10(q) Pursuant to S.C. Code § 16-3-20(B), "[o]nly such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible." With respect to Applicant's background, the Notice of Evidence in Aggravation of the Punishment alleged that the State would seek to introduce

> evidence as to the defendant's character, mentality, background, prior adult and juvenile acts of violence, adult and juvenile crimes and other unlawful conduct, prior adult and juvenile violations of laws, rules, regulations and/or ordinances, prior criminal adult and juvenile records and nature of said crimes, propensity to commit or attempt to commit acts of violence or bodily harm as an adult and a juvenile, propensity for violence and unlawful conduct as an adult and a juvenile, disregard for peace and good order as an adult and a juvenile, and other similar characteristics of the defendant, as an adult and a juvenile, by the testimony of victims, witnesses, police officers, statements by the defendant and other relevant testimony, photographs, and exhibits. ROA 1904.

At the sentencing phase, the State sought to introduce disciplinary reports and school records and the corroborating testimony of records custodians to show that Applicant was behaved poorly during middle school. See ROA 1332-47. The disciplinary reports detailed a series of infractions for disruptive and disrespectful conduct and consequent suspensions.

See ROA 1920-35. Defense counsel raised no objection and the evidence was subsequently admitted.

The State's Notice makes no mention of school disciplinary records. The Notice's references to juvenile violations, propensity for unlawful conduct and disregard for peace and order are vague. Those categories, as well as the others, are so broad in scope that they failed to provide Applicant with reasonable notice that the State sought to introduce Applicant's middle school disciplinary records. Applicant, therefore, was not "given a fair and complete opportunity to respond to each factual allegation used the State as a justification for a sentence of death." See State v. Riddle, 353 S.E.2d 138, 141 (S.C. 1987). Accordingly, introduction of the evidence of applicant's middle school disciplinary records violated S.C. Code § 16-3-20(B) and deprived applicant of due process of law. Ibid.; see Gardner v. Florida, 430 U.S. 349 (1977).

Defense counsel, therefore, should have objected to the introduction of the school records as evidence in aggravation. Further, counsel should have and failed to object to the admission of the school records on hearsay grounds, see Evidence Rule 803(6), as well as on the ground that an improper foundation had been laid for the admission of the records under state law, see S.C. Code § 19-5-510. The introduction of the school records was particularly damaging to Applicant because, as a result of the lack of notice, the information was offered in an effectively irrebutable manner. Although the records custodians presented by the State may have been able to authenticate the records, without notice Applicant was unable to call witnesses to verify the accuracy of the information contained within those records. Defense counsel's failure to object to the introduction of the evidence was,

therefore, both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

9(r) *Applicant did not knowingly or intelligently waive his right to present a case in defense of his innocence and was thereby denied due process of law as guaranteed by Article 1, § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.*

10(r) Prior to opening statements, defense counsel announced to the court that, as a matter of strategy, the defense would admit to Applicant's involvement in the crime, but not to Applicant's guilt of the charged offenses. ROA 761-63. The trial judge then asked Applicant whether he had been informed of and agreed with defense counsel's strategy to admit his "involvement in th[e] affair" -- "that [he] was in, around, upon and a part of it" – and Applicant answered affirmatively. ROA 765.

Insofar as there was an understanding between Applicant, defense counsel, and the court with respect to admitting involvement but not guilt, defense counsel betrayed that arrangement during opening remarks to the jury. During the opening statement, defense counsel announced to the jury that applicant was not only involved in, but also guilty of the crimes charged:

> This young man, you will find the evidence, is involved. His guilt under the law – you'll hear about the felony murder rule. His guilt is clear. It does not matter who had the gun. It does not matter who pulled the trigger. If you combine to commit a crime and people's lives are taken, you're guilty. ROA 809.

Based upon the colloquy that took place between the trial court and applicant, it is evident that the waiver was secured upon an erroneous premise. Although Applicant

responded affirmatively to the trial judge's question as to whether Applicant agreed to admit his involvement, Applicant was never asked whether he wished or agreed to admit his guilt of the charged offenses, and there is no evidence that he understood the court's question as such. Given that Applicant is mentally retarded and was only sixteen years of age at the time of the waiver, it is especially unlikely that Applicant would have understood such subtlety in the proceedings. See State v. Orr, 403 S.E.2d 623, 625 (S.C. 1991) (recognizing that scrutiny of waivers of rights is heightened in instances where the defendant may have limited mental ability, such as mental retardation; see also Butler v. State, 397 S.E.3d 87, 88 (S.C. 1990); State v. Arthur, 374 S.E.2d 291, 293-94 (S.C. 1988).

Defense counsel's opening remarks, therefore, effectively deprived Applicant of the right to present a defense. Waiver of a constitutional right must be competent, intelligent, and on the record. Taylor v. Louisiana, 414 U.S. 17, 19-20 (1973); Johnson v. Zerbst, 304 U.S. 458, 465 (1938). Because Applicant did not make a knowing, voluntary, and intelligent waiver, see State v. Cooper, 439 S.E.2d 276 (S.C. 1994); State v. Charping, 437 S.E.2d 88 (S.C. 1993); State v. Orr, 403 S.E.2d 623 (S.C. 1991); State v. Reed, 362 S.E.2d 13 (1987) (S.C. 1987), this error constitutes a violation of Applicant's Sixth and Fourteenth Amendment rights.

*9(s)* *Applicant was denied due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments in that the state elicited testimony during direct examination of a witness that the solicitor either knew or should have known to be false.*

10(s) During direct examination of State's witness Henry Daniel Owens, Jr. -- who was facing charges of misprision of a felony, accessory before the fact of murder, and accessory

before the fact of armed robbery relating to the same incident for which Applicant was charged -- the solicitor elicited testimony from the witness with respect to his plea agreement. The witness divulged that he pled guilty to misprision and had agreed to testify in exchange for the State's dismissal of the other charges against him. ROA 823. The witness further stated that for the misprision charge he was facing "up to fifteen" years in prison. ROA 823. Specifically, the following colloquy occurred:

Q. Would you tell the jury what that plea agreement is?

A. I plead guilty to misprison [sic], and they won't charge me with the accessory charges.

Q. All right. And do you know how much time you're facing on the misprision charge?

A. Up to 15.

Q. Okay. . . .

ROA 823.

The solicitor knew or should have known that the witness was not facing up to fifteen years for the offense of misprision of a felony. Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As codified by federal statute § 18 U.S.C. 4 (1994), the offense is a misdemeanor not punishable by more than three years in prison. Although, under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) (noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term), the witness's claim that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript

of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., 5 (court asking Owens, "[d]o you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "[y]es, sir").

By not only eliciting but affirming the witness's misstatement, the solicitor improperly and intentionally created a false and misleading impression and, thereby, denied Applicant due process of law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968);Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935); see also Johnson v. Mississippi, 486 U.S. 578 (1988).

9(t) *Applicant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by counsel's failure to object to the solicitor's elicitation of false testimony during the direct examination of a witness.*

10(t) The relevant facts in support of this claim are set forth in 10(d) above. Defense counsel raised no objection to the solicitor's elicitation and affirmance of the false testimony. Defense counsel's failure to object to the introduction of that evidence was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984).

11 & 12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been previously presented to this or any other court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was represented at trial by Phillip F. Newsome. On direct appeal and for the Petition for Writ of Certiorari Applicant was represented by Joseph L. Savitz, III, of the S.C. Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, SC 29201.

18. Applicant seeks the vacation of his convictions and sentences.

19. Applicant is not under sentence from any other court.

Respectfully submitted,

Pamela A. Wilkins

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ATTORNEYS FOR PETITIONER

October 7, 1999.

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | |
| COUNTY OF CALHOUN ) | |
| **HERMAN LEE HUGHES, JR.,** ) | |
| ) | |
| Applicant ) | |
| ) | **CERTIFICATE OF SERVICE** |
| ) | |
| v. ) | |
| ) | |
| **MICHAEL MOORE,** ) | |
| Commissioner, S.C. ) | |
| Department of Corrections, and ) | |
| **CHARLES M. CONDON,** ) | |
| Attorney General, State of ) | |
| South Carolina, ) | |
| Respondents. ) | |
| ) | |

I do hereby certify that I have served upon the attorney for the Respondent a Third Amended Application for Post-Conviction Relief in this action by hand delivery and by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 7th day of October, 1999, in Columbia, South Carolina.

Pamela A. Wilkins

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN )

HERMAN LEE HUGHES, JR., ) Case No. 98-CP-09-101
)
Applicant, )
)
versus ) TRANSCRIPT OF RECORD
) (Post-Conviction Relief)
MICHAEL MOORE, COMMISSIONER, )
DEPARTMENT OF CORRECTIONS, )
AND CHARLES M. CONDON, )
ATTORNEY GENERAL, STATE OF )
SOUTH CAROLINA, )
)
Respondents. ) October 11-13,1999
) Conway, South Carolina

B E F O R E :

THE HONORABLE PAULA H. THOMAS, Judge.

A P P E A R A N C E S :

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Attorneys for the respondents.

JEAN S. JOHNSON
Circuit Court Reporter

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COURT'S STATEMENT RE: LOCATION OF HEARING AND ADMISSION OF MS. JOHNSON PRO HAC VICE

THE COURT: This is the case of Herman Lee Hughes, Jr., as the applicant, vs. Michael Moore, Department of Corrections, Charles Condon, Attorney General, and The State of South Carolina.

This is the third amended application for post-conviction relief, and the time and date of the hearing, the parties have agreed that the hearing would be held in Conway in Horry County, and for that, I wish to thank you.

It was the right of the defendant or the applicant to actually be heard in Orangeburg, but my understanding is that right has been waived, and it's being presented here in Horry. Is that correct?

MR. BLUME: Yes, Your Honor.

THE COURT: All right. Also, in chambers there was some discussion of an attorney being admitted for limited purposes of examination of a specific witness, and there had been no objection. Is that correct?

MR. ZELENKA: That's correct. That's for admission pro hac vice, Sheri Johnson of Cornell Law School, and we have no objection.

THE COURT: Very good. Also, any further motions will be held later this afternoon as there are

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some witnesses that need to take some flights out, so we understand that that will be -- those motions will be reserved to be heard the latter part of this day. All right. We'll begin.

MR. BLUME: The only thing we need is the applicant.

THE COURT: We certainly do. I would have preferred him to be there for all that I've just said.

(Applicant's Exhibit No. 1 marked.)

MR. BLUME: The applicant would call Marty Beyer.

MARTY BEYER, BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: State your full name for the record please and spell your last name.

THE WITNESS: Marty Beyer, B-e-y-e-r.

THE COURT: Yes, sir.

DIRECT EXAMINATION BY MR. BLUME:

Q. Ms. Beyer, how are you currently employed?

A. I'm a clinical psychologist. Much of my work is doing consultation in child welfare and juvenile justice, as well as individual work with children and juvenile justice and children and their families and child welfare.

Q. And could you briefly tell us your education?

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A. Yes. I have a Bachelor's Degree from Vassar College and a Ph.D. in Clinical Psychology from Yale University.

Q. Would you mind briefly going through your employment history? You don't have to do everything but just give us some of the -- your employment history which is relevant to the issues that you're going to discuss today.

A. Well, after I completed my graduate training, I became a psychologist in a juvenile detention facility in Washington, D. C., and much of my work for several years after that was with delinquents in the District of Columbia. I later ran an organization of youth-serving providers in the District of Columbia and ran training programs for individuals who worked with delinquents, and then I became involved in, as an expert in, litigation against the juvenile facilities in the District of Columbia where I had previously been a consultant, and I became -- I was a member of a panel to work with the court to improve conditions in juvenile facilities, and then I began other consultation work in other states, both in juvenile justice and child welfare, some of the time as a result of being an expert and then being subsequently hired by the state to assist the state in improving services for children and

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families or improving juvenile facilities.

Q. Have you ever been at work with the Department of Justice on children's issues?

A. The Federal Department of Justice, yes. I worked with the Special Litigation Unit there, particularly in the Georgia juvenile facilities, which the Department of Justice investigated for conditions and lack of treatment for juveniles.

Q. And with the states, have you ever been involved in any cases in South Carolina?

A. Yes. I was involved in litigation against the -- the South Carolina juvenile facilities.

Q. Ms. Beyer, let me show you what's been marked as Applicant's Exhibit 1. Can you tell me what that is please?

A. Yes. This is my resume.

MR. BLUME: So, in order that I don't have to go through everything, I would ask that her CV resume be made part of the record. As I understand it, it's without objection.

MR. ZELENKA: No objection.

THE COURT: Without objection.

(Applicant's Exhibit No. 1 admitted into evidence.)

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. Ms. Beyer, would you -- again, I don't want to

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go through all of your publications, but have you written in the area of children's -- children law, children and the juvenile justice system?

A. Yes. In addition to publications in -- regarding children in foster care, I've written about understanding the childlike aspects of juvenile delinquents. I've written about services for -- to meet the emotional needs of juveniles in correctional facilities, and I've written about evaluations of juveniles in both those going into juvenile court and facing adult sentencing.

Q. And have you, also, done research and writing in the area of child development, child psychological development?

A. Yes.

MR. BLUME: Your Honor, at this time I would offer Dr. Beyer as an expert in child development and children and juvenile justice issues.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: All right. Without objection, I so find.

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. Dr. Beyer, at my request did you conduct an evaluation of Herman Hughes?

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A. Yes.

Q. And, more particularly, did you -- did I ask you to review records and examine Mr. Hughes in order to determine the significance of the -- of the fact that Herman was sixteen years old at the time of the offense, which resulted in his conviction and death sentence?

A. Yes.

Q. And did I ask you to look at the child development and psychological development issues?

A. Yes.

Q. Can you tell me what your evaluation consisted of?

A. I reviewed a number of records, including his school records, his evaluation at the Hall Psychiatric facility, another forensic evaluation, and I, also, read his statement and the statement of the witness, and, in addition, I reviewed expert testimony presented at the trial, and then, in addition to that, I interviewed him.

Q. You interviewed Mr. Hughes?

A. Yes. I'm sorry.

Q. And is the type of information which you reviewed in this case the type of information that you normally review in order to make -- to render your opinions?

A. Yes.

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Q. And before we go through your conclusions in detail and to lay them out for the court, could you briefly summarize what your conclusions are?

A. Yes. I concluded that, first, sixteen-year-olds, because of where they are in their cognitive and 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 trauma that he had experienced, and because of his alcohol abuse, was less mature than a typical sixteen-year-old and, therefore, less culpable. Third, I, in my opinion, Herman should not have been waived to the adult court and instead that family court should have continued their jurisdiction over him.

MR. ZELENKA: Your Honor, I would object and move to strike that last statement as irrelevant for these purposes for this hearing, what her opinion is whether he should have been transferred up. That's a judicial determination, and that goes beyond the area of expertise.

THE COURT: All right. Yes, sir.

MR. BLUME: First of all, it does not go beyond her area of expertise. It's part of what she does. She does waivers in this area, but a claim, a

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specific claim, in the application is that counsel was ineffective at the family court hearing because of failure to get an evaluation, for the failure to have Mr. Hughes evaluated, and failed to offer testimony to the effect that he shouldn't be waived up. It's directly relevant.

MR. ZELENKA: She gave a speculative opinion that the -- the judge, in fact, would not have transferred it when, in fact---

THE COURT: I will -- and I sustain the objection and ask you to be more specific in regards to what would have been proper at that level rather than reaching the conclusion.

MR. BLUME: Maybe it's a matter of Dr. Beyer's phraseology.

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. But, is -- as I understand it, is your opinion that if you had evaluated Mr. Hughes -- had been asked to evaluate Mr. Hughes at that time, it would have been your recommendation that the family court retain jurisdiction over Mr. Hughes?

A. Yes.

Q. I'm sorry. I didn't -- I think you had one other conclusion.

A. Yes. Lastly, I have doubts about whether

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Herman was competent by -- at this point I have difficulty evaluating that fully so many years later.

Q. Thank you.

THE COURT: All right.

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. Now, Dr. Beyer, coming to your conclusions and reaching the conclusions you've reached in this case, could you tell us what factors do you consider to be important when making an evaluation of a child or an adolescent?

A. Well, I'm interested in looking at where the young person is developmentally, how far have they progressed in their cognitive development, in the development of a stable identity, in their ability to reason morally, and what's been the impact of trauma on their development.

Q. And why do you consider those factors relevant?

A. Well, both based on research and my experience with adolescents, that those areas of development and the impact of the trauma on them are a way of getting a look at how far the young person has progressed and what's remaining for them in development.

Q. Is it fair to say that development isn't linear?

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A. Right. It's important to recognize that adolescent development is not a linear or -- or straightforward progress, but some children progress much more quickly in one area of development than another, and it's not necessarily related to age, so you can't tell where a young person is in their development simply by knowing their age.

Q. You mentioned a number of areas, and the first one that I understood you to talk about was cognitive development. Can you please tell us what do you mean by cognitive development and why you think that's an important factor?

A. Well, adolescents think differently than adults. The adult planning process is different, and the adult ability to see a number of options simultaneously and weigh them, which involves thinking abstractly about possibilities that the adult may not even have experienced, are skills that young adolescents simply don't have and that we see develop over the course of a young person's cognitive development. Here I mean something different from intelligence. A bright adolescent can still have immature thought processes.

Q. Can you briefly give -- you -- you talked a little about this in the abstract. Are there any examples or certainly in more detail some of the

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differences between how a sort of normal teenager or sixteen-year-old would think and an adult?

A. Well, one example of immature thought process is how present oriented adolescents are. They don't plan in the same way as adults, and they, in being present-oriented, they can go about an evening or a whole day with -- without a plan, and that contributes to their view often that unanticipated things that have happened to them were accidental because indeed they didn't expect those things to happen given their lack of planning. Secondly, adolescents normally take risks, but as a result of that, because they don't usually imagine the consequences of their actions, that can result in, again, in things happening that they simply can't anticipate because of the way that they think and the risk-taking that they are often involved in, and, lastly, a characteristic of adolescent thinking is to see only one choice. Often when they get involved in an activity, what they had envisioned was that it would happen in only one way, and when it doesn't unfold that way, they have a peculiar kind of rigidity in their thinking that may not allow them to choose an alternative at that point, and they continue on with the activity despite the fact that it hasn't unfolded the way they planned, they anticipated.

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Q. Okay. The second sort of area you mentioned was moral development.

A. Uh-huh (affirmative response).

Q. And can you tell me what is -- what you include in the moral development category?

A. What we see there is that child, thinking morally, are first only concerned with right and wrong when it comes to getting caught, and they progress to that -- from that to thinking about punishment, and then, as they progress further in their moral development, they're able to think about the possible harm that might be caused to others by their actions, and hopefully, as they move into adulthood, they will progress even further morally in being able to think about their actions in terms of the larger society, but, as I said, this is not an entirely predictable or linear process of development, and what we're interested in is what are the young person's moral values, and are they able to reason morally when they're presented with some kind of ethical problem.

Q. And in this category what are some of the differences between how a "normal" teenager would -- would think morally or develop morally and an adult?

A. Well, one thing is that a young person may know right from wrong, but under stress they may not be

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able to abide by their knowledge of right and wrong. Secondly, teenagers tend to be quite moralistic, and they object to unfairness and often will act to try to right a wrong that they see, sometimes being unable to think about anything else, other than that unfairness, and, third, teenagers tend to give more important to loyalty than oftentimes adult -- adults do in their moral reasoning. Adolescents' concern about another -- being loyal to another person may be the value that dominates their actions at a certain time, and, lastly, teenagers, even if they do have strong feelings for others, may have difficulty showing their empathy under -- in stressful circumstances.

Q. And you, also, mentioned -- well, you started about what you meant by it and some of the differences -- now the next category you mentioned was unresolved trauma or trauma issues. What do you include in that category?

A. Well, there what we know is that---

Q. Actually, I'm sorry, I skipped on -- I skipped identity.

A. You want to know about identity.

Q. I apologize. Let me back up. You -- the third category you mentioned was identity development, and what do you include in that category?

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A. Well, there what we see is the progression from childhood into a stable sense of identity in the young person, and for that to occur requires nurturing and success so that the young person develops confidence that they are a capable person, and here what we're looking for is we recognize that teenagers do try out different identities. They do sometimes experiment with behaviors that are not characteristic of themselves because they are trying to figure out who they are, what their stable identity is going to be. We, also, see that teenagers in becoming more independent, an aspect of their identity development, is greater autonomy and a desire to take charge of more things, and often that results in differences with authority figures as the teenager tries to assume responsibilities for areas where their parents or other adults formerly were totally responsible.

Q. Is it fair to say that in your opinion success and experiencing success is a crucial factor in this whole identity development category?

A. Yes. For a young person to develop a stable identity they have to be good at something. It may not matter what that is. They have to experience success, and we see that then having the result that they're able to imagine themselves in a positive way in the future

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in some kind of job or in some kind of role as an adult.

Q. And the sort of the last category that you mentioned was trauma and unresolved trauma and the effects of trauma. What do you -- what do you include in that category?

A. Well, there are a variety of traumas that can slow development in any of these areas. The prominent ones are abuse and loss, and there are many examples, of course. An abused youngster may fail to develop emotionally beyond the age at which they were abused, or the youngster who's experienced death may develop a depression or may use substances as a way of avoiding the pain of that death to themselves. Also though, there are other things that might be less traumatic for adults that are experienced as a trauma for children and can delay their development, particularly in the identity area. An example would be the young person who feels different and -- and ostracized may well -- that may well be so traumatic that they are not able to progress in a normal way in their identity development.

Q. Now, you talked about -- you've laid out your framework, which you assess a child's development and a teenager's development, and you've talked about some of

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the characteristics of normal sixteen-year-olds or normal teenagers and adults and adult thinking. Let me ask you this. In your opinion from the documents that you have reviewed for your assessment and the materials, was Herman Hughes a normal sixteen-year-old?

A. No, he was not.

Q. Can you tell us why not?

A. He was going through many of the aspects of normal adolescent development that I described, but those were affected by the trauma that he experienced, as well as his lower intellectual ability.

Q. Well, if -- if you don't mind, what might help the court or might help us talk about it, is maybe if we went back and looked at the specific areas we discussed before and talked about Mr. Hughes' cognitive development and moral development and identity development, so could we start with cognitive development and say why in your opinion his cognitive development was not only different from an adult but different from a normal, "normal" sixteen-year-old?

A. Yes. His cognitive development was both different from an adult and different from other adolescents at sixteen. First of all, because he was intellectually limited, testing had found that he had a lower IQ than is typical of adolescents. Secondly, he

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has a simplistic way of thinking about things. His thinking is concrete so that he cannot explain why or how this offense happened. When he recalls, and I quote him here, that the gun went off, that appears to be his experience of it and not that he is trying to avoid responsibility. Thirdly, he describes even less planning than is typical of adolescents who I have said don't plan, don't have the ability to plan well when they are younger adolescents. He describes himself going through life without a plan, and at the time of the offense he did not have a plan to rob someone or to hurt someone. Fourth, he took risks and did not imagine the consequences. He still can't believe the consequences of that night of his offense. He did not anticipate carrying a gun. He didn't -- when the gun was handed to him, he didn't imagine using it, and he did not in his description see the dangerousness or the risk involved in his co-defendant having the gun in the first place.

MR. ZELENKA: Your Honor, I would object and move to strike that last part of the testimony. It's based upon hearsay and not supported by the record in this particular case.

THE COURT: Are you talking about just---

MR. ZELENKA: Where she is saying---

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THE COURT: ---dealing with the---

MR. ZELENKA: ---what---

THE COURT: ---taking risks?

MR. ZELENKA: ---what Herman is saying, things he didn't know if -- it's contradicted by the record itself.

THE COURT: May I hear from you?

MR. BLUME: Sure. First of all, it's not truly contradicted by the record, but, secondly, it's not -- the record has very little on this, but, secondly, the expert witness rule itself says that an expert witness is -- is able to rely upon informa-- information which might not be admissible in coming to a conclusion. Hearsay is something that experts rely upon all the time. If you struck it out, no expert, no mental health expert, would ever testify in any case.

THE COURT: All right. I'm -- I'm going to allow it in. I'm certainly able to tell that this is what -- what their discussions have revealed to her.

MR. ZELENKA: Well, I -- I -- I guess that's my question is that because all of the materials she relied upon, there are certain factors which are clearly inconsistent with that information. If this is coming

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from her own discussions with Herman Hughes, that may explain that objection.

THE COURT: And that's my understanding.

MR. ZELENKA: It would be wrong in that circumstance.

THE COURT: All right. That's -- that's my understanding is that's from your conversations or your actual interview with Mr. Hughes. Is that correct?

THE WITNESS: Yes.

THE COURT: All right, and you'll be given an opportunity to cross-examine on that, if you desire. Yes, sir.

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. We talked about Mr. Hughes' cognitive development?

A. Right. The other points I would -- I would want to make is that at the time he did not see himself having another choice. He felt or he was limited in the way that he was thinking to feel boxed in to following his co-defendant and not -- and he did not consider saying no to his co-defendant as this offense was occurring, and, lastly, in addition, these immature thought processes and his intellectual abilities were further compromised by his being drunk.

Q. We've been talking about cognitive development

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and Mr. Hughes' cognitive development. What about his moral development?

A. In the area of moral development he believed that robbing and hurting people was wrong, but from what I can tell, he was unable to use his moral values because he was drunk. He does describe with great empathy several other individuals in his life showing him to have empathy, which, as I described, is an important component of moral development, particularly in his descriptions about his ailing grandfather. However, he says that he was unable until a year after the offense to feel for his victims, and in my experience in interviewing young people, often, both because of shock but, also, because of the peculiar sensitivity that adolescents have about being ashamed, their shame often makes them unable to feel for their victims for some time and is not necessarily a sign of a lack of empathy, and, last, loyalty to friends was an important value that he described to me, and it may partly explain why he didn't refuse when his co-defendant urged him to participate in the crime. He thought and presents his thinking as being simplistic, that his co-defendant was older, and he did what his co-defendant told him to do although I would put that in the loyalty context, knowing what I

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do about adolescents.

Q. Dr. Beyer, I'm going to talk to you about identity development, but before I do, there's one question that I notice I sort of forgot to ask you. You prompted me when you were talking about other adolescents that you have interviewed. Approximately how many teenagers or adolescents have you evaluated in your career?

A. I don't know. Hundreds.

Q. Now, on the identity development what -- how would you describe Herman Hughes' identity development?

A. The most striking aspect of his delay in terms of identity development is that he -- he did not have a stable sense of himself. He was not able to describe his being successful at anything. He struggled with -- with failing in school, and that is understandable given his third grade reading level when he was in regular junior high school and social studies class and English class that would require a much higher level of reading. He was not good in sports. He did not have a job goal nor could he describe viewing himself in any particular role in the future at that time. He had, also, not outgrown the phase of behaving to living up to the expectations of the people that he was around. In a

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sense this chameleon-like tendency in Herman was more benign than in the typical delinquent. He described his three friends that he hung around with most of the time, who, although ultimately they didn't graduate from high school, they, also, didn't get arrested, and he described their enjoyment of life together doing non-delinquent activities; however, he was the class clown, and this led, in pleasing other peers, it led him to be disrespectful to teachers, which resulted in his being suspended and eventually expelled from school, and on the night of the offense he was not with his other three friends, but -- but he described that as the first time that he was alone with the co-defendant, who was quite a different kind of -- of character and who provided him with what he said was much more alcohol than he was used to drinking, and he went along to fit in with him.

Q. Now, the last category -- well, let's just go back a few things you were talking about. You were talking about his academic or failures, and by the time he was sixteen he had failed a number of grades?

A. Yes.

Q. So that, I take it, that's one of the things that you relied upon, and when you were talking about a generally more benign drift, I take it by that you're

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referring to the fact that until really shortly before this incident, in fact, a week or so before, he had never been charged with any criminal activity?

A. Yes.

Q. The last category that you talked about was trauma, the effects of trauma and unresolved trauma, and in your -- basically in your evaluation did Mr. Hughes experience any trauma that made it even more difficult for him to develop?

A. Yes. I would see several areas of very significant trauma. The first is the school system's failure to meet his needs, which is a trauma that appears to have had a lifelong effect on him. Essentially the school system concluded that his third-grade reading level fit with his lower intelligence and, therefore, should not be remedied by special education, although as a younger child when he was tested in second grade, a learning disability was identified, and apparently it was never addressed through special education, and there are numerous indicators in the testing over the years that -- that he had a learning disability, which in other children, when it is properly addressed through the right kind of teaching techniques, can result in grade level reading, which certainly would make a big difference to school performance.

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Furthermore, he was not, according to any of his descriptions, exposed to any vocational education and given the disparity between his ability and -- or his tested skills and his ability, vocational services might have made him able to function in school and to have left school with a skill that then he could have envisioned himself in the future having as a job.

Q. Now, Doctor, you're obviously more schooled in this area than I am, but, as I understand what happened educationally, he was failing, and he was referred for an assessment when he was in the, I guess, sixth grade after he failed it for the second time -- been previously referred to---

A. Yes, in second grade.

Q. And then he failed a number of grades and was referred again, and, as I understand what happened -- and please correct me if I'm not right -- is they said, "Well, his IQ is just a teeny bit over 70, so he's not retarded, so he doesn't qualify for special ed, and there's no discrepancy on the one hand, and there's no discrepancy between his achievement and his IQ because we don't expect somebody with a low 70 IQ to pass anyway, so he's not learning disabled," so, therefore, he was essentially put in regular classes and permitted

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to fail?

A. But that's a complete misunderstanding of the federally funded special education programming because there are different types of special education. Being ineligible for a program for mentally retarded students doesn't make a youngster ineligible for special education, and, in fact, the learning disabilities programs in many special education departments are larger than any of the other disabilities, so his early testing and other subsequent evidence points to a reading disability that could have been addressed, as it is with many students, through a learning disabilities special education program, which he was not provided with from anything I can see in his school record, and he did not progress beyond third grade reading.

Q. Now, he was -- you have been talking about the sort of trauma in school area and this happening, he failed, and he was expelled as a result of discipline problems. You were, also, going to talk about other areas of trauma?

A. Yes. I think a very significant trauma was that when he was thirteen, his grandfather had a stroke that was -- that caused substantial paralysis and never resuming the same kind of functioning, and he describes

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his grandfather as his best friend. They did many outdoor activities together. His grandfather provided him with a great deal of guidance, and -- and the loss of that, I think, was a very significant trauma that -- that affected him ever after, and his description was a loss of interest in life. Herman's description was that he lost interest in life, and his -- the quote I -- I remember most was, "There was no hope," meaning for himself after his grandfather's stroke. It may have been, since he continued to help care for his grandfather for some time after his stroke, that -- that no one could fully appreciate how much he was grieving the loss of his grandfather as his best friend, and it -- it's, also, probable that this loss had another effect on -- on his life, which was that caring for his grandfather must have been -- required -- must have required much more time from his grandmother, and, as Herman describes it, he could get away with a lot more with his grandmother than with -- with his grandfather, who was much stricter, and so possibly because of her attention being occupied with caring for his grandfather, his grandmother may not have provided the kinds of limits which we know a youngster, who is still functioning in an immature way, requires, and -- and he himself describes the ways that he was able to get away

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with doing things when he was living with his grandmother during his grandfather's illness.

Q. I wanted to go back and set the table a little bit because you sit here and listen to it, and you go, "Well, okay, his grandfather, that would be significant," but really the historical record in this case indicates that his grandfather was, also, his adopted father?

A. Yes.

Q. And that he -- his parents were married at a very young age, that they separated and divorced, and then he was actually legally given up for adoption to his grandparents?

A. And -- and the record describes ways in which his experience of abandonment by his parents may have, also, been traumatic for him, as it is for -- for other children who have that experience.

Q. And what---

A. And -- and so that made his grandfather even more important than a grandfather would normally be for a youngster.

Q. Well, is this type of family development -- is that critical to a -- to a child's development or very important?

A. Yes. The nurturing that he received from his

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grandfather is -- was crucial in his life, but the -- and the loss of that would be very traumatic on him, as would the earlier sense of abandonment that he experienced.

Q. When you look at the interrelationship of the traumatic factors that you've mentioned, and, for example, there's no question in Mr. Hughes' case is he -- in Herman's case is he -- in school he began to have some disciplinary problems -- as a matter of fact, he had a number of disciplinary incidents -- you can't get away from that -- at school -- did you notice any relationship between that and his grandfather's illness?

A. Yes. Those disciplinary incidents occurred and increased enormously after his grandfather became ill.

Q. This is -- I've shown this to Mr. Zelenka, but just for demonstrative purposes, can you tell me what this is?

A. Yes. This is a -- a time line of Herman's life, and it has color-coded the major family events and -- and school disciplinary problems and criminal activities, and what we see and going according to his years in life, we see many instances of academic failure identified by the yellow dots and family

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disruptions occurring up until he's about fourteen, and then starting at fifteen, which is as his grandfather got sicker and sicker, we see all of these red dots, which are school disciplinary problems and then a cluster of -- of several arrests at the time of this crime.

Q. So, does this document sort of a downward spiral, I guess, for Mr. Hughes, or I don't know if that's the right phrase or not, but---

A. Yes, and you -- we can attribute that both to the trauma of the loss of his grandfather as his best friend but then, also, as the limit setter in his life at a time when an adolescent at fourteen and fifteen still requires adult guidance because of immature thinking, because of risk taking, because of and on a not fully formed identity and an inability to make good moral judgments. Because we know that those are normally occurring around fourteen and fifteen, it's crucial to have an adoles- -- have an adolescent have outside limit setting.

Q. Especially, I guess, combined in this area where the school failure was so prominent in his life?

A. Yes. School was not a rewarding experience. It was an unhappy experience for him, and -- and so the

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acting out, as it increased in school, would have required some adult intervention, both by the school and by family. The adolescent isn't going to be able to solve the cause of their school acting-out, particularly if it is because they can't do the work, and it's impossible for them to sit in the classroom being unable to do the work required of them.

Q. Overall, in your opinion then, did Mr. Hughes function like a normal sixteen-year-old?

A. No, he did not. He functioned at a more immature -- in more immature ways than a typical young person.

Q. Dr. Beyer, I'd like to turn to two final areas with you, and these were, as I understand it, the third and fourth conclusions, which you discussed previously, and the first has to do with the family court process and the waiver hearing, which took place in this case. Let me ask you this. Have you ever evaluated a child charged with a crime for the purposes of the waiver hearing?

A. Yes.

Q. Have you ever in your experience made recommendations to the Court about whether a child should be retained in family court or waived up to adult court?

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A. Yes, based both on their development and their amenability to rehabilitation in the juvenile system.

Q. Okay. Amenability, what do you mean by amenability?

A. Well, generally that's an important factor in considering whether the -- whether the family court should retain jurisdiction because the Court wants to know whether the young person is likely to benefit from the services that are available in the juvenile system.

Q. Based upon the evaluation that -- that you conducted, if you had evaluated Mr. Hughes in -- at the time of this case for that purpose, what would your recommendation to the Court have been?

A. I -- I would have recommended that he remain in family court, first, because of his intellectual deficits, his immature cognitive, moral, and identity development, and the impact of trauma, that he remained in immature, and in that sense belonged in family court; and, secondly, I would have recommended the family court retain jurisdiction because he -- it appears that he would have benefited from juvenile rehabilitative services. He had a lot of growing up left to do in all those areas of development. He

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was not a chronic juvenile offender. He had not received treatment in the juvenile system nor had he received treatment for his alcohol problem. He had not had the benefit of an appropriate education, and -- and it appeared that juvenile services would have helped him complete his development but, also, recover from the traumas that I described that he had in his life.

Q. Dr. Beyer, have you ever been asked to evaluate an adolescent's competency to stand trial?

A. Yes.

Q. And in your opinion or do you just use the same or different than when considering other types of competency issues?

A. Well, there's an additional area for adolescents beyond the adult competency areas of mental illness and low intelligence. Juveniles may not be able to assist counsel because of their immaturity.

Q. And in this case do you -- as I understood what you said at the beginning was is that it's difficult for you now to render an opinion that Mr. Hughes or Herman was incompetent at the time, that you have questions about it?

A. Yes.

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Q. And can you tell me what your concerns are?

A. Well, determining competency really can only be done at the time if we're looking at specifically how his immaturity at that time would have affected his ability to work with his lawyer.

Q. Are there some specific factors in your evaluation of Mr. Hughes, any specific things you're concerned about, what he might have, you know, what the issues might have been?

A. Yes. I think as I look at him today and hear his story from him and my reading of the record, the reasons that I question whether he could have assisted counsel back then is that, first, like many adolescents he thinks what happened was an accident since he was drunk and didn't act purposefully, and as a result he's unable to see his responsibility in the same way that an adult would, and that makes talking about it with his lawyer a -- a very difficult process or would have in my estimation then. Secondly, he remains a simple thinker, and that makes me think that back then he would have had difficult understanding abstract concepts or legal words, particularly because he thinks things over slowly, so things that would occur in the courtroom would perhaps go by too quickly for him to digest.

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Third, his difficulty in planning, as I described it, would have made it more difficult for him to envision the future well enough to plan hearings or to think about a plea or a sentence or any of the issues involved in -- in those. Fourth, he is -- he may have been an adolescent who wanted to please others, and that makes it possible that he would have said what he thought his lawyer wanted him to say and that he would not have spoken up if he couldn't understand something, and, last, because he's intellectually limited, he may well not have understood his rights and might have mistrusted counsel, so, for example, I gave him a competence, a series of competency questions, to see how he would respond to them that I usually use with juveniles to try to assess how their immaturity may affect their ability to work with their attorneys. I asked him this question. A fifteen-year-old is in court, and the judge calls his lawyer and the prosecutor up where they talk so quietly he cannot hear them. What does the fifteen-year-old think his lawyer is talking about? And he responded, "He's railroading him. His lawyer is helping them convict him," and I asked, "Is that just what a kid at fifteen would imagine?" and he responded, "No, it could have been what was really happening. Only some lawyers can be trusted." I, also,

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inquired -- another one of my questions that I use to assess competency is, "Did you ever feel your first lawyer did not understand you?" and his response was, and I quote, "He said he didn't ever believe any of his clients. I thought he must have had a bunch of clients who lied. I wasn't lying to him, but he didn't ever believe me," and those responses today to competency questions that I would normally ask a younger person cause me to wonder whether he would have been competent when he was sixteen.

Q. Please answer any questions that Mr. Zelenka or whoever from the attorney general's office cross-examines you.

THE COURT: Yes, sir. Cross.

CROSS-EXAMINATION BY MR. ZELENKA:

Q. Dr. Beyer, give me some understanding please of the case you were involved in against South Carolina and the South Carolina Juvenile Justice System?

A. Yes.

Q. When that was?

A. That was the Alexander S. case named after one of the youngsters who was a plaintiff, and the -- the judge -- it was an unusual arrangement for experts because the judge involved a group of experts to advise him rather than the experts being involved in the case

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from either side, and our role was to visit the facilities and put together reports on various aspects of the juvenile institution, so I -- my particular area was mental health services and some overlapping health and education services as they might relate to the emotional needs of the juvenile in that facility.

Q. What year was that, Doctor?

A. I believe it was in the early nineties, 1993 and '94.

Q. It was in 1993 and '94, and what was your opinion of the -- of the South Carolina Juvenile Justice System, particularly in the areas of education and mental health at that time?

A. Well, I didn't look at the whole system, but in the large juvenile facility at that time, there were many deficiencies in the mental health services that were provided, and -- and I believe that the outcome of the judge's actions in that case resulted in substantially more funding for staff for mental health services and educational and other services in the facility, as well as the development of additional facilities, I believe, although I have not followed that since my time in the state.

Q. So in 1994 you had an opinion then that the South Carolina Department of Juvenile Justice was

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deficient in education in mental health treatment. Is that correct?

A. Yes, in that facility.

Q. Okay. In -- let me just ask you a few questions. Do you have a moral objection to sixteen-year-olds or seventeen-year-olds being sentenced to death?

A. I view it as a penalty for an adult crime, and if the sixteen or seventeen-year-old was not thinking or reasoning like an adult, then I would think that they didn't commit a crime like an adult, and, therefore, it would seem to me that an adult penalty wouldn't fit them developmentally, so it's not -- it -- it's my view based on what I know about children.

Q. So you are saying that a sixteen-year-old should never be sentenced to death for committing the crime of murder?

A. If he's operating like a sixteen-year-old, he's not operating like an adult.

Q. Okay. What about a seventeen-year-old? Should a seventeen-year-old, acting as a normal seventeen-year-old, ever be sentenced to death in your opinion for the crime of murder?

A. It would depend upon how he was thinking, whether he was an adult in his thinking at the time.

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Most seventeen-year-olds are still progressing through adolescent development, and it's not complete at the age of seventeen, which is why the society doesn't allow seventeen-year-olds to have many adult responsibilities.

Q. So, you personally disagree with the South Carolina law the way it is right now, correct?

A. Yes.

Q. Because in South Carolina a sixteen-year-old who commits the crime of murder is charged with the murder and is treated as an adult, is an adult as a matter of state law. You're aware of that, aren't you?

A. Yes.

Q. So you disagree with South Carolina law the way it is now, and in your opinion no one who is sixteen should ever be transferred to an adult court for the crime of murder. Is that not correct?

A. No. I think there are times when the Court determines that a young person was thinking like an adult. What I'm saying is that that's something that has to be looked at individually. It cannot be based on the age of the person.

Q. So, when you're saying, "thinking as an adult," what you're saying is thinking as an eighteen-

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year-old or a nineteen-year-old but never as a sixteen-year-old. Is that correct?

A. I'm saying that at sixteen a young person could be anywhere in the process of completing their cognitive development or their moral or identity development for that matter. It could be much more like a younger adolescent, and conceivably some adolescents do function in a more adult-like way, and you have to determine that individually.

Q. But just so I'm clear, the normal sixteen-year-old is never acting in a way -- when I'm saying, "normal," I'm saying under your level of normalcy -- in a way that they should ever be treated as an adult. Isn't that correct?

A. I would never say never because that means that I am not looking at it individually, and from my perspective you have to look at it individually.

Q. Okay, but it would be extraordinary for you to have that opinion. Is that correct?

A. It would be the unusual sixteen-year-old who operates at -- thinks like an adult in all ways, yes.

Q. So, similarly, that individual who is functioning as a normal sixteen-year-old or seventeen-year-old should never be sentenced to death in your opinion, correct?

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A. If they're not thinking like an adult, they shouldn't have an adult criminal penalty associated with what they do, in my opinion.

Q. Have you given any written reports in this matter?

A. In this case?

Q. Yes.

A. No.

Q. And why have you not done that?

A. I wasn't asked to.

Q. Did you have any notes reflecting your meetings with Mr. Hughes?

A. Yes.

Q. Specifically what did Mr. Hughes tell you about the crime itself involving the date of Mr. Pressley and the assault on Ms. Hoffman at that time? What did he tell you?

A. He described the offense as -- at my request walking through very slowly his thought process that night starting---

Q. Let me just stop you. When did you have your interview with him? I don't believe you stated that previously.

A. I spent the day with him on October 6, 1999.

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Q. So you spent one day with him?
A. Yes.
Q. And that was October 6th?
A. Yes.
Q. 1999, which would be about one week ago?
A. Yes.
Q. In preparation for this hearing when Mr. Hughes is challenging his death sentence, correct?
A. Yes.
Q. Okay. Go ahead please.
A. So he described the large amount of alcohol that he had to drink about an hour or an hour and a half.
Q. How much alcohol did he say he had?
A. What he described drinking was a -- a six-pack of a kind of beer that has a higher alcohol content than many beers, and he couldn't recall whether those were twelve-ounce or sixteen-ounce containers.
Q. Did he tell you where he got that alcohol from?
A. From his co-defendant.
Q. From Kelsey Pierce?
A. Yes.
Q. Did he say Kelsey Pierce's name?

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A. Yes.
Q. Okay. Go ahead please.
A. And that he described his co-defendant borrowing a gun and his co-defendant coming up with the idea of the robbery although Herman couldn't explain where that idea came from. It seemed to him to be surprising.
Q. Let me stop you there.
A. Uh-huh (affirmative response).
Q. Did he describe to you where Kelsey Pierce got the gun from or who he got the gun from?
A. Yes. He said that he got it from his -- a relative of his.
Q. A relative of---
A. Mr. Pierce's.
Q. One of Mr. Pierce's relatives?
A. Yes.
Q. Did he describe what kind of gun it was---
A. No.
Q. ---at that time? Okay. Go ahead please.
A. So, being surprised with this idea seemed to be part of his very foggy thought process because of his drunken state, and that continued to be characteristic of his description of "I don't know why we went to the store. I didn't think it was really going to happen. I

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don't -- I -- I was confused. I was out of it," and -- and those descriptions go right up to the front door of the store.

Q. Okay. When did he say Kelsey told him about the robbery?

A. I -- shortly before they started -- they had previously been out and went home to the -- his co-defendant's and were drinking, and the idea came up at that time, so the way he described it, it would have been the same evening as the offense.

Q. Okay. Did he describe going into the Blue Diamond previously?

A. Yes.

Q. What did he tell you about that?

A. I don't recall anything other than that he was playing a video game and that the -- and that the person who was working at the time was at the time of their first visit was not the same individual who was working at the time that they returned.

Q. Okay, so he was aware that there were different individuals in the Blue Diamond Casino?

A. Yes.

Q. Did he tell you who the first group of individuals were and who the second group of individuals were?

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A. He told me that the first person -- I believe it was an individual -- was an older woman. I don't -- didn't get any more description from him than that, and the second person was a young man, and, also, in this store was a young woman, who he described as the young man's girlfriend.

Q. Okay. Did Herman tell you whether, in fact, he knew either Ken Pressley or Kelly Hoffman before?

A. He said he did not but that his co-defendant did.

Q. Okay. Now, how did he know that his co-defendant did?

A. He said that his co-defendant looked in the window and saw the young woman and said he couldn't go into the store and, therefore, that Herman would have to.

Q. Okay, so at that time, according to what Herman was telling you last week, he knew that there was a robbery, correct, that he was going to be involved in a robbery and had to go into the store, correct?

A. With some disbelief and confusion but, yes.

Q. Okay. He had been given the gun by Kelsey Pierce at that time or not?

A. I believe not until his co-defendant recognized the person in the store.

Q. Okay, so then he received the gun from Kelsey before he went into the store. Is that the first time or the second time that he went into the store?

A. As I understand it, there is time two and time three that occurred at the same second visit to the store, so there was the earlier visit to the store and then the return to the store, and he went in and came back out again unable to carry out any kind of robbery and -- and told his co-defendant that he couldn't do it.

Q. Okay, so the -- the information you got was the first time he went in he didn't shoot. Is that correct?

A. Yes.

Q. And then he went in a second time, and that's when he shot the individuals in the store, correct?

A. Yeah, the co- -- his co-defendant belittled him, and as a result of that and what I described as his not seeing any other choice at that point, which I view as being both the result of alcohol but also that kind of rigid thought process. I -- he didn't say no the second time. He went back in.

Q. And then the second time he went in he

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shot Kelly Hoffman twice and Ken Pressley once, correct?
A. His recollection of the shooting was that the gun went off, which surprised him, and again this is -- appears to be affected by his alcohol and by being startled by the noise of the keys being thrown down, although at his request being thrown down, and he startled, and he describes the gun going off.
Q. Okay. You apparently have not talked to his trial lawyer, Phil Newsom?
A. Correct.
Q. So, Mr. Newsom, who represented the defendant in -- at the trial, you're not aware of his deposition which has been given in this case?
A. No.
Q. You haven't looked at that?
A. No.
Q. So you're not aware that back at that time he described shooting the victim two times in preparation for the trial. You're not aware of that information?
A. I -- I am aware of that information through the victim's statement.
Q. Okay. You're not aware of any information as to whether or not Herman Hughes thought that Kelly

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Hoffman could identify him. You're not aware of any of that information, which may have been expressed back then?

A. No.

Q. Would that impact upon your opinion as far as whether he should have been transferred?

A. I'm sorry. Whether he thought---

Q. Whether he should have been transferred to adult court?

A. Whether he thought his victim could identify him?

Q. Yes.

A. It would depend. If the young person's view was that that gave them no choice, again I'm not excusing the behavior, but they might have a -- a distorted thought that -- I've heard this from -- from juveniles -- a distorted thought that if they know -- if they can identify me, then I have to protect myself from being identified, and I -- I would -- I recognize, of course, that that isn't abnormal thought, but it may be one that causes them to be boxed in to a corner where they are unable to say, no matter what, I should do what I know to be a right thing.

Q. Would it have changed your opinion?

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A. Not if the young person---
Q. Well, I'm talking about Herman Hughes.
A. Well, I don't know because I don't know how he would have described that. What I'm concerned about is how he thought at the time and was it the way that an adult would think, or was it the way that a child would think.
Q. Well, what -- what I'm saying is shortly before the trial at a time when these critical issues were coming up, Mr. Hughes was telling his lawyer something different, and what I'm asking you is if you had that same information from Mr. Hughes that he shot her because he thought that, perhaps erroneously, that she was able to identify him, would that information have impacted upon your decision; and, if I understand you correctly, it would not have, correct?
A. If he thought about it in a childlike -- in that childlike way that I've just described, no, then it would fit with other immature thought processes that I've described.
Q. Okay, so anytime an individual goes to rob any store, an adult making that same decision and -- and kills somebody to avoid being detected because they're a possible witness, that's a childlike

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action?

A. No. If the adult has the capacity to purposely choose another behavior -- to walk away, for example -- if that adult is capable under stress of thinking that way, as most adults are, then they -- they would do it in a -- in a -- they would then carry out the shooting in a purposeful way.

Q. Well, I thought -- I thought you just said Herman did walk away once?

A. He did.

Q. So he was able to function like that, correct?

A. Did you review Dr. Frierson's notes with Herman Hughes based upon the answers that he gave to Dr. Frierson concerning competency to stand trial? Did you look at that material?

A. I looked at his report on competency.

Q. So you didn't look at -- at the raw data material---

A. No.

Q. ---from Dr. Frierson? Was that provided to you, and you didn't look at it, or did you choose not to ask for it?

A. It was not provided to me. I did not ask for it.

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Q. Would that be important to you to have that information from another forensic specialist who interviewed Herman Hughes contemporaneous to the time of the trial and made a determination of competency to stand trial to see exactly what the basis for that evaluation was?

A. What I read in the report led me to think that it was a standard competency determination based on whether he was mentally ill or had low enough intelligence that he did -- was unable to answer the factual questions regarding the role of the attorneys and the judge in the court, the meaning of the hearings, the -- the crime of which he was accused, and having answered those factually correctly, as is usually the case in an adult competency determination, he was found to be competency, and -- and I was making my -- my competency assessment when I'm looking at whether immaturity might compromise the young person's ability to assist counsel. I'm not looking at their factual understanding of what goes on in the case. They may well be intelligent enough and not mentally ill and, therefore, competency to answer factual questions, which he was at that time.

Q. So you accept for a fact he was able to understand the role of the solicitor, the role of his

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defense lawyer, the role of the court, the potential punishment he was facing. You acknowledge that he had -- was able to understand those factors?

A. That was the finding of the evaluator at the time on those.

Q. You don't have any evidence to dispute that, do you?

A. Right.

Q. Okay. You don't have any evidence that Mr. Hughes did not have an understanding of the proceedings as they were going on from the beginning to the end of that particular trial. Isn't that correct?

A. I gather that he was able to answer factual questions about the proceedings in general. What I would be concerned about would be that because he processes information slowly, which I observed in my discussions with him, and because he does not even today tend to ask the question, "What do you mean?" or "I don't understand," that he could well have given the appearance of being present but not understood the words, the abstract concepts, of what was going on in the proceedings and not spoken up about it.

Q. Okay, but he seemed to be able to express to you now some four to five years later clearly a factual

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understanding of the circumstances of the crime as he perceives it. Isn't that correct?

A. Yes.

Q. It's not evidence saying to you any mental or amnesia under those circumstances, does it?

A. No, other than the incapacity as a result of the alcohol.

Q. And yet even with that incapacity he was able to describe to you his ability to attempt to conform his conduct to the requirements of law. When knowing that there was a robbery, he first attempted to leave, and then he went in and chose to complete that robbery. Isn't that correct?

A. Yes. He can't explain it, but he reported it.

Q. Well, how much does he have to explain a robbery? A robbery is going in to get money. That's the explanation for the robbery, isn't it, Dr. Beyer?

A. Yes, but from his point of view it was inconsistent with the kind of person that he was, with his knowledge of right and wrong, so explaining it means explaining it to himself, as well. Why would he do that? And that's what he can't explain.

Q. Okay. Inconsistent with the kind of person he

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was because he had been expelled from school for fighting? That's the kind of person Herman Hughes was. Isn't that correct?

A. Most of his expulsions were for being disrespectful.

Q. He did get expelled for fighting, correct?

A. Yes, sir.

Q. He was known to be a trouble maker by other individuals, or do you have information that he was known to be a trouble maker?

A. Other than the school record of expulsion and suspension, I don't.

Q. Okay, so you -- you haven't been exposed to -- to some of that testimony about his reputation?

A. No.

Q. Okay. Describe to me -- and I just want to be sure I understand this correctly -- you stated that when his grandfather or his adopted father was suffering under a stroke, he, Herman, cared for the grandfather. Is that correct?

A. He assisted in his care.

Q. Okay. Describe for me what he did to assist his -- his grandfather after his stroke?

A. His grandfather was paralyzed on one side and became increasingly incapacitated by that and so he

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assisted in the physical care of him, including lifting him up.

Q. Okay. Did he help feed him?

A. Yes.

Q. Did he cleanse him?

A. Yes.

Q. Did he brush his teeth?

A. I don't know.

Q. Did he help bathe him?

A. Yes, and helped to lift him up in that process.

Q. Okay. Did he -- did he do that on his own?

A. No. He assisted his grandmother.

Q. Okay. Was he ever attempting to -- to take that caretaker role at all during that time period of his life of his stricken grandfather?

A. To care for him alone?

Q. Yes. I mean, were there some times when the grandmother wasn't there that Herman on his own would choose to -- to do that?

A. I don't know.

Q. Okay. What did you learn about Herman's adaptive functioning, how he was able to care for himself during that time period while he was growing up?

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What information did you have about that?

A. It's very difficult to assess adaptive functioning after the fact. It's really something that the assessor has to be able to observe firsthand and inquire about from the individuals who can observe it firsthand at the time, so I gather from his report that he took care of his own daily personal hygiene and getting to school and -- and those kinds of normal adolescent self-care activities.

Q. You mentioned that there was a breakdown of vocational training with Herman. Is that correct?

A. That -- as I understand it, none was offered to him.

Q. At age sixteen he attempted to join the Job Corps. Isn't that correct?

A. Yes.

Q. What was the result of that based upon your evaluation?

A. He indicated that he wanted to leave the Job Corps and did because he was unhappy living there.

Q. Okay. What was he doing at the Job Corps, other than being unhappy living there?

A. He was taking up a -- the trade of welding.

Q. Okay, and what got him into the Job Corps?

A. He said that his mother encouraged him

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to apply to the Job Corps so that he could get a vocation.

Q. Okay. Now, when we're talking about his mother, because of the adoptive situation, who are we talking about?

A. His birth mother.

Q. His birth mother, Miranda?

A. Yes.

Q. Okay. What was his status in school at that time when he joined the Job Corps?

A. At that time I believe that he had -- he turned sixteen in the summer after he had failed in seventh grade.

Q. Okay, so he was not in school at all when his mother encouraged him to join the Job Corps, and he did that?

A. Yes.

Q. Correct? And then, at some time was he working in a job at the time this crime occurred?

A. No.

Q. Where did he get his mother?

A. From his grandmother is what he reported to me.

Q. Okay. How much money did he report to you that she gave him?

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A. I don't -- he didn't. I didn't ask him how much money he was receiving.

Q. Okay. Now, other than drinking alcohol on that day, did Herman express to you any involvement with drugs or intoxicants, other than at that particular time period?

A. He said that he had used marijuana periodically but that that -- that particular time he was drinking beer that evening only.

Q. Okay. When did he advise you that he began using marijuana?

A. I don't recall. He had used it off and on during his teen years.

Q. Okay, so at the time he was in school he was using marijuana?

A. From what I could tell, he was not a regular marijuana user. It sounded like he was a weekend alcohol user with periodic marijuana use but not frequent.

Q. Okay. Did he advise you where he got his marijuana during his school years?

A. No, I didn't ask him.

Q. Did he describe to you what impact, if any, the marijuana use had on his ability to function in school, take tests, pass courses? Was he ever

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intoxicated with marijuana at that time while he was in school?

A. I don't know.

Q. Now, did you -- did you say he was an alcohol abuser?

A. He used alcohol on the weekends. Again, it's very hard to in retrospect get an accurate assessment of the level of use of a person in order to classify them on a continuum of abuse, so it sounded like he used alcohol regularly but that he was not accustomed to drinking a six-pack of this type of beer at a time so that this was clearly in my opinion abuse and -- but it was way over what he was used to, but it's hard to recreate how much of an alcohol abuser he was.

Q. Based upon your review of the records, was Herman ever documented before by any discussion with his lawyers or anyone else prior to your interview with Herman, the amount of alcohol he took, he had on that day?

A. I don't know if he had.

Q. So you don't know whether there's any co-operation of that day either. Isn't that correct?

A. Yes, I don't know.

Q. So you don't know whether, in fact, he's

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on his ability to function that day. Isn't that correct?

A. Well, I would -- I guess I would see two -- two corroborative things. One is based on my interview, the way that he described his state is like the way other young people I have interviewed who have been high when they made decisions, described their state, and I, also, reviewed an affidavit from his co-defendant, which indicated that Herman was drunk at the time of the offense, so that was corroborative of Herman's report that he was drunk although not of the exact amount that he drank.

Q. Did that affidavit -- when did you see that affidavit?

A. I saw that affidavit after I had interviewed him.

Q. Okay. Have you ever spoken or reviewed the record of testimony from Kelly Hoffman, the surviving victim in the case?

A. I read her statement.

Q. Did she describe any alcohol on the part of the defendant?

A. I don't recall.

Q. If it is such a strong part of your diagnosis, don't you think it's important to check with the only

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don't you think it's important to check with the only witness, the surviving victim of the case, about what her opinion was, what her recollection was concerning that?

A. I think that more corroborative information about his amount, the amount of alcohol he had consumed prior to the offense and its effect on him could have been gathered at the time from a number of individuals, none of whom I would have ac- -- have had access to at this time.

Q. So at the time of the transfer hearing, when the State's case was presented, there was no indication at all that he was under any influence of alcohol at that time. Isn't that correct?

A. I don't know what was available.

Q. If there was -- you -- did I mishear you? I thought you said you read the transfer record in this case.

A. The---

Q. Am I in error?

A. Yes. I did not.

Q. So you haven't reviewed either the detention hearing, the detention order, the transfer hearing, or the transferral order in this matter. Is that correct?

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A. Right, just the testimony that I listed.
Q. Okay. In 1995 you certainly weren't an employee of the Department of Juvenile Justice because you were a witness against him. Isn't that correct?
A. Of the South Carolina?
Q. Department of Juvenile Justice, correct?
A. Right. I have never been an employee of theirs.
Q. So, if a request would have been made for Juvenile Justice Department input, you could not have given it because you were not an employee of the Department of Juvenile Justice as to whether the transfer would have been appropriate or not. Isn't that, also, correct?
A. Right.
Q. Just so I'm clear on some of your conversations with Mr. Hughes last week, did Mr. -- what did Mr. Hughes specifically tell you in your conversations with him that Kelsey Pierce told him to do?
A. His recollection was not clear. He could not remember the words that his co-defendant used. He described him as bullying him to go back into the store, but I asked about whether he had an idea of what he was

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ask for the money and the car keys, and those were the instructions that he appeared to be carrying out, although he said he couldn't remember the words that his co-defendant had used.

Q. Okay. Kelsey Pierce, even from the most recent discussion with Herman Hughes, didn't tell Mr. Hughes to go in and shoot either Kelly Hoffman or Kelsey Pierce. Is that correct?

A. Not that I know of.

Q. No further questions.

THE COURT: Yes, sir.

REDIRECT EXAMINATION BY MR. BLUME:

Q. Dr. Beyer, I have some -- actually I'm going to have a number of questions for you since we opened the door on what was said in trial counsel's deposition about what Mr. Hughes told him and whether it was consistent with what he told you, so I'm going to have to ask you a number of statements about that and make sure that the record is -- is clear and complete as a number of the questions that were asked were based on this information, but first I want to touch on some other things. When you were talking about competency and Dr. Frierson's evaluation and sort of your opinion, as I understand it, your testimony is that often there are different issues in cases involving

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often there are different issues in cases involving juveniles and competency, which can be overlooked if you just take a standard question about did the person understand and sort of the typical psychiatrist's view of competency?

A. Yes, because the juvenile could be unable to assist counsel because of their immature thought processes, their immature identity, their immature moral reasoning, and that would not be the result of low intelligence or mental illness, and that immaturity might not affect their factual understanding of the -- the matter that they were appearing in court for.

Q. Okay. On the -- the question of intoxication that you were asked a fair number of questions about, if I informed you that the record, the testimony at trial from Henry Daniel Owens, Jr., who was the other person involved in this, was that they bought a fifteen-pack of beer, that Kelsey and Herman bought a fifteen-pack of beer, that he drank three, that Kelsey Pierce and Herman Hughes drank the rest, that would be entirely consistent with what he told you about what he drank that night?

A. He described it as his drinking a six-pack.

Q. So fifteen minus three is twelve, divided by two is six, the way I do the math?

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A. Uh-huh (affirmative response).
Q. Okay. On the question of what the in-house counsel reacted, you -- you sort of -- and there was some discussion about that and how their interactions -- if you heard counsel say things like, "Herman was of -- of help in some things and not helpful at all in the trial preparation, not helpful at all. He was just a stone wall," would you be surprised by that statement? Would it be consistent with what you've seen of Mr. Hughes and how he would interact with the lawyer?
A. Yes. What I found with Herman was that frequently when I first asked a question, he would respond with, "I don't know," and it was up to me to develop a more skillful way at inquiring so that the answer, "I don't know," wouldn't be a possible answer, and I -- and so I would probe more deeply and was able to learn more, but I could see that particular if there were time constraints, that someone might give up and consider that he was not co-operative if he consistently answered, "I don't know."
Q. And would you be surprised that counsel said that "Herman was the dumbest client I ever had, and I don't even know who would be a close second, and I always had doubts about whether he was competent. I didn't think he was competency to stand trial," that

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counsel said that?

A. (No response)

Q. Let me ask you---

THE COURT: There -- there was no response---

MR. BLUME: I'm sorry.

THE COURT: ---opportunity.

MR. BLUME: I didn't mean that.

MR. ZELENKA: I don't think there was a question.

MR. BLUME: No. I asked her if that would be consistent with the type of issues that come up with a cognitively impaired juvenile and their interactions with their lawyers.

THE WITNESS: He might well, a cognitively limited juvenile might well, not understand questions that were being asked or plans that he was being asked to participate in, particular if they required abstract reasoning, and, therefore, they'd have to be presented more simply and followup questions in order to elicit more detailed answers that he would have the capacity to respond if he was interviewed in that way though.

REDIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. If trial counsel said in his deposition that what -- there are some questions about the consistency

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over time of Herman's accounts, that Herman told him that he went in the first time. Kelsey was supposed to do the robbery, but Kelsey saw the girl's car up there and had known her socially, so he didn't want to do the robbery. There wasn't any plan to kill. He sent Herman in. Herman came back outside. Kelsey called him a punk and asked if he was going to do it or not. He went back in and did it. Would that be, more or less, consistent with what Mr. Hughes told you?

A. Yes.

Q. Now---

MR. ZELENKA: Are you going to read the other part of that?

MR. BLUME: I'm getting ready -- I'm coming to that. I've skipped two sentences. Well, there's -- it's actually in three different accounts. I'm going to -- get to that point right now.

MR. ZELENKA: Okay. Which part of the deposition are you referring to?

MR. BLUME: I'm -- I'm going to come back to this part on page 23, which I think is the part you're looking at.

THE COURT: Mr. Zelenka, if there's anything that you want to -- to clarify in regards to it, I'll give you that opportunity to.

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MR. ZELENKA: Thank you. I just want to make sure the quote gave defense counsel's fair---

MR. BLUME: I'm going to let her read it. I'm going to let her read it because I think that's the fairest to her.

REDIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. Now, the parts that he was talking about or the parts -- it's actually two separate places in the deposition, and it won't take you but just a second to read it. The first part is on page 23. It's really from here. 23 basically from line 3 through line 18.

A. Do you want me to read it out loud?

Q. No. You can just read it to yourself.

A. Okay.

Q. Let me show you one. There's a similar -- just take it. There's a discussion of this later on. Then on page 41 beginning on line 8 through 24. Then on page 50, line 14 through line 22. Now, I think the question that was asked of you on cross-examination was whether -- I don't think -- I -- I guess it would be -- would it be fair to say -- correct me if I'm wrong, but there's certain -- there is some inconsistency in that whole scheme of things and what you were told?

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A. Yes. Herman told me that he did not know the girl in the store, and it sounds like under at least one of those that he had said that he thought he knew her, and then it turned out she didn't know him after all.

Q. And the testimony basically indicates that he saw her coming at a friend of his house, at a trailer, and he had briefly sort of seen her and that when he was in there, he had some fear that she might recognize him. That was essentially the gist of what counsel said Herman told him?

A. Yes.

Q. And he fired, or one of the reasons he shot her was possibly the question of identification as Mr. Zelenka indicated on cross-examination but that one of the things counsel was confused about and remarked about Mr. Hughes' lack of intelligence, but, according to his version, he didn't shoot Mr. Pressley, but Mr. Pierce did, but he said somehow that made sense to Mr. Hughes is the gist of his testimony. Is that right?

A. Yes.

Q. And I think the question on cross was would that testimony that you reviewed, if you had seen that, would that change, I think it was, would it change your

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opinion on the waiver hearing itself. Would you -- would you have recommended -- would your recommendation that he not be waived up be the same had you known of that information?

A. No, because -- no, if the way that it was described to me at the time was his confusion about why he would do something that he knew was a terrible thing to do and what his thinking was about if he were motivated to do it because he was afraid of being identified. Kids do sometimes harm another person because they're afraid of being identified, and then they look back on it and think it was a terrible thing to do. They don't understand how they could have been thinking at the time, being boxed into a situation where the only choice that they could think of was to go through getting rid of a witness, and that can be misunderstood if you don't look at what they're being -- why they're boxed into one choice. I don't know enough about that particular aspect of the offense to be sure that that's how he's thinking, but if that were the scenario, I would want to know how he was thinking before I would be able to say that it would change my point of view.

Q. And is it fair to say that based on your assessment of Mr. Hughes that because of his

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intellectual limitations and his -- his -- basically his mental limitations that we will discuss in detail later today, that he does have difficulties of explaining what was going on in his head?

A. Yes, and difficulty because his head was, also, confused by the alcohol.

Q. And I just want to make clear, I think he says, but one of the things when he talks about the gun going off, that could sound to me or to some reasonable person like he's attempting to avoid responsibility or shirk responsibility for his role in this. Is that your assessment on it?

A. No, and I -- I went over that quite a bit with him. That's not the way that he says it, as a way to avoid it, but more a true confusion about how could this have happened and his shock that the gun went off.

Q. He's not portraying this like some legal defense or something---

A. No.

Q. ---what happened. It's just his inability to really articulate what happened. It's inconsistent with how he views himself?

A. Yes.

Q. Nothing further.

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MR. ZELENKA: Just one brief followup, Your Honor.

THE COURT: Yes.

RECROSS-EXAMINATION BY MR. ZELENKA:

Q. With respect to page 23, what it says and what you have reviewed that Mr. Blume on his direct examination is quoting, it says, "Herman went in the first time, recognized the girl, and thought she would identify him. He didn't want to do it for that basis. He went outside, and Kelsey called him a punk and asked him if he was going to do it or not. Then he went back in and did it." Does that not reveal to you that at that time he had an understanding of the situation?

A. (No response)

Q. At first he didn't want to commit the crime because he was afraid that she would identify him, and then after Kelsey spoke to him some more, even though there was no intent to kill, he went in and committed the robbery and shot her for his own reasons?

A. That's not how he described it to me.

Q. Okay, but that's how he's describing it to his lawyer from the materials which Mr. Blume told you contemporaneous prior to the time that he was sentenced to death. Isn't that correct?

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A. Yes.
Q. He, also, revealed in that same material is his understanding to his lawyer as to where he thought he may have seen Kelly previously. Is that not, also, correct?
A. What -- what was in the subsequent section about---
Q. Yeah. I believe on 23. Herman had met the girl socially one time coming out of a friend's house---
A. Yes.
Q. ---is his understanding? So, he had a basis that he was able to reveal to his lawyer where he thought he got that information from, correct?
A. That's what's in there.
Q. No further questions.
THE COURT: All right, ma'am. You may step down. Do you want this witness released?
MR. BLUME: Yes, Your Honor.
THE COURT: Any objection?
MR. ZELENKA: No objection.
THE COURT: All right. Then you are free to leave.

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THE COURT: We've probably come to a good point to take a quick break as well. I'm going to allow everyone to disperse in just a moment, but I ask if -- we're going to take about a ten-minute break -- does Mr. Hughes need to go back?

THE COURT: So long as there's someone here.

AN OFFICER: It doesn't matter.

THE COURT: All right. That would -- we wouldn't delay as much if he can remain, just so you would know he would remain here. We'll take about a ten-minute break.

(WHEREUPON, RECESS IS TAKEN.)

---

GEORGE W. WOODS, JR.,

BEING DULY SWORN, TESTIFIES AS FOLLOWS:

THE COURT: We have just -- we have just sworn in the witness, and we'll acknowledge that you remain under oath, and we'll begin at this time.

If you would state your full name for the record. Spell your last name please, sir.

THE WITNESS: George W. Woods, Jr.

MR. BLUME: Dr. Wood---

THE WITNESS: W-o-o-d-s.

MR. BLUME: I apologize. I jumped the gun

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there.

DIRECT EXAMINATION BY MR. BLUME:

Q. Dr. Woods, how are you employed?

A. I'm a physician specializing in psychiatry.

Q. So you are a medical doctor?

A. Yes, I am.

Q. Could you briefly go through your educational history for the Court?

A. Sure. I graduated from Westminster College in Salt Lake City, Utah. I then went to the University of Utah Medical Center in Salt Lake City and received my M. D. Degree. I then did a fellowship -- I'm sorry -- that's incorrect. I did an internship at Alameda County Hospital in Oakland, California. I then did a psychiatric residency at Pacific Presbyterian Hospital in San Francisco, California, and was chief resident my last year. I then did a fellowship with the National Institute of Mental Health in Psychopharmacology at Rockville, Maryland, and, also, in San Francisco, and that was the extent of my formal education although I've maintained my continuing education credits, and I've taken a number of courses since.

Q. Now, Dr. Woods, are you associated with any medical schools?

A. Yes, the University of California at Davis

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Medical Center.

Q. And what -- what association do you have?

A. I am an adjunct professor in the post-graduate department of medicine in the forensic fellowship.

Q. And have you ever been a professor at -- at any other medical center?

A. Yes. I've taught at the University of Nebraska in both their medical school and their college of public policy.

Q. Are you a member of any professional associations?

A. That's what my dues say, yes. I'm a member of the Northern California Psychiatric Society, the American Academy of Psychiatry and the law, the International Academy of Law and Mental Health, the American Psychiatric Association, the American Medical Association, the American College of Forensic Psychiatrists, the American of Forensic Examiners.

Q. Do you have any present -- I mean, I'm sorry -- in your practice do you have any particular areas of concentration?

A. Neuropsychiatry and forensic psychiatry.

Q. And what is neuropsychiatry?

A. Neuropsychiatry is the study of the relationship between the brain and behaviors.

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Q. Is that a recognized field within the field of psychiatry?
A. Yes, it is.
Q. And what forensic psychiatry?
A. Forensic psychiatry is the study of law and medicine, issues of law and medicine.
Q. And in addition to your other work, have you ever worked for any organizations having to do with victims, victims of crime?
A. Yes. I am a consultant to the Victims Assistance Program in California. I'm, also, the technical advisor to the Operation Recovery, which was a -- I was asked to go to Kenya and Tanzania and provide assistance to the victims of the Kenya/Tanzania bombing. I've been doing that for the last year.
Q. And are you board certified in any area?
A. I'm board certified in psychiatry. I am -- yes.
Q. Now, Dr. Woods, Applicant's Exhibit 2, is that a current copy of your CV?
A. Actually this is a bit old, but it is an accurate copy of my CV.
Q. Is it close enough for government work, in laymen's terms?
A. Yes, right. Yes, it is.

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MR. BLUME: Okay. Rather than -- Your Honor, I would offer that as evidence, Exhibit 2 -- rather than go through in detail.

THE COURT: Any objection?

MR. ZELENKA: No objection.

(Applicant's Exhibit No. 2 admitted into evidence.)

MR. BLUME: At this time I would offer Dr. Woods as an expert in neuropsychiatry and forensic psychiatry.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: All right.

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. Dr. Woods, at my request did you conduct a neuropsychiatric and forensic psychiatric evaluation in this case?

A. Yes, I did.

Q. And can you please tell me what that evaluation consisted of?

A. Yes. The -- it consisted of two evaluations of approximately two and a half to three hours apiece of Mr. Hughes. I saw Herman at the detention facility he's currently in here in South Carolina. It, also, consisted of a review of neuropsychological testing that was performed by Dr. James Evans, as well as

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consultation with Dr. Evans. I reviewed a neurological examination by Dr. Gero Kragh. It reviewed school records and psychodiagnostic evaluations from about 1985 through 1991. It reviewed the psychological records and brief stay for Mr. Hughes for competency evaluations at the Hall Institute. I, also, reviewed -- I had the opportunity to interview Mr. Hall's grandmother, Ms. Lucille Hall, as well as his uncle, Mr. Woodrow Hall. I had the opportunity to go to her home and talk with her. I, also, reviewed trial testimony of Dr. Frierson, Dr. -- I don't know if it's Dr. or Mr. Finuf from the Department of Special Services for Children here in South Carolina. I had the opportunity to, also, review other of the medical special -- specialist testimony as well.

Q. So you -- and you did review, just to make clear, the -- the record of the W. S. Hall Institute evaluation in this case?

A. That's correct. I mean -- that's correct.

Q. As well as the expert testimony that was presented?

A. That's correct. I may have missed something, but that's basically the bulk of my information.

Q. And school social history records, medical records, family records?

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A. That's correct.
Q. Do you -- is the information that you relied upon the type of information which is normally relied by an expert in the field?
A. Yes.
Q. And do you feel that you have sufficient information and you've had sufficient opportunity to talk to Mr. Hughes and to review this material in order to render your opinions in this case?
A. Yes.
Q. Dr. Woods, if you don't mind, I would like you to briefly summarize the conclusions that you reached in Mr. Hughes' case. We'll go through them in detail. You can just briefly lay out what they are so we'll have some structure for where we're going to go for the next little bit.
A. Sure. It's my professional opinion that Herman has significance neurologic impairments that IQ just doesn't in any way reflect, and those neurological impairments, along with an extremely low IQ, are consistent with someone who has developmental disabilities. Mr. Herman -- Mr. or Herman's deficits clearly are developmental, and he's clearly disabled, and the combination certainly in terms of a low IQ and impairments in adaptive functioning that are reported as

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early as in the second grade reflect a -- a true developmental disability. It's, also, my opinion that Mr. Hughes has a history -- these are just my medical opinions -- that Mr. Hughes' history of drinking during that period of time is consistent with alcohol abuse although it's not clear that it rose to the level of alcohol dependence, probably due -- due to the short period of time that he, in fact, was -- was drinking, say, three years or so. I believe that Mr. Hughes suffers from a mental disorder not otherwise specified that is---

Q. Okay. Now, wait a minute. That's -- that -- let's back up. Let's stop right there and talk about this. I understand that now we're talking about the DSM4 and how they do diagnoses?

A. That's correct.

Q. And now, what is the DSM4?

A. The DSM4 is the diagnostic and statistical manual. It's currently in its fourth edition, and this is a classification system that is used by the American Psychiatric Association and most psychiatrists and mental health providers in the United States. There are two classification systems in the world. One of them is the Diagnostic and Statistical Manual. The other one is the International Classification of

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Diseases, which is currently in its tenth evaluation. I compared Mr. Hughes' diagnosis of mental disorder not otherwise specified in the DSM4 to make sure that it was consistent with the International Classification of Diseases as well.

Q. And most mental health professionals use the DSM?

A. That's correct.

Q. And DSM4 is the version that's in place now?

A. That's correct.

Q. And it, also, was the version that was in place at the time of Mr. Hughes' trial?

A. That's correct.

Q. Now, the DSM4, as I understand -- I've read a little bit about it -- asks for you to render your opinions based on different axis---

A. That's---

Q. ---or axes?

A. That's correct.

Q. What -- what is that? What are those different axes?

A. There are five axes, and if -- if I may take a moment to explain why the DSM4 developed the axis system, it might help understand. Early in the

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development of classification systems -- there have been a number -- it was determined that a person can have more than one mental disorder, or they could have a combination of a mental disorder and a medical disorder, and so the idea of just having one disorder doesn't really capture the difficulties that a person may have or their strengths, and so it was -- the classifica- -- what we call the Multi-axial Classification System was developed starting with the Diagnostic and Statistical Manual Three in 1980, and what it -- there are five axes, and each axes is designed to express a different either medical, psychiatric, or social component of your diagnosis. Axis One looks at what we call major psychiatric disorders: schizophrenia, depression. Substance abuse is often on Axis One. Anxiety disorders are on Axis One. Axis Two talks about personality disorders, as well as developmental disabilities or mental retardation, so you've got Axis One that talks about perhaps a person being depressed or a person having a mental disorder not otherwise specified. You have Axis Two that talks about personality disorders, how someone is in the world, kind of a long-standing maladaptive approach if they have a disorder. Axis Three really reflects the -- any medical issues that may be relevant to Axis One or Axis Two. For example, in

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neuropsychiatry we often see a person that has a tumor or a person whose brain doesn't work effectively. The manifestations, the expressions, of that medical problem can often be expressed on Axis One. Axis Four really talks about the environment, the problems that a person has, where they're -- where there are legal problems, where there are school problems, or where there are marital problems, and so the stresses that the mental disorder or the medical disorder may -- may have are often written on Axis Four, so we've got Axis One, major medical disorders; Axis Two, personality disorders; Axis Three, medical problems that may, in fact, relate to the psychiatric disorder; Axis Four are the things in the environment that may be, also, affected or, also, may be causing the psychiatric or medical problems, and then Axis Five is what's called a global assessment of functioning, and it's a rating scale, and it basically rates people from a hundred, meaning that you're a happily married, wealthy, Rhodes scholar, to zero, meaning you have significant medical, physical, mental, and functioning problems, and so those are really what the five axes are about. It's been used since 1980. It's the standard of practice in psychiatric care.

Q. Okay. Now, is this case did you determine

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that in your opinion Mr. Hughes has a diagnosis on Axis One?

A. Yes.

Q. And what was that?

A. Mental disorder not otherwise specified secondary to a general medical condition.

Q. Okay, and we'll come back and sort of talk about that, but basically, as I understand it, that means he's got brain damage?

A. Yes, brain impairment.

Q. Brain impairment?

A. Yes.

Q. Okay. On Axis Two do you have an opinion that Mr. Hughes -- did Herman have a diagnosable condition on Axis Two?

A. Yes. It's my opinion that Mr. Hughes meets the criteria, the total criteria, for developmental disability.

Q. Okay, and then did you note anything of significance on Axis Three?

A. There are really a number of factors on Axis Three, but I think they all have to be put into the area that there are significant neurological impairments. There are infectious disease processes that probably speak to those impairments, specifically neurosyphilis,

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and I can talk about that later.

Q. And we'll come back---

A. Okay.

Q. ---and deal with that in some detail. Then, on Axis Four were there any psychosocial environmental factors, which you deemed to be significant?

A. Well, there are clear family issues when one looks at the history of Mr. Hughes' nuclear family. There are clear family issues of -- of disruption and chaos and, I might add, that because Axis Four really relates back to what' going on on the major mental disorders or on the -- on the developmental disability, when we look at those, that type of chaos can be extremely important, and there are, also, obviously school problems.

Q. And substance abuse issues?

A. And substance abuse issues.

Q. And we'll come back and talk about those in some detail as well, and then finally on Axis Five did you do a global assessment of functioning as required by the DSM?

A. Yes. I -- I evaluated Mr. Hughes as being about forty to forty-five, which means that he has significant control problems. He has significant adaptation problems, etc.

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Q. And now, let's first, Dr. Woods, talk about the Axis One impairment, which will, also, have some, I think, relationship to Axis Three, and talk about the neurological impairment in Mr. Hughes' case.

A. Yes.

Q. But, if you would -- I think it won't make sense unless you briefly tell us what the different parts of the brain are.

A. Can I use the back of this to draw?

Q. It's fine with me.

A. Is that okay? Your Honor, is that all right?

THE COURT: Any objection to---

MR. ZELENKA: No objection.

THE COURT: You may step down, and I just ask you for the record if you will speak up. You will have two things going against you; that is, you won't have a microphone, and your back will be to the court reporter.

THE WITNESS: Okay. Well, I'll -- I'll yell.

THE COURT: Good.

THE WITNESS: I'm good at that so---

THE COURT: Very good.

THE WITNESS: Okay. May I borrow one of your---

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MR. BLUME: We won't let him steal it.

THE WITNESS: Not this time.

MR. BLUME: Will this help?

THE WITNESS: Oh, that's perfect. Yes, please. I need to start off by saying I got an A in doctor writing, so I apologize, but let me just talk about how the brain is formed because the brain is really formed from a tube that starts out much smaller than that but very similar to this, and over time this tube elongates like this. This tube spreads out and starts to form the fetus, and the brain is one of the first parts of the fetal structure that's developed, and it's developed from the midline, and so what happens is as you -- if you kinda' really think about the fact that we have this right side and this left side, the brain is really developing that way, and when you have injuries to the brain in the first trimester, particularly, either because of infection problems -- antibiotics can do it -- you will find that you'll have these midline defects, and those midline defects can often infect how the brain, in fact, works, so we've got two pictures here. I told you. So, this is kinda' looking at the brain from the front, okay, so you've got a right side of the brain. You've got a left side of the brain, and here you have these connecting fibers that try to tell

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each side of the brain what's going on, so that's how the brain talks to both sides, the -- what's called the corpus callosum. Now, if you look at the brain from the side, however, it really looks much like an ear, and this is a brain from this side, so you've got frontal lobes. The frontal lobes are the largest part of the brain in the -- the human. They are about thirty-five per cent of the brain, really a significant part of the brain, and the frontal lobes -- and we'll talk more about this -- but the frontal lobes are the last part of the brain to develop and, in fact, continue to grow until -- through adolescence, so you have development of the frontal lobe that continues from childhood, changes in the latency or early -- or later in childhood, continues to grow through adolescence, and probably starts growing around the time a person is fifteen or sixteen, and that's very important because the frontal lobes are what -- are what kind of stop people from -- often from doing things. The rest of the brain is what we call excitatory. It's energizing. It's impulsive, and it acts up, but the front of the frontal lobes are what are called the cap of the brain, and they are really designed to -- they're -- it's inhibitory, and it's really designed over time to help the rest of the brain slow down, to think about what's

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going on, to understand the process, to be able to weigh and deliberate, and for those of you that either have or have had kids like my daughter is fifteen. You know this part of the brain. It's still developing. The section right behind the frontal lobes is called the parietal lobes, and the parietal lobes are parts of the brain that are involved in understanding an entire picture. Those of you that are good at those puzzles that you put together piece by piece -- I can't even name them because I'm so bad at them -- but if you could see that picture and look down at the parts and start to put it together, that's your parietal lobe working because you can conceptualize. You can kinda' see the entire part. This is, also, the part that helps people with music. Einstein had bigger parietal lobes than anyone, so that's how the parietal works. The occipital lobe, which is really at the back of the brain, are really designed to help with vision primarily. They -- they help with both color vision, as well as black and white vision. They integrate pictures. They allow you to not see things in pieces. That's kinda' where your eyes end up, and that allows you to -- to see things and to integrate your vision with your other symptoms, and your temp- -- your temporal lobe, this is what's -- what we've got:

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frontal, we've got parietal, we've got occipital, and we've got temporal. The temporal lobe is very, very important because academics, the ability to do solid academic work, the ability to understand language, as well as to express language, what we call expressive aphasia and receptive aphasia, reception meaning you understand what's coming in. Expression means you can make sense of what's coming or what's going out. From any of us who have had family members that have had strokes, you'll often find they have difficulties in expressing or recep- -- or receiving information, this is where it's occurring, in the temporal lobe, and so that's a -- that's a quick journey through the brain, the frontal lobes, the parietal lobes, the occipital lobes, and the temporal lobes.

Q. And based upon your material that you have reviewed and your examination of Mr. -- Mr. Hughes, can you tell me what parts of the brain in your opinion are damaged?

A. Well, three of the four parts of Mr. Hughes' brain are damaged. The frontal lobes are significantly damaged. The parietal lobes, the ability to kind of understand the totality of something, are damaged, and there are parts of the temporal lobe that are damaged as well. There are other parts -- there are other parts

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that are not.

Q. Now, we're going to -- we talked a little bit about what those parts do, and we'll come back in a minute, also, and discuss the -- the etiology or what might have caused this brain damage. I think that's where the neurosyphilis would be relevant, but first can you tell us why it's your opinion or why you believe that -- that Herman Hughes has this neurological impairment?

A. Well, Herman Hughes, particularly in terms of his brain, has led a documented life. When you look at the history of Herman over time, we are lucky enough to have psychodiagnostic tests that start as early as the second grade, and when we look at this psychological testing, we see a number of factors. One, we see a---

Q. Let me stop you just real quick.

A. Sure.

Q. ---so we're sure what we're talking about. Let me show you what's Applicant's Exhibit 3, which is a psychoeducational evaluation report, which occurred when he was in the second grade. Is this the particular report that you're speaking about?

A. Yes.

Q. Applicant's Exhibit 3?

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A. Yes, it is.

MR. BLUME: Your Honor, I would ask that this be admitted as evidence.

THE COURT: Any objection?

MR. ZELENKA: I don't think I have one. I just want to make sure I know which one. This is the psychoed report. No objection.

THE COURT: All right.

(Applicant's Exhibit No. 3 admitted into evidence.)

DIRECT EXAMINATION RESUMES BY MR. BLUME:

Q. This is the report that you're talking about?

A. Yes.

Q. Well, then go ahead. I'm sorry to interrupt you.

A. Oh, no, that's quite all right.

Q. You were saying that there was some evidence of that, you felt?

A. Yes. When you -- this is a report that was done January 7th of 1986. It's at a time when Mr. Hughes was eight years old five months, and there were a number of examinations, test examinations, that were given to Mr. Hughes at that time, as well as an interview was taken by the -- by Dr. Moore, who is a school psychologist. If you look at this particular

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examination, a number of factors from a neurological point of view come up. No. 1, Dr. Moore did several -- Dr. Moore did several screening evaluations, not only for IQ, which is really a minor aspect of how the brain works. It really is a function of information. If I could -- if you have the opportunity in front of you to look at the assessment procedures, there are one, two, three, four, five, six, seven, eight, well, seven tests and then a review of records and social history, and I -- I'd like to have you look at this in the same way as looking at you're taking your car -- you may take your car in, and your car may be perfectly clean, and it may even have gas in it, but when you're looking to figure out what may be going on with your car, you just don't look at the engine, or you just don't look at the electrical system, or you just don't look at the cooling system; you have to look at each part of these in order to determine how well your car is functioning, and that's true with the brain as well, so you just don't look at IQ, or you just don't look at academic functioning, and this particular evaluation is -- is relatively good in terms of the breadth of the evaluation. Certainly we see an intelligence scale, and this is at a time that Herman is in the second grade. He's already failed one grade. He's failed the first

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grade, and in that sense we see a real impairment of even rote learning, which is what the first grade, first four or five grades are about. He has a full scale IQ of 80, which is low. It's actually the highest that has ever been recorded for him, but it is -- it is still very low; however, as you continue to look at other tests that Dr. Moore did, you'll notice on page 3 that Dr. Moore did a Bender Visual-Motor Gestalt Test. The Bender Gestalt is a test for -- it's a screening examination for brain function, and what Dr. Moore understood here was that IQ is not enough to determine how someone functions, and she -- I've got to check -- Elizabeth, yes, and she went further to look at some of the other issues that may be going on besides Herman's level of information. If you'll look at the test, it says here errors made were five in distortion of shape, five in rotation, zero in integration, and two in perseveration, and what she's noticing is that, and further up in that paragraph, the Bender is scored for errors; therefore, a high score indicates poor performance while a low score indicates good performance. The number of errors were twelve, which indicates that visual-motor perception, the way that Herman at eight years five months, looked at the world was consistent and was able to figure

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out how the world worked, is consistent with a child three years younger, so we see even at this point academically he's fallen behind; from a neurological point of view he's fallen behind. Dr. Moore has already seen that the type of neurological findings, the type of impairments, that we see now and particularly Dr. Evans saw in his neuropsychological testing, are already there.

Q. Okay. Did the school system ever do another evaluation of Mr. Hughes?

A. Yes, in 1991.

Q. And this was after he -- as a result of his continued academic problems in school?

A. That's correct.

Q. And let me -- his repeated failures, as I understand the record, he failed the first grade, was promoted, then was promoted, failed -- I mean, failed the second grade, was promoted even though he ranked at or near the bottom of his class, promoted, failed, and at this point at age thirteen in the sixth grade after this failure and academic performance, they did another evaluation?

A. That's correct.

Q. And is this what's been marked as Applicant's Exhibit 4? Is that the report that was produced in that

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evaluation?
A. Yes.
MR. BLUME: Your Honor, I would ask that this be admitted as evidence as Exhibit 4.
THE COURT: Any objection?
MR. ZELENKA: No objection.
(Applicant's Exhibit No. 4 admitted into evidence.)
DIRECT EXAMINATION RESUMES BY MR. BLUME:
Q. Dr. Woods, as a neuropsychiatrist what was important to you about this evaluation by the school system?
A. Well, Mr. Blume, the first thing that was important was the fact that it was completed by a different psychologist. Dr. Moore did the first testing. Dr. Campbell did the second testing. What else, I thought, was im- -- important was that although Dr. Campbell did not do the same number of tests that Dr. Moore did. She did do some of the same tests, so we have the opportunity to see consistent reports over time, something that's very rare, particularly with children, and so that was very, very important.
Q. And what was the IQ that was detected at this point?
A. The IQ that was detected was 74.

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Q. So there had been a drop in IQ?
A. That's correct.
Q. And did they, also, give the Bender at this---
A. Yes, they did.
Q. And was there anything significant about the Bender?
A. The number of errors on the Bender this time was five, which indicated visual-motor perception to be seven years six months. As I recall, by this time Mr. Hughes was twelve or thirteen, and so what we really are seeing her is a -- is a continual falling behind in those -- in those neurological parts of the brain that you have -- you have to -- you need to have to think and function.
Q. And so in coming to your conclusion that Mr. Hughes has a damaged brain, I understand, the first thing you said you considered was his history of school failure and the results of the psychometric testing, which were done by the school?
A. That's correct.
Q. But, as I understand, that's just sort of the beginning. There are, also, other things that you relied upon?
A. That's correct.

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Q. What else would that be?
A. Well, if -- if I can just make one more comment---
Q. Sure.
A. ---in terms of the testing, if you don't mind.
Q. No, no.
A. The -- the other part that I consider to be very relevant about the testing, there -- there are other aspects about both the first testing and the second testing that were important. In the first test they did a Vineland, which is a test of adaptive functioning, and if you look at Mr. Hughes' score, he was falling behind in adaptive functioning in the second grade, but, also, what I think is important about this material---
Q. Adaptive functioning is how you go about life's business?
A. How you socialize, how you deal in the world, your -- your -- your ability to -- to -- to deal in the world, but what I thought was, also -- is, also, important, relevant to this particular proceeding is that clearly this was at a time when there would have been no issues of malingering. There would have been no issues of exaggeration or -- or attempting to somehow confound the testifying, so what we have here is -- is

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testing before any type of criminal activity that is consistent with the testing that was found after the criminal activity as well.

Q. Okay. You were, also -- another factor you mentioned, I think, was Dr. Evans' neuropsychological?

A. Right. Dr. Evans did a very thorough neuropsychological testing, once again repeating---

Q. What is neuropsychological testing?

A. Neuropsychological testing is testing to look at how the brain functions. It is considered by the American Board of Neurology to be the best indicator of brain functioning, much more effective than an MRI or a CT scan, which only describe how the brain looks but give no indication on how it really works, so neuropsychological testing is testing to look at each part of the brain to determine how successfully it functions, and Dr. Evans performed the neuropsychological testing in this -- on -- with Herman in this case.

Q. And what did that reveal which was of significance to you as a neuropsychiatrist?

A. Well, I think really most important, Mr. Blume, was the -- right off the top -- was the internal consistency that we see between the previous

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psychodiagnostic testing and what we -- and what Dr. Evans found. Dr. Evans found an IQ of about 74. He found significant frontal lobe, what we call, executive function impairments. He found perseveration, and perseveration is the inability to change once you have started something. People often think of the frontal lobes as being impulsive, and they're really not im- -- I mean, people that have frontal lobe impairment, they don't just jump out at you. What happens is that if something starts, they have real difficulty stopping that behavior, and that's called perseveration, and if you -- if you recall, even as early as 1986 when Dr. Moore looked at, in a very superficial way, looked at Mr. Hughes' functioning, neurological functioning, she found perseveration, so we've seen -- we see this over a period of years. Dr. Evans, also, saw academic impairments. I'm going to get up one more time. So, when we look at the Bender Gestalt, we -- we see problems with perseveration with an inability to stop a behavior once it's started. Executive function, also, speaks to an inability to really sequence things, figure out how they go piece by piece by piece. You have a number of links here, but it's hard for you to understand that that -- those links put together can make a chain. It's hard for you to conceptualize how

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things work. That's called frontal lobe, and so in 1986, 1991, and here again in 1999 we see this consistent impairment in Mr. Hughes' frontal lobe. These abilities to create a plan, let alone act to follow through with one, are all reflected throughout his history. What we, also, see are problems in the temporal lobe, and this again in '86, '91, and '99. We see academic problems. We see problems with math. We see problems with reading. Mr. Hughes was never able to get past a third-grade reading level, and I -- and I think it's important when you look at the testing. The test that was given, the Wide Range Achievement Test, is really a test for read- -- for sight reading. It's not even a test for reading comprehension, so what we're really seeing here is that Herman can sight read, but whether he, in fact, understands everything that he reads is -- is still open to question, and that's, also, where we see the different -- the difficulties in language, in the temporal lobe, and Dr. Evans recorded these in his psychological testing, and those really relate to what are called a poverty of thought. Poverty of thought really means that a person has difficulty thinking. It's like an empty vessel, so what we've seen in the testing, and I think in the experience of Mr. Hughes, of Herman, is not only is the door the -- the

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door, the neurological door, impaired, but once you open the door, once he opens the door, there's very little in the room. His thinking is not only slow, but there's a true poverty of thinking that makes it very, very, very difficult.

Q. And this was based -- reflected in the neuropsychological testing---

A. Well, it---

Q. ---as well as your interview?

A. It was based upon the neuropsychological testing, as well as my interview, but it was, also, based on the neurological examination of -- of Dr. Kraus, who found unusual and what we call infantile reflexes that should be gone by the time someone's five or six years old.

Q. So, your opinion is based upon the review of the records and historical information in them?

A. That's correct.

Q. Dr. Evans' neuropsychological testing?

A. That's correct.

Q. Dr. Kraus' neurological report?

A. Yes, Dr. Kraus' neurological report was extremely telling, and we can talk about that now or perhaps at some other time.

Q. Now, but why don't you just -- what was

sig- -- of significance to you as a neuropsychiatrist?

A. Dr. Kraus' neurological report reflected what we call infantile reflexes, as well as hyperactive reflexes, and, if I can explain this briefly, infantile reflexes are reflexes that over the course of development of a child go away, and so there are certain reflexes, for example, the Gabellar reflex, G-a-b-e-l-l-a-r. The Gabellar reflex is a reflex that's typically a child has, a baby has, and it's a reflex that occurs when it's going to feed, and that is a reflex that typically goes away as the child becomes older. In the same way that when you startle a baby, and the baby may respond in this general sense, as a child gets older and becomes more adult in their central nervous system development, many of those kinds of reflexes go away. You -- you rarely see children that -- that startle or, you know, adults that startle all over, but when that occurs, when you see that in a -- in an adult, it's really called a hyper-reflexive response, and Dr. Kraus noted, as I did, that Mr. Hughes still has hyper-reflexive responses. These are consistent with someone who, once again, tying it back in, this is consistent with -- with the testing. When Dr. Moore and Dr. Campbell talked about doing a Gestalt test, and this

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child and -- Mr. Hughes -- had had a impaired visual perceptual or visual-motor and perceptual-motor activity three years behind in 1986, seven years behind in 1991, their neuropsychological testing, limited though it was, is absolutely consistent with the neurological findings of Dr. Kraus.

Q. And then you, also, I thought, indicated that the final sort of component in your conclusion he has brain damage was your own clinical interview?

A. That's correct.

Q. And what was it about that?

A. Mr. Hughes has a profound poverty of thought, and we talked about it. We -- he says, "I don't talk much." He's never been one to talk much, and, as the doctor -- diagnosed earlier -- diagnosed earlier -- noted earlier, his first response is often, "I don't know," and then you would move, you'd attempt to move, from there. Over time it became clear that there's a true poverty of thinking. It's more than a simplicity. It's -- it's a true emptiness in thinking that was reflected in my mental status examination and in my notes. This poverty of thought is often consistent with impaired information gathering. If you -- if you have parts of your brain that don't work right, if you have parts of your brain in terms of information gathering

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that doesn't work right, if you have parts of your brain in terms of language gathering that doesn't work correctly, if you have parts of your brain in terms of putting this all together that don't work correctly, you have this poverty of thought, and that was very clear. That does not imply that -- that's not a memory function, so that doesn't imply that you don't remember anything or that you can't know certain things in the world, but it does imply that particularly under stress there can be significant impairments in your response to environment.

Q. Okay, so you've talked about the various components that led you to conclude that Mr. Hughes has this damage to the frontal, the temporal, and parietal areas of his brain and the totality of the circumstances. Do -- do you know or do you have what caused the damage to his brain? I understand etiology can be difficult.

A. Yes. Etiology can be difficult unless you have specific findings. There appear to be two high -- two potential etiologies. First is one of neurosyphilis, and the second one, there is the potential of fetal alcohol effects. My bet is the neurosyphilis.

Q. What is neurosyphilis?

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A. Neurosyphilis is syphilis that affects the brain. There are three stages of the syphilitic process in someone that's actively affected, and the first stage is a local process. The second stage, actually the syphilis goes away into the white cells, goes inside the white cells and hides, and then the third stage you find that syphilis will attack the central nervous system and will attack the brain. Usually it's required that the carrier have syphilis for about six months before you would develop a neurosyphilis. Syphilis is, also, as -- as other infectious diseases, is often a disease that can be passed on from mother to child. It -- it crosses what's called the brood -- blood (one word inaudible) barrier.

Q. Is that what we call congenital syphilis?

A. Exactly.

Q. And was there evidence of congenital syphilis in this case?

A. Yes.

Q. Would you elaborate?

A. Titers were run on Mr. -- well, first of all, Mr. Hughes was found to have syphilis around the age of fifteen, sixteen, and titers were run to look to see if those were -- was it acute infection? Did he, in fact, get syphilis from perhaps a sexual -- sexually acquired

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syphilis, or was it a more chronic infection? And, titers are just a level of -- of the response to the body of the syphilis virus. You can't actually record the syphilis virus directly. You record the response to the body of the syphilis by -- and the titer response was consistent with a long -- a chronic syphilis, congenital rather than an acutely acquired syphilis. It's, also, known that his mother was treated for syphilis during the time that she was pregnant. In fact, there is a note that the doctor was very concerned about that and discussed with her the dangers of -- of syphilis.

Q. Dr. Woods, you talked a little bit about the brain damage and what caused it and your opinions on why it exists and how. As I understand it, your opinion and the most likely explanation for it is the congenital syphilis?

A. Yes.

Q. Let me ask you this. Why in your opinion -- you've read the Hall Institute record?

A. Yes.

Q. And they did not make a finding that Mr. Hughes or conclude that Mr. Hughes, that Herman has a neurological impairment?

A. That's correct.

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Q. And -- and why in your opinion did they not find the neurological impairments that you've discussed today?

A. Well, there a number of factors. First of all, they did no neuropsychological testing nor did they even do any neuropsychological screening examinations. Secondly, they didn't do any infectious disease screenings that would perhaps have picked up the syphilis in terms of titers. Thirdly, the---

Q. Well, I'm not sure. I thought they did testing?

A. They did testing.

Q. And he tested positive?

A. That's correct.

Q. For syphilis?

A. That's correct, but then the next step would have been to look and see, first of all, to take a history to determine how he was treated. If you look, he actually---

Q. There was a prior diag- -- he had been found positive for syphilis on a prior occasion?

A. At the Job Corps, that's correct and, in fact, was treated with half the normal amount of -- of -- of penicillin and, in fact, the wrong type of penicillin, but that's a whole different issue, and the last thing

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was that they did do what's called neuroimaging. They did an MRI, I believe, at Hall, and based upon the MRI the neurological consult concluded that there was no neurological impairment, but an MRI is not able to determine neurologic impairment. It is only able to determine whether there are alterations in the structure, the actual physical structure of the brain, and there can be alterations in the structure, and the brain can still work fine and vice-versa.

Q. So then would it be accurate to say that a person can have a severe neurological impairment and yet have a normal MRI?

A. Well, that's exactly what happened in this case.

Q. Now, you've talked about the neurological impairment. What I'd like to do would -- and this is what led you to conclude that he has a medical---

A. A medical disorder not otherwise specified secondary to a medical condition.

Q. Which is---

A. Mental disorder. I'm sorry. Mental disorder not otherwise specified.

Q. Which is sort of how the DSM4 does this thing?

A. Yeah. The difficulty with the DSM4 is that it is a psychiatric classification system, so it does not

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capture the quality of neurologically -- neurologically based illnesses that have psychiatric manifestations. The closest it comes is to describe a mental disorder secondary to a medical condition.

Q. And your Axis Two diagnosis was mental retardation?

A. That's correct.

Q. And that was based upon the psychological testing. What do you -- what did you make that conclusion based upon?

A. It was based upon a number of factors, Mr. Blume. I think, first of all, we see a consistently low IQ, and although the diagnostic and statistical manual looks at an IQ of 70, the National Association for Mental Retardation, the International Association for Mental Retardation, both as of 1996 felt that an IQ of 75 was more consistent when you're just looking at IQ. It's No. 1, but even the Diagnostic and Statistical Manual notes that it must be -- that the IQ must be around 70 and that there must be other factors in terms of inability to adapt. First of all, we have a test that was performed, the Vineland Adaptive Functioning Test that was performed when he was in the second grade where he's already fallen behind in terms of adaptive functioning. We have clear impairments of adaptive

functioning that have nothing to do with drugs or alcohol, marijuana, anything like that, starting from the second grade on through his later years, so we have impairments as of the second grade. We have impairments in academic functioning. We, also, see, even on the testing, real impairments in his -- just his information, he thinks there are six seasons. There were -- there was real confusion and not -- and not delirium. I'm just talking about a real lack of understanding about many of the basic functions of the world, except on the most simple level. He was unable to pass his test for his driver's license. Mr. -- Herman told me that he had taken the test several times and wasn't able -- was unable to pass the test for his driver's license, so we see a number of factors in terms of adaptive functioning. The real difficulty, of course, is that at the time of the crime he was still a child, and so even greater aspects of adaptive functioning were difficult to look at because he was a kid.

Q. Now, the -- the IQ test, which was done by the Hall Institute at the time of Mr. Hughes -- after the crime and before the trial, indicated he had a full scale IQ of 74?

A. That's correct.

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Q. And, as I understand what you're saying, DSM4 indicates the IQ has to be approximately 70?
A. That's correct.
Q. But that envisions that there is a plus or a minus range. I think the commonly accepted wisdom is five points?
A. The Wechsler Adult is -- has a range of 4.7 points.
Q. And it was not at that time an absolute cutoff. If you were above 70, you weren't retarded; if you were below 70, you were?
A. It's actually never been an absolute cutoff. It's been a number that must be taken into consideration with the other ways a person functions. The IQ is really based on fund -- a fund of information rather than a person's true cognitive functioning.
Q. And so to make the determination someone is mentally retarded, you both have to have an IQ and an assessment of adaptive functioning?
A. That's correct.
Q. And you can't do it properly unless you make -- take both factors into account?
A. That's correct.
Q. So, you, also, were talking about the psychosocial factors. I think you were really talking

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about these on Axis Four?

A. Yes.

Q. You were talking about the -- the psycho- -- the environmental and psychosocial factors, which are relevant to your conclusions?

A. That's correct.

Q. And, as I understood you, you were talking about sort of the chaotic environment in his home and other factors. Can you talk about those in a little more detail?

A. Yes. One of the real difficulties with a child or an adolescent that has an impaired brain is that when faced with a chaotic structure that doesn't function successfully at home, they often don't have the coping mechanisms that even a normal kid would, so you've got this kid, and there are things going on at home that certainly are not stable or are not supportive that may, in fact, be traumatic, and a child that -- whose brain is impaired and obviously impaired since the first grade does not even have the -- the ability to develop coping mechanisms no matter how dysfunctional that other children may have, and so, you know, you -- you're basically building a glass house on shifting sand, and that's exactly what we have here. We have a -- a family unit with Mr. Hughes where Herman was moved

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back and forth between his grandmother's home and his mother's home multiple times in his first twelve years where there appears to be significant anger and heat, extremely acrimonious relationship between his mother and his grandmother where there were times when it's unclear whether the interests of Herman was put -- as a child was put ahead of the needs of the parents. Herman's father has been described as being slow in social histories. His mother moved a significant number of times. Herman went back and forth between the families. He was moved from one school to another, and, in fact, when we look at his educational process, we see that the transition from special education classes, which he was in earlier in his life, to mainstream classes were -- were, also, precipitated by a move. It's reported at times that Herman would have to be taken out of school and taken to his grandmother's without -- while he was staying with his mother, so you have a tremendous amount of instability. There's, also, a significant -- in my opinion the issues of violence within the home. His mother reported that his father had been violent toward her and that, also, he had -- although he had not been violent toward Herman, that he had -- that Herman had been present, as well as her younger son, Charles, when Mr. -- when Herman