VOLUME VII OF X

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Calhoun County

Honorable Kristi F. Curtis, Circuit Court Judge

HERMAN HUGHES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001415

APPENDIX

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that are adaptable to prison life," and that's -- that's why you'd present an expert like that, to try to take the -- the dynamite out of that particular testimony that went unanswered in this case.

Q. Thank you.

MR. ZELENKA: No further questions.

THE COURT: All right. You may step down.

MR. BLUME: Your Honor, we would ask that Mr. Mauldin be released.

THE COURT: Any objection?

MR. ZELENKA: No objection.

THE COURT: You're free to leave.

THE WITNESS: Thank you.

THE COURT: All right.

MR. BLUME: Your Honor, with the exception of the depositions which we have taken and move in, that would be the applicant's presentation at this time, and there are going to be the witnesses which we have to depose. That's the end of the witnesses.

MR. ZELENKA: Yeah, on the Kelsey Pierce issue.

THE COURT: Yeah, it -- it's being held open for the -- for -- that's -- that's correct. I

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understand.

MS. WILKINS: Also, just to clarify as to Dr. Dewitt's affidavit and Harold Morgan's, we've been discussing that this morning, and we may be able to work something out. We don't know yet, but if the record could be held open, if we work something out, to enter those into evidence.

THE COURT: All right. Very good. Be glad to do that. All right. We've come to a good breaking point. We'll break for lunch at this time, and I'll need you back here in one hour. That will be 2:15. I need you back in the courtroom at 2:15. Have a good lunch. All right.

(WHEREUPON, RECESS IS TAKEN FOR LUNCH.)

THE COURT: Thank you. Please be seated. All right. Yes, sir.

MR. ZELENKA: I think that there are some depositions that---

MS. WILKINS: We already had them marked, and at this time, I guess, we would ask to enter them into the record.

MR. ZELENKA: Without objection, other than the objections with respect to the particular depositions that we made during those depositions.

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THE COURT: All right.

MR. ZELENKA: If you follow what I'm saying.

THE COURT: Yes, I -- I follow it. The objections within the deposition, I did follow that.

MR. ZELENKA: Right.

THE COURT: All right. In evidence without objection with a notation objections are contained therein. All right. Yes, sir.

MR. ZELENKA: Your Honor, at this time we'd like to make sure that the record on appeal is part of the record before the Court, consisting of seven volumes. Also, the brief of appellant, brief of respondent, and opinion of the South Carolina Supreme Court in this particular matter, which we've provided with our initial return.

THE COURT: All right. Very good.

MR. ZELENKA: The State's first witness will be Walter Bailey.

THE COURT: Yes, sir.

WALTER BAILEY, BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS:

THE CLERK: Please state your name and spell your last name.

THE WITNESS: Walter Bailey, B-a-i-l-e-y.

DIRECT EXAMINATION BY MR. ZELENKA:

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Q. Mr. Bailey, what is you present occupation?
A. Solicitor of the First Circuit.
Q. How long have you been the solicitor of the First Circuit?
A. Seven years.
Q. What was your practice before solicitor briefly?
A. I was in private practice in Summerville for around twenty years before I was solicitor. During the initial part of that time out of law school I was a part-time assistant solicitor for probably a total of four or five years.
Q. Okay. As part of your private practice were you involved in defense work, defense of criminal cases?
A. When I first got out of law school in '72 we did not have a public defender system in Dorchester County, so the younger lawyers handled those cases, and especially during the early part of the practice, when I wasn't assistant solicitor, I -- I did a lot of -- had a lot of court-appointed cases. I think I had three cases where the death penalty notice was served where I was involved in the -- in the defense.
Q. All right, sir. Once you became solicitor, were you involved in making decisions as to whether to

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seek the death penalty against individuals charged with murder?

A. Yes.

Q. Approximately how many death penalty cases have you been involved in since you've been solicitor in the First Circuit?

A. As far as serving death penalty notices, probably twenty-five, cases that went to trial, twenty.

Q. All right, sir, and one of those cases was the case we're here before?

A. That's correct.

Q. Herman Hughes?

A. Yes.

Q. With respect to the Hughes case, who was the defense lawyer in this case?

A. Initially Mary Miles was appointed; once the death penalty was served, then Ronnie Hut- -- excuse me -- Ronnie Hutto and Clyde Dean were appointed. While they were still appointed, Phil Newsom was retained. We had a hearing with Judge Cottingham to -- to determine representation, and based on Mr. Newman's being retained -- I mean, Mr. Newsom being retained, Judge Cottingham excused the two court-appointed lawyers.

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Q. Okay. Subsequent to the retention of Mr. Newsom as a lawyer, did you work with him in a professional manner in his preparation of the case, as well as your prosecution in the case?

A. Yeah. For like three months before the case, that's pretty much all I did was prepare -- prepare the case, and that included a lot of contact with Mr. Newsom.

Q. Okay. Do you have an opinion based upon your interaction with Mr. Newsom and your interaction with other lawyers in capital cases about his level of preparation from your viewpoint in the case?

MR. BLUME: I think it's irrelevant. Unless he can say he was a part of the defense team, he was present at the meetings, he knew what the defense lawyers were actually doing, he's not in the -- the situation to say how the preparation went from the defense side.

THE COURT: Rather than have him give an opinion, the Court is most interested in -- in what he observed and what actions were taken and -- and if we can get into those facts.

MR. ZELENKA: Okay.

DIRECT EXAMINATION RESUMES BY MR. ZELENKA:

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Q. Generally what did you observe of Mr. Newsom and his preparation of this case?

A. Well, first of all, I had to get prepared on it. I had to review the file, talk to the witnesses and all of that, so I pretty well knew what happened. In dealing with Mr. Newsom, I was, you know, aware that he knew what was going on, too. He had done his homework. He had done the preparation. He had done the legal research. He was as well prepared as any other death penalty lawyer that I've been involved in (sic), and that's like forty lawyers.

Q. Okay. While he was present in the courtroom, did he appear to be to you dedicated to his case?

A. Extremely dedicated to the case. He -- he was trying to do the best job he could with some real bad facts, and I was -- I was impressed with the level of dedication he had to -- to Mr. Hughes and to his -- his situation.

Q. A question has been raised concerning the order of the voir dire in this particular case?

A. Uh-huh (affirmative response).

Q. I believe you're aware of that?

A. Yeah.

Q. Is that not correct?

A. I was present during the last witness'

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testimony.

Q. Okay. In your experience as solicitor in the First Judicial Circuit in the over twenty cases that you've handled, how has the voir dire been handled in the vast majority of those cases?

A. I think in all but two or three of them I went first on every occasion. I -- I think it was just part of the trial process where the State has the burden of proof, and you normally go forward, and that's what we did. On two or three of the cases the judge alternated, but that was not the -- the rule. That was the exception.

Q. Okay, and during that voir dire process there's been an issue concerning two jurors, Brenda Wise and William Barron. What impressions did you have of Brenda Wise, Juror No. 293, concerning her presentation during the voir dire process?

A. My concern with her was that on -- on two different occasions she seemed to require a greater degree of proof than beyond a reasonable doubt. At one point she was talking about absolute certainty and then a hundred per cent certain. If I had had more than five strikes, I probably would have used one of those strikes on her because I was afraid of some kind of residual doubt situation if we reached the penalty

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phase where she would need a hundred per cent proof of guilt.

Q. Okay. Did it concern you as a prosecutor about her expression of her understanding of some of the victims in this case?

A. It -- it didn't concern me. Judge Cottingham went into that to a fair degree, and she said she could put aside any of those contacts and -- and sit as a fair and impartial juror. The only concern I had with her was, as I said, that she appeared to be requiring something more than reasonable doubt to either convict or to bring back the death penalty.

Q. Okay. With respect to Juror William Barron, you reviewed his proceedings, also?

A. Yes, I have.

Q. What was your impression as a prosecutor concerning this particular potential juror?

A. Overall favorable enough not to strike him, obviously because he -- he served on the jury. My concern, and it's not reflected in the transcript, was there was a -- a hesitation, a prolonged hesitation, when I asked him about being able to impose the death penalty on a sixteen-year-old. He had to reflect on it and had this look on his face like he really didn't -- didn't know if he could do it for someone that

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young.

Q. Now, that leads to the next question. You were somewhat consistent in your voir dire inquiry about asking each of the potential jurors of their ability to sentence a sixteen-year-old to death. Is that correct?

A. That's correct.

Q. What was -- did you have a legal basis in your opinion for asking that question?

A. Yeah. It was either State versus Roachville or Longworth, I think. I had researched that issue, and that came up where the jurors, one of the jurors, was asked in that case whether or not they could impose the death penalty on a non-triggerman, and the other question was whether or not they could impose the death penalty on a young person, and that particular juror said they would have trouble doing that, and that was either a justification for excusal or strike. I've forgot which, so I knew the Supreme Court had basically sanctioned that type question, so I -- I thought it was important and significant really in this case.

Q. Okay. Prior to the time of trial you entered into agreement with Henry Daniel Owens?

A. Yeah.

Q. Is that not correct?
A. Yeah, after some back and forth with his lawyer, I did.
Q. During the trial itself Mr. Owens was presented as a State witness. Is that correct?
A. He was.
Q. And during his presentation as a State witness questions were presented by you which placed in the record Mr. Owens' understanding of the plea arrangement at that time?
A. That's correct.
Q. Is that not correct? A review of the record reveals that in response to a potential penalty he could receive for misprision of a felony, he advised the jury that it was fifteen years. Do you---
A. Yeah.
Q. Do you remember that happening at the time of the trial?
A. I recall it now. Of course, it's been a while since the trial. My idea at that time was I was trying to elicit what his understanding of the plea agreement was, what was in his mind that may have motivated him, I guess, in the defense view to fabricate some story that he thought we wanted to hear, so I didn't think it was that significant what the time

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actually carried. I thought the significant issue was what he thought it carried because that would have been the only thing that could have motivated him, and obviously the only reason I asked him what the plea agreement was to preempt Phil Newsom from asking that question. I think you just have a -- a position that I've got some dirty laundry. I want to go ahead and air it and not let the defense do it and argue we were trying to hide the fact that we had a plea agreement with this guy.

Q. Okay. Were you aware at that time that the crime of misprision carried up to ten years?

A. Yeah, but, again, I -- my purpose wasn't to get into debate with Mr. Owens over what the actual time was. The purpose was to -- to let the jury know there was agree- -- a plea agreement and to let them know what he thought that agreement was. I was not privy to what Mr. Culclasure that represented Owens had told him the time was, so I -- I didn't think it was appropriate to -- to go in there and try to correct anything his lawyer may have told him.

Q. Okay. Your understanding at that time of the trial---

A. Ten years.

Q. ---correct me if I'm wrong -- was that it was

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a maximum of ten years?

A. Yeah, common law, ten years.

Q. And, in fact, consistent with that, in your closing argument you represented to the jury at that time that it was -- he was facing up to ten years, correct?

A. Yeah.

Q. With respect to the testimony of Kelly Hoffman in this case, did you have any information that she had a relationship with Kelsey Pierce?

A. If you say, "a relationship," I assume you mean a sexual relationship, and the answer would be no. She had told me that she had been to school with him and that she knew him, knew who he was, and that was the extent of it, of what I -- what I knew.

Q. So your understanding of her relationship with him, if any, was correctly represented at the time of the trial during your questioning. Isn't that correct?

A. Yes.

Q. Also, during the defense portion of Ms. Hoffman's testimony the taped statement of Ms. Hoffman was, also, presented?

A. Yeah.

Q. It was presented at -- at your request with

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consent of the defense counsel?
A. Yeah.
Q. Why did you seek to do that at that time rather than waiting until redirect?
A. Okay. I think under the rule that I'm entitled to do that, and this was '95. I think the rules were in effect, and it -- it was like Mr. Newsom was going to get into some possible conflicts between her initial statement and what she was testifying to, and I figured just to bring the whole thing out in front of the jury, it would be better for them to hear the tape. The transcript was not, as I recall, not put into evidence. I think the tape was the evidence, and the transcript was just there to -- to aid the jury, if I'm not mistaken. I could be wrong on that.
Q. Okay. At the -- at that time of the trial what had been presented concerning Herman Hughes' statements? Do you recall?
A. I'm trying to remember the -- the sequence of -- of what evidence came up when, and right off the bat I don't recall at that time Ms. Hoffman testified whether or not Herman Hughes' statements had come in or not.
Q. Okay. What was Herman Hughes' statements to

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the police about his involvement in this particular case?

A. He admitted to being involved in it. He admitted to shooting Ms. Hoffman. He alleged, if I'm recalling correctly, that his co-defendant, Kelsey Pierce, came in and shot Mr. Pressley. He, also, said in the taped statement that Sheriff Jones took that Ms. Hoffman could not have seen Kelsey Pierce.

Q. And that was -- Herman Hughes had already presented that information?

A. He had already -- yeah, he -- he'd -- that was in his taped statement to the sheriff, but, again, I don't recall whether that was in the record at the time I -- Ms. Hoffman testified or not.

Q. Okay. In your closing argument to the jury in the penalty phase of the trial, you made the following comment, and let me refer you to page 1651, lines 1 through 12, and ask you to refresh your recollection on that.

A. Okay.

Q. In that portion of the closing argument you're referring to the possibility of a -- a life imprisonment for Herman Hughes, and "Herman Hughes gets life imprisonment, goes to prison. He's cared for by the State of South Carolina; he's fed; he's clothed; he's

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given medical attention." That portion of your closing argument, were you of the opinion that that was appropriate under South Carolina law for you to argue that?

A. Yeah, and I can't cite a case, but I think there are cases on point where similar arguments that I, think, may have been a little more elaborate than that argument have been upheld. I thought there was a factual basis for it in the record due to Mr. Newsom's cross-examination of the Orangeburg Correctional officer that testified about the disciplinary infractions he'd been involved in.

Q. Okay. Briefly tell the Court how Judge Cottingham prepared the potential jury charges at both the guilt phase and the penalty phase and what opportunities he gave to the defense and---

A. Okay.

Q. ---both, the prosecution, concerning that?

A. Judge Cottingham had -- I'd had other death penalty cases with Judge Cottingham before, and he's -- in every case he's---

MR. BLUME: Your Honor, I -- my question here is -- it seems to me this is an issue on which the record will speak for itself, and the way he's sort of doing it, he's going beyond what the record

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is and attempting to establish, I guess, what happened -- I mean, I'm not sure that it's relevant, but if the question is did Judge Cottingham give them the instructions ahead of time and instruct a jury previously, I think that's reflected by the record.

MR. ZELENKA: Well, that's---

DIRECT EXAMINATION RESUMES BY MR. ZELENKA:

Q. When did Judge Cottingham give you his proposed charges?

A. He -- to the best of my recollection he gave us those prior to the trial at one of the pretrial hearings.

Q. Okay, so you had the opportunity to -- to review those?

A. Yeah.

Q. At some time during the trial were you given the opportunity, along with Mr. Newsom, to give the judge potential charges?

A. Yeah, and I -- I recall giving him two or three request to charges.

Q. Were the charges given by Judge Cottingham in the -- the guilt phase and the penalty phase consistent with South Carolina law as you understood it?

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A. To the best of my knowledge they were. His -- his penalty phase charge was -- was pretty much the standard charge I've seen almost every judge use.

Q. I've no further questions.

THE COURT: Cross.

MR. BLUME: Yes, I'm going to have some cross. I just want to clarify one thing for the record, and it would eliminate some, probably some, questions briefly later on. One of the allegations in the petition is that counsel is ineffective for failing to object to the jury charges, and we're going to withdraw that portion of the complaint, and we've gone back and looked at it again, and so that particular subclaim is withdrawn.

MR. ZELENKA: Okay.

THE COURT: All right.

CROSS-EXAMINATION BY MR. BLUME:

Q. Solicitor Bailey, good afternoon. I'm going to have a few questions, and I'm probably going to cover a few different areas---

A. All right.

Q. ---than Mr. Zelenka did. I want to start out, now, you were solicitor in this case, State versus Herman Hughes, and you were, also, still the elected

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solicitor at the time that Mr. Pierce was tried?

A. Yeah.

Q. And you would have been the one that made the decisions about whether or not to go forward as a capital case against Mr. Pierce and whether to seek the death penalty in Mr. Hughes' case?

A. Yeah.

Q. And whether and what type of agreement to enter into with Henry Daniel Owens, Jr.?

A. Uh-huh (affirmative response).

Q. I mean, basically you were the one who made the serious decisions of that nature as the solicitor, elected solicitor?

A. That's correct.

Q. And at some point shortly prior to Mr. Hughes' trial you elected not to go forward as a capital case in Mr. Pierce's trial?

A. At some point I made that decision. Whether it was before that trial or afterwards, I don't recall.

Q. And do you recall whether as part of making that decision you asked Mr. Pierce to submit to a polygraph examination by SLED?

A. I recall Mr. Pierce submitting to a polygraph exam.

Q. And I assume that part of that was you were

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trying to figure out what really happened?

A. No, I -- I knew what happened. What I was trying to do is convince or try to get Mr. Pierce's lawyers to acknowledge their client's involvement. Their position, they were dumping the whole thing on Herman Hughes. From my investigation of the case I knew Hughes was -- felt like he was the main player but thought Kelsey Pierce was on the outside and was involved in it, so it was -- the polygraph was not to let me know whether or not he was lying or not. I knew he was lying to his lawyers based on what they told me. I was trying to force their hand to get them to come to terms with reality that their client was involved seriously and needed to---

Q. But the polygraph indicated that Mr. Pierce was, in fact, there, was, in fact, present, was withholding information, and was inconclusive even on the issue -- inconclusive, pointing towards deception, on whether he shot anybody?

A. I can't dispute that. I don't recall the specifics of polygraph. Again, I don't put a whole lot of stock in polygraphs. This was part of my effort to get his lawyers to come to---

Q. So, in your decision as solicitor---

A. If I could finish, it was part of my effort to

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get his lawyers to come to grips with the reality.

Q. But you are not disputing with me what that polygraph said, the results of that?

A. I just said I -- I did not dispute that.

Q. Okay, and now, let me go on to a couple of other areas here. Now, as I understand your testimony on the misprision of a felony issue, you would agree, would you not, that Henry Daniel Owens, Jr., was charged with accessory before the fact of murder and other charges?

A. He was initially charged with a misprision of a felony, and that was the only charge for a while. I wanted to get his attention. We submitted a indictment to the grand jury that was true billed for accessory before the fact. I wrote his attorney, Tommy Culclasure, and told him what I thought his client's involvement was, what his exposure was. We were -- I was looking for evidence in the case against Herman Hughes. I thought he had it based on a statement that he'd given several days after the -- the murder took place and---

Q. But you indicted him for accessory before the fact?

A. Right. It was true billed.

Q. And accessory before the fact carries a

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punishment of life imprisonment?
A. Yes.
Q. And the plea agreement was that he was permitted to plead guilty to misprision of a felony?
A. Right.
Q. Which carries a maximum punishment of ten years?
A. Correct.
Q. As I understand your testimony, at the time he said fifteen years, you knew that was incorrect, but you felt like you just didn't want to correct him in the presence of the judge or jury because in your view what was significant was that he had a deal?
A. The significance was what was in his mind at the time he agreed to testify for the State. I don't know what Culclasure told him the time was. I knew what the time was. He's saying, "My understanding," I assume, based on his conversations with his lawyer, "is I'm looking at fifteen years." On the one hand, you've got life in prison. On the other hand, you have either ten or fifteen years. I figured from the defense point of view either one of those scenarios could be something they could impeach him on. I didn't think the difference in five years was that significant.

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Q. Okay, but you did know---
A. But I---
Q. ---it was wrong, and you didn't say anything to -- to the judge---
A. It was wrong---
Q. ---or jury about it?
A. ---as a matter of fact.
Q. Right.
A. It was not really fifteen years. It was ten. It was correct in that that was what he thought it was, which was the whole basis of my question.
Q. But he was not, in fact, facing fifteen years. The maximum he could have been sentenced to was ten?
A. Right, but not to beat a dead horse to death again, the issue was not what the time was. The issue was what was in Mr. Owens' mind as far as the plea agreement. My question, "What is your understanding of that agreement?"
Q. Correct.
A. He told me what his understanding was. He answered my question. That was the end of it.
Q. But the relevant legal facts are he was facing a sentence of life imprisonment?
A. If I had served the indictment on him.
Q. And the maximum punishment he could have

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received under the plea bargain was ten years?
A. Right.
Q. Now, I want to ask you a question about do you remember when the defense called an individual named Ricardo Gilford?
A. Yeah.
Q. In the Hughes trial?
A. I -- I -- let me say this -- I have not reviewed the transcript, except for a portion briefly today. I recall calling Ricardo Gilford because he was one of the people that was in contact with Kelsey Pierce and Herman Hughes and Daniel Owens after the fact later on that evening.
Q. And Ricardo Gilford testified that he had heard Mr. Pierce make statements indicating that he shot one or more of the victims?
A. I think he -- one of the -- the -- one of the people -- there were two or three people that were in contact with this group afterwards -- one of them reported that Pierce said he had shot three people. I don't know whether that was Gilford or one of the other ones.
Q. Okay, but the statement of Mr. Gilford indicated that Pierce had indicated he was at least he was involved in the shooting?

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A. Yeah.

Q. And do you remember that you attempted to impeach him, the cred- -- his credibility at the trial?

A. Whatever I said in the record is what I said. I don't have total recall on that.

Q. Okay. Well, let me ask, if the record reflects that you -- that you did attempt to impeach the credibility of that evidence, you would not dispute that?

A. No.

Q. Now, in the case of The State versus Kelsey Pierce, which your office handled---

A. Uh-huh (affirmative response).

Q. ---but, as I understand, you did not -- you did not actually prosecute. Is that right?

A. Somebody else in my office prosecuted that case.

Q. Would you dispute the fact that at that trial the solicitor's office called a Mr. Gilmore to give essentially the same testimony as Mr. Gilford gave at Mr. Hughes' trial?

A. I -- I wasn't present at that trial. If that's what the record reflects, then I -- I obviously wouldn't dispute that.

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Q. Okay, and you would, also, agree with me that those positions in the two, that's inconsistent in the two trials, to attempt to impeach a witness in Mr. Hughes' trial, who says that Mr. Pierce was the shooter, but nevertheless to call a witness in the Pierce trial to try and convince the jury that he might have been the shooter?

A. If that's what occurred, it would seem inconsistent, but I -- I -- again, I don't re- -- I wasn't at the second trial, haven't reviewed the transcript, and haven't reviewed the transcript in this case, so I can't answer your question. Whatever the record says, the record says.

Q. And you would agree with me, would you not, you called Ms. Hoffman as a witness?

A. Yeah.

Q. At Mr. Hughes' trial?

A. Yeah.

Q. And her testimony in Mr. Hughes' trial was she was adamant on the point that there was no possibility that Mr. Pierce was in the Blue Diamond?

A. Again, her -- her testimony will speak for itself. She -- I don't recall whether she was adamant that he wasn't there or whether she said she didn't see him there.

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Q. Okay. Well, let me -- let me ask you to review. This is 1168 of the record.
A. Okay.
Q. Really beginning down---
A. Okay. Do you want me to read this?
Q. You can read it to yourself.
A. Okay.
Q. You can read it.
A. Okay. It says she was absolutely positive that Herman Hughes was the only one in there.
Q. Okay. Did she indicate that she has a complete and clear recollection of what happened, is absolutely positive he did not come in?
A. That's---
Q. Mr. Pierce?
A. That's -- that's what that transcript says that you just showed me.
Q. Okay. Now, let me ask you to review part of the trial in The State versus Pierce. It's just, again, it's just a few sentences.
MR. ZELENKA: What page is that?
MR. BLUME: 110, 111.
MR. ZELENKA: Thank you.
MR. BLUME: Beginning at the bottom of this page and going on.

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THE COURT: What transcript is that?

MR. BLUME: This is the transcript in The State versus Kelsey Pierce.

THE COURT: Pierce.

MR. BLUME: And it's page 110 and 111 is what Solicitor Bailey is reading from.

THE WITNESS: Okay. All right.

CROSS-EXAMINATION RESUMES BY MR. BLUME:

Q. And you would agree with me, wouldn't you, that in this trial Ms. Hoffman testified that she didn't if know Mr. Pierce was in there or not?

A. Right, but she didn't see anybody else but Herman Hughes.

Q. She didn't know if he was in there or not because she was looking down?

A. Right, after she was shot.

Q. Right.

A. By Herman Hughes.

Q. Right, and, again, that is inconsistent with the testimony at the Hughes trial, absolutely positive versus could have been in?

A. It -- looking at the cold record, I would have to agree with you, which you -- you need to bear in mind this is a young woman that's been shot two times. When EMS gets there, she has no pulse, no blood

pressure, and I don't know what kind of shape she was in when she---

Q. That's right, and---

A. It would be difficult to remember with total recall when something like that happens.

Q. That's right.

A. I would imagine.

Q. To remember accurate what happened---

A. Right.

Q. ---it's difficult, but at least on the cold record in the Hughes trial, absolute certainty, Mr. Pierce was not present, and in the Pierce trial, does not know if he was in or not---

A. That's---

Q. ---based on the---

A. That's what those two transcripts say, right.

Q. Now, you've indicated that you did not have any knowledge yourself of any relationship between Ms. Hoffman and Mr. Pierce of a -- of a sexual nature?

A. Right.

Q. And that the information you had did indicate that they knew each other?

A. Right.

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Q. And that she could have identified him had he gone inside the Blue Diamond?
A. Yeah. She went to school with him. She could have identified him if he had been there to be seen. She didn't see him.
Q. And -- and essentially both sides at the trials, more or less, agreed that one of the -- the main reason Mr. Pierce didn't go in the store was that he didn't want to be identified?
A. I don't know why Mr. Pierce didn't go in the store. I -- I assume that he -- I -- I think there was some -- and I'm trying to go back and -- some indication that he knew Mr. Pressley. He recognized the car out front and figured if he went in, Mr. Pressley might recognize him. I don't recall him knowing that Kelly Hoffman was even in there.
Q. Well, would you argue with me or dispute if I said that the State's, the crux of the State's, theory at the Pierce trial was Mr. Pierce did not go in because Ms. Hoffman knew him and could identify him?
A. Again, I did not prosecute that case. I've not -- I wasn't present at the trial. I haven't reviewed the transcript. Things come to light at different times during the process, and some information may have come to the attention of the assistance

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solicitor that I didn't have at the time of the Herman Hughes trial. I -- I don't know.

Q. But it certainly is at least plausible from your perspective just at sitting in the world that if two people are going to commit a robbery, and one of them knows somebody inside when they get there, that that person wouldn't go in. It's just a sort of a common sense?

A. I -- I'm -- a lot of times people don't exercise common sense, so you can't always common sense would lead somebody to do something or not. I don't know what motivates people to do armed robberies and murders. I'm going on the facts, and the facts were that Kelsey Pierce was outside. Herman Hughes was inside doing the shooting. I based the presentation of my case on the facts as I understood those facts to be---

Q. Right.

A. ---which included Mr. Hughes' statement that he was in there doing some shooting and that Kelly Hoffman could not have identified anybody else in there.

Q. Right, but Mr. -- well, first of all, let's establish that Mr. Hughes statements were not admitted at this trial. You chose not to admit them?

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A. Mr. Zelenka's nodding his head. I have not reviewed the transcript. It's been a while, so I would assume that's correct.

Q. And I assume you chose not to admit them because in the statement Mr. Hughes, although admitting he shot, said that Kelsey Pierce is the one who actually killed Mr. Pressley?

A. If somebody makes partially self-serving and partially incriminating statements, and I've got other evidence that I think tells what happened, then I'm going to use that other evidence---

Q. Right.

A. ---which is what I did in this case.

Q. That's -- of course, this is from your perspective of the case, the prosecution side of the case?

A. Right.

Q. The defense theory of the case in regards to whether they got Mr. Hughes' statement in was that Mr. Pierce was involved in the shooting at the Blue Diamond, and that was the defense theory in this case?

A. That was their theory.

Q. Now, I think I just have one -- there were a few questions now. I just want to turn quickly to

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the voir dire and issues. As I understand it, your testimony is is that you are routinely permitted to go first during the voir dire process?

A. Pretty much, yeah. I think I said like seventeen out of twenty I'd gone first.

Q. And in the other cases have defense lawyers asked to go first and been prohibited from doing so?

A. On at least one other occa- -- you're asking prohibited? No, I don't recall that happening.

Q. Okay. Now, I think, if I could just take one second to review Ms. Wise's voir dire. I thought that you -- you indicated -- well---

A. I will be glad to show -- show you what I was referring to, if you'd like.

Q. Okay. Be happy to. It would just -- it would help me to understand it.

A. Okay. Okay. Page 197 I asked her if you---

Q. You don't object to me looking over your shoulder?

A. No. "If you and the other jurors vote for the death penalty, could you sign your name to a piece of paper, a death verdict form, that would put that verdict into effect?" She says, "If I was one hundred per cent sure." Later on, I asked, "I'm just asking you

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if the case was bad enough, could you impose the death penalty on a sixteen-year-old?" Her response was, "If there was no doubt in my mind." That's what I was referring to.

Q. Okay, but what, of course, she's saying there is, "If I was convinced he was guilty, I could give a sixteen-year-old the death penalty"?

A. If she was a hundred per cent certain that he was guilty, that caused me concern because of the fact that she may be convinced beyond a reasonable doubt that he's guilty but might -- might need a hundred per cent certainty to bring back the death penalty, and my understanding of the law is is that's not required.

Q. So it was your opinion that she held some heightened standard---

A. Yeah.

Q. ---of reasonable doubt---

A. Absolutely.

Q. ---that would have caused it?

A. And I'm sure Mr. Newsom heard that, also.

Q. I don't have anything further.

REDIRECT EXAMINATION BY MR. ZELENKA:

Q. Mr. Bailey, I have just got -- got one question. Just some I'm clear, Kelsey Pierce was

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acquitted of murder?

A. He was.

Q. He was convicted of armed robbery?

A. Yeah.

Q. No further -- one other. Let me show you some documents and ask if this refreshes your recollection.

A. Yeah. What you have handed me is a polygraph report from SLED, and this does refresh my memory as far as what -- what questions were asked and whether or not Mr. Pierce indicated deception.

Q. What was your understanding of the information Mr. Pierce gave to the SLED agents, if any?

A. Let me -- the polygraph report indicates that four questions were asked of Kelsey Pierce. He indicated deception on all four of them. The questions included whether or not he shot either of the two people that were shot at the Blue Diamond, whether he was at or around the Blue Diamond, that he planned it with Herman Hughes, and was he withholding information. I -- I don't see what his responses were, whether they were yes or no responses, but it -- it does indicate that he was -- indicated deception on all of them.

Q. Okay. I don't believe I have any further questions.

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THE COURT: All right. Nothing else?

MR. BLUME: Your Honor, we have no objection to Solicitor Bailey being excused.

THE COURT: All right. You may be excused, sir.

THE WITNESS: Thank you.

MR. ZELENKA: Judge, could I take a brief five-minute break? This may be our last witness, but I just want to be sure.

THE COURT: Certainly. All right. We'll take about a five-minute break. We'll be at east.

(WHEREUPON, RECESS IS TAKEN.)

THE COURT: Thank you. Please have a seat.

MR. ZELENKA: The State calls Kelly Hoffman Driggers.

KELLY HOFFMAN DRIGGERS, BEING FIRST DULY SWORN, TESTIFIES AS FOLLOWS:

THE CLERK: State your name and spell your last name.

THE WITNESS: Kelly Hoffman Driggers, D-r-i-g-g-e-r-s.

DIRECT EXAMINATION BY MR. ZELENKA:

Q. Ms. Driggers, you were the -- one of the

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victims in the Herman Hughes case. Is that not correct?

A. Yes, I am.

Q. And you testified previously in this matter?

A. Yes.

Q. Have you had the opportunity to review your testimony in the Herman Hughes case?

A. Somewhat.

Q. Okay. I just have a couple of questions to ask you. At the time of the crime that you were a victim of did you know Kelsey Pierce?

A. Yes.

Q. How did you know him?

A. I went to school with him for about three years.

Q. Okay. Did you have a boyfriend/girlfriend relationship with Mr. Pierce?

A. No.

Q. What kind of relationship did you have with Mr. Pierce? Please explain.

A. Casual acquaintance. I went to school with him. He never was in my class, but I knew him. It wasn't that big of a school.

Q. Okay. At any time in your life did he ever

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call your house?
A. Yes.
Q. Briefly describe that.
A. He called me at my mother's house. He said that he wanted to be my boyfriend but that -- he loved me but that I had to understand he was going to have other girls, and I, you know, it was ridiculous. I got off the phone with him, and I don't know if he ever called me back. I wasn't at my mother's house that much.
Q. Okay. At that time was that a surprise to you that he would make these comments---
A. No.
Q. ---to you by the telephone? Had you been out on dates with him before that?
A. No.
Q. Had you ever been unusually friendly towards him as one may be to a friend? Did you ever essentially, while not having any date, did you go places with him?
A. No.
Q. Do you have any idea why he made this call to you?
A. Yes.
Q. Why was that?

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A. Well, I can recall three specific, actually four, at school where he did things that I didn't want him to do.

Q. All right. At the time of the trial itself were you being honest when you gave that statement to the Court that you weren't -- you just knew him through school?

A. Yes.

Q. At the time of the crime who were you having a relationship with?

A. Ken.

Q. How close was that relationship?

A. We lived together. I knew him for eight years at the time.

Q. At the time of the trial did you in any way, shape, or form attempt to limit the involvement of Kelsey Pierce in this case based upon any relationship or friendship or prior contact that you had with Mr. Pierce?

A. No.

Q. At the time of the trial did you give the testimony as you believed it to be concerning the crime and the shooting that Mr. Hughes was involved in?

A. Yes.

Q. Prior to your testimony today I've provided

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you with some copies of some affidavits from individuals within the community, two individuals, a Sheila Keller and a Stephanie Frederick?

A. Yes.

Q. Based upon your review of those affidavits do you know what events they are talking about?

A. I read what they said, but I don't know where they got that impression.

Q. Okay. Similarly I have provided you with some information from Kelsey Pierce. Do you have any idea where he may have gotten that information from?

A. His imagination.

Q. I have no further questions.

CROSS-EXAMINATION BY MR. BLUME:

Q. Ms. Hoffman, I'm going to ask you some questions a little more -- in more detail about some of your prior statements, and, as I understand your testimony, and I'll only actually ask you one or two brief questions about this -- you -- is that you did not have a relationship with Mr. Pierce, a sexual relationship?

A. Not a sexual relationship.

Q. But you knew him clearly?

A. Yes, I knew him.

Q. And you knew what he looked like?

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A. Yes.
Q. And you would have certainly immediately recognized him had he come into the Blue Diamond---
A. Yes.
Q. ---the evening this happened, and you would have immediately known it was him?
A. Yes.
Q. And your testimony is that you don't really know where this sort of information came from in the affidavit?
A. I assume it came from him.
Q. Okay, or, I mean, for example, one -- have you ever had any interactions with a police officer, Danny Kirkland?
A. I know for a fact that I have, but I can't remember precisely.
Q. And so, for example, if he has previous given a deposition in this matter that one of the reasons the police immediately began to suspect Kelsey Pierce was because it was rumored that Kelsey and Kelly had a "little thing going," you wouldn't know where he got that information either?
A. No, I certainly wouldn't.
Q. From a police officer, a Kirkland?
A. I never heard that.

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Q. And, now, let me ask you a few questions about, I think, some things that we will have -- shouldn't have much trouble agreeing on and then going to some other matters. At the time this happened you were seventeen?

A. Yes.

Q. And you indicated in your trial testimony that Mr. Hughes came inside, that Herman came inside, and then he left?

A. Temporarily.

Q. Right, and then he left, and then he came back in?

A. Yes.

Q. And your testimony at Mr. Hughes' trial was that when he came back in, he looked paranoid?

A. In retrospect.

Q. Right, but you said that he -- you said that he looked paranoid when he came back in?

A. Now that I know what happened.

Q. Okay.

A. At the moment I didn't think, "He's acting paranoid."

Q. Okay. You didn't?

A. I didn't feel scared.

Q. Well, I thought you said that at one point

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that you saw him, that he was watching you, and you moved, and he looked at you funny---

A. Yes, but---

Q. ---before this happened?

A. ---lots of guys look at me funny.

Q. Now, did you know a woman named Pat Thornal?

A. I had met her a few times. I mean, I knew her.

Q. Uh-huh (affirmative response), and she was the owner of the Blue Diamond. Is that right?

A. As far as I know.

Q. All right. Do you ever remember, was there ever any situation that came about when she indicated she didn't want you to come back to the Blue Diamond?

A. She didn't tell me that.

Q. Did she -- did anybody tell Ken that?

A. I did not hear her tell Ken that.

Q. Okay. Did -- did Ken tell you that?

A. He mentioned it.

Q. Okay, and the part I was speaking of, I just want to -- I'm not trying to play tricks -- I just want to show you the part about looking back. This is the transcript of page 1160 of your testimony?

A. Uh-huh (affirmative response).

Q. "Did anything seem unusual about him? In

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retrospect he seemed kinda' paranoid, but when he came back in, I went to get something out of the drawer, and he looked at me real quick like. I don't know. Maybe he thought I was getting something."

A. Yeah.

Q. That was your testimony at the trial?

A. Yeah.

Q. And, now then, you testified that he left, and he went outside, and then he came back in?

A. Uh-huh (affirmative response).

Q. How long was he outside?

A. At the most, approximately ten minutes.

Q. Okay, approximately ten minutes. Would you dispute that in the statement you gave -- let's first establish, you gave a taped statement to Earl Rudy when you were in the hospital?

A. Yes.

Q. You then testified at a motions hearing in a pretrial proceeding in the Hughes case?

A. I testified at the trial.

Q. You testified before the trial. You testified at -- at a hearing before the trial?

A. It's hard to remember.

Q. Okay.

A. I've been to so many of these courtroom

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proceedings.

Q. All right. Well, we -- we will establish you did.

A. I'll take your word for it.

Q. Okay. Then you testified at Herman's trial?

A. Okay.

Q. Right?

A. Yeah.

Q. And then you testified again at the Pierce trial, at Kelsey Pierce's trial. Is that correct?

A. I assume it is.

Q. Now, at -- would you dispute that when you talked to Earl Rudy, you said he was gone for five minutes; when you testified at the pretrial motion hearing, you said five to eight minutes; then at Mr. Hughes' trial you said ten minutes?

A. I may have said that. It was an approximation.

Q. Okay, and would you agree with me that when you talked to Earl Rudy in the hospital, you said that four shots were fired, but subsequent to that you indicated that five shots were fired?

A. When I was on morphine, yes, I may have said that. According to what I read, I did say that.

Q. Okay. When you talked to Earl Rudy, you said

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four, and then subsequently you said five, and would you agree with me that you told Mr. Rudy that you had your eyes closed, and you didn't see all the shots when you talked to him; that at the motions hearing you said you didn't see where Mr. Hughes shot Mr. Pierce?

A. Excuse me. He didn't shoot Mr. Pierce.

Q. I'm sorry.

A. He shot Mr. Pressley.

Q. Mr. Pressley; that he didn't see where he shot---

A. There is a huge difference.

Q. That he didn't see where he shot Mr. Pressley; that at Mr. Hughes' trial, Herman's trial, you indicated that you had your head on the desk but were looking up and saw all the shots; but then at Mr. Pierce's trial you indicated that you did not look up?

A. If that's what it says, then that's what I said.

Q. Okay, so, and in those four proceedings you gave that testimony, and, again, when you talked to Mr. Rudy the first time, you indicated that you were shot first in the face and then in the chest?

A. I don't even recall what I said in my first conversation with Mr. Rudy. I was in the hospital. My teeth were wired shut, and I was on

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morphine.

Q. But you would agree that that's what this statement says?

MR. ZELENKA: Let her answer the question please.

THE COURT: Let her complete it.

MR. BLUME: I think I can get the answer to the question, and then she can explain it.

CROSS-EXAMINATION RESUMES BY MR. BLUME:

Q. You agree that's what this statement says?

A. Yes. That's what I read.

Q. Now, back to Officer Kirkland. I would like to show you what's been marked -- it'll take some -- while you're looking for it, let me just ask you to read this, and then I'll show you the official exhibit.

THE COURT: Well, wait. She can't look for it and take all this down, too. She's pretty amazing but not quite that amazing.

MR. BLUME: I'm sorry, Your Honor.

CROSS-EXAMINATION RESUMES BY MR. BLUME:

Q. Ms. Hoffman, I'm going to show -- I'm sorry -- Ms. Driggers, is that correct?

A. Now, yes.

Q. Yes. I'm going to show you what's been marked as Applicant's Exhibit 11, and I think really the

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relevant part of what I'm going to ask you is just this part right here, this paragraph.

A. Okay.

Q. Now, you would agree with me, would you not, that this letter indicates that you said to Danny Kirkland the -- the night that you were shot -- there was a police officer present at the scene -- on one occasion that you were shot by a tall black man and on another occasion by a short black man. That's what this letter says?

A. I was told that he said that.

Q. And Mr. Pierce, Kelsey Pierce, is taller than Herman Hughes. Is that correct?

A. I don't know if he is now, but I think that he was then. I'm not positive.

Q. Okay, and the last -- would you agree with me that when you testified at Mr. Hughes' trial, at Herman's trial, that you testified that you were one hundred per cent positive that Mr. Pierce or anyone else came in the Blue Diamond?

A. I testified that no one else did the shooting besides Herman Hughes.

Q. Okay. That is your recollection of your testimony?

A. Yes, and that's my recollection of what

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happened.

Q. Okay, but you're -- let me show you the testimony, which is on page 1168 and 1169 beginning at the bottom.

A. Uh-huh (affirmative response).

Q. "Are you positive Herman Hughes was the only one inside the Blue Diamond?" You answered, "Yes." "If somebody else had come in, would you have seen them?" and you said, "Definitely."

A. Yes.

Q. And then at Mr. Pierce's trial you were asked, "There on the night in question we need to ask you about who was in the Blue Diamond. It wasn't Kelsey?" "I don't know if he was or not, but I didn't see him."

A. I would love to be able to place him at the scene of the crime.

Q. So, but in the Pierce trial you indicated you didn't know if he was in there or not?

A. Anything's possible.

Q. But in the Hughes trial you were absolutely positive that no one else was in there?

A. Yes.

Q. I have one final question for you. Have you ever been convicted of a criminal offense?

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A. No.
Q. You're not? Are you Kelly Michelle Hoffman?
A. Yes.
Q. Let me show you what is an official arrest record from the South Carolina Law Enforcement Division, which indicates you were charged with shoplifting and were convicted of the offense of shoplifting in 1995?
A. Oh, yeah.
Q. Is that true?
A. Uh-huh (affirmative response).
Q. Thank you. I don't have any further questions at this time.
REDIRECT EXAMINATION BY MR. ZELENKA:
Q. Ms. Driggers, I've just got a couple of questions.
A. Okay.
Q. At the time of this crime, again, did you ever see Kelsey Pierce in the Blue Diamond?
A. No.
Q. Are you definite that you never saw Kelsey Pierce in the Blue Diamond on that day?
A. Yes.
Q. Were you definite in 1995 that you never saw Kelsey Pierce in the Blue Diamond?
A. Yes.

Q. In any of your statements that have been discussed here, were you ever seeking to indicate to anyone that Kelsey Pierce was the individual in the Blue Diamond?

A. No.

MR. BLUME: Your Honor, I don't know if he has anything else, but, I mean, I -- I've kinda' been generous here, but he's asked nothing but a series of leading, tremendously leading, questions, and it is his witness.

THE COURT: It is leading. Let me ask you if you'd -- you'd stop.

THE WITNESS: Am I allowed to add something?

THE COURT: Just respond to the questions, if you would, unless you're responding, you're -- you're answering a previous question, and I think you've---

THE WITNESS: Okay.

THE COURT: ---fully answered. Just respond to the questions, if you would.

THE WITNESS: Thank you.

REDIRECT EXAMINATION RESUMES BY MR. ZELENKA:

Q. Is there anything you would add in response to any of the questions which you gave concerning whether Kelsey Pierce was in the Blue Diamond on that

day?

MR. BLUME: I object, Your Honor. That's clearly not a proper question.

REDIRECT EXAMINATION RESUMES BY MR. ZELENKA:

Q. Have you fully answered all the questions that I've asked you?

MR. BLUME: That's even -- that is even more objectionable.

THE WITNESS: Well, I wanted to say more with him, and he wouldn't let me speak.

MR. BLUME: Well, Your Honor, I would ask that the witness not -- if he's got a legitimate admissible question, to ask it, but none of these questions are admissible. I mean, I would love it if we could come into court and do that, but I've never been in a courtroom where you could.

THE COURT: We need to have it where you respond to the questions by the attorney.

MR. ZELENKA: I have no further questions at this time.

MR. BLUME: Nothing further, Your Honor.

THE COURT: All right. You may step down, ma'am.

MR. ZELENKA: Your Honor, at this point the

State has no further evidence to present with the understanding that we're going to take these other depositions.

It's, also, my understanding for the record that these depositions would be done as defense witness depositions. Is that correct?

MR. BLUME: Well, that's our understanding, too.

THE COURT: Understanding as well? All right.

MR. ZELENKA: Okay. I just wanted to make sure that I had the opportunity to deal with these witnesses on cross-examination as opposed to direct.

THE COURT: I understand. All right. We, also -- anything further in that regard?

MR. ZELENKA: Nothing further.

MR. BLUME: No.

THE COURT: We have the outstanding matters of the affidavits dealing with the jurors, and they will need to be -- they're proffered, and I assume they---

MR. ZELENKA: I've never seen any affidavits from any jurors.

MR. BLUME: But the proffer was made in the

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pleading itself; this is what they would say.

THE COURT: Well, what---

MR. ZELENKA: But I -- it doesn't say any jurors.

THE COURT: I know, and what I'm thinking is you're going to want to put it in the record, and -- and we could pending -- I believe, based on the case law that I've read thus far, the best way to handle this would be to seal it pending the decision of admissibility. You have it then there for anything further.

MR. BLUME: And we will prepare the affidavits and submit them under seal as the proffer. Is that -- that's my understanding what we're talking about.

MR. ZELENKA: The proffer relating to the particular jurors?

MR. BLUME: Right, and then if the Court rules they're inadmissible and won't look at them, they'll just be part of the record. If the Court rules they are admissible, then you'll look. As I understand, that's the procedure that you're envisioning.

MR. ZELENKA: Well, if the Court says they are admissible, we may want to take their depositions.

THE COURT: And that, I certainly understand that.

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CERTIFICATE

I, the undersigned, Jean S. Johnson, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record taken in the trial of the captioned cause, relative to appeal, in the Court of Common Pleas for the County of Calhoun, State of South Carolina, on the 11th, 12th, and 13th days of October, 1999.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Jean S. Johnson

Court Reporter

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MR. ZELENKA: Right.

THE COURT: I certainly understand that. All right. Let me ask you at this time if you would articulate very clearly for the Court the reasons for the introduction of these, and let me tell you why.

It's very difficult based on -- on the cases that I've read to make a decision not knowing more specifically what it is that -- without getting into exactly -- but just what it is or what the point is of these particular -- you've indicated funda- -- fundamental fairness; you have talked about due process; you have indicated that it would be proper for them to be submitted, but it's hard to make a determination, so if I could get you to put on the record as specifically as you can, it will assist the Court.

MR. BLUME: Well, you're asking a lot when you want me to be quick and articulate, but I will -- I will do -- take my best cut at it, Your Honor.

THE COURT: All right.

MR. BLUME: The allegations -- there is no -- I guess I'm trying -- there is no substantive claim of juror misconduct in this case, so there is not a claim in the application of juror misconduct, so they are not offered to show that Mr. Hughes is entitled

to a new trial because of something the jurors did wrong.

The relevance of the material in our view has to do with one of the components of our claim of ineffective assistance of counsel, is that Mr. Newsom conducted an inadequate voir dire and that he did not ask jurors, as you've heard through the testimony of our expert, John Mauldin, and certainly through my examination of Mr. Newsom, he did not ask questions sufficient to determine whether jurors were legally qualified under the law.

Our investigation in talking to the jurors has indicated that several of them were under the impression that if they found Mr. Hughes guilty and if there was an aggravating circumstance, that they had no option but to sentence him to death, that they did not believe that they could consider mitigation, and while that, I think, would not give rise to a substantive claim of juror misconduct or anything the jurors did wrong, it's our view that it does establish prejudice, at least as some proof of prejudice under the Strickland versus Washington standard because it's my understanding of the law in order to prevail on a claim ineffective assistance, we have to show that not only were counsel's actions deficient but that they were, also, prejudicial,

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so they are offered to help establish prejudice under Strickland, if -- if that makes sense.

THE COURT: All right, but wouldn't that go specifically to the charge that was presented to those jurors? Wouldn't then, if the jurors were properly charged, that would be -- that would take care of this issue, looking to the charge itself?

MR. BLUME: Well, I mean, our position on that -- I'll explain it -- certainly all the empirical research and the empirical data that's available indicates that jurors often don't understand the instructions themselves.

They often misunderstand many points, and that's why it's important for counsel in a case -- I think there was certainly testimony to this effect today from Mr. Mauldin -- it's important for counsel to spend time during the voir dire to educate the jurors about what the law is and what the law is relevant to -- to sentencing.

While I understand Your Honor's concerns, if there is not a challenge to the substantive instruction itself, how could this be, but it's our view that still it's counsel's obligation to help educate the jurors on the relevant law, and it's in order to determine whether they are qualified.

THE COURT: All right. Anything that you want to put on the record in clarification of that issue I'll allow you at this time.

MR. ZELENKA: No, I think our reasons in our memorandum are even stronger than that, Your Honor.

THE COURT: All right. It will remain open. I will expect that I'll hear from you. How long can we hold this open? When can I expect that these depositions will be complete?

MR. ZELENKA: The depositions will definitely complete in thirty days.

MS. WILKINS: And we're agreeable to that certainly.

MR. ZELENKA: My assumption is it'll be done even before that, and the -- the resolution of the affidavits may be able to be resolved before the end of the day.

THE COURT: We're talking about the remaining affidavits, not the juror affi---

MS. WILKINS: Yeah.

MR. ZELENKA: Correct.

MS. WILKINS: We may still have two affidavits coming in by consent. They won't come in today obviously, but if we're able to agree on a few things,

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we can get them in.

MR. BLUME: Your Honor, what I would propose or at least throw out, and Mr. Zelenka can respond, is that we try and do these depositions within thirty days, that we, also, discuss with Mr. Zelenka and see if we can come to some agreement on a schedule for post-hearing briefing, and then we can just inform the Court if we can't agree.

If we can agree, then at the time we can do that, we can ask for the Court's intervention and assistance in setting reasonable period of briefing.

THE COURT: I'll give you that opportunity. All right. Now, I've had an opportunity to review and -- and -- and am comfortable at this time with ruling on the admissibility of the expert testimony on the issue of ineffective assistance of counsel, and -- and let me go ahead and say that I'm -- I'm allowing it in.

It has been proffered in, but I will allow it in, and -- and I'm in a position where I can weigh that, and there was clearly adequate cross-examination of this witness.

In light of the fact that I did not try death penalty cases nor have I sat as a judge in a death

penalty case, it's beneficial to the Court to have that type of information.

Of course, I have access to -- to the case law and -- and certainly have reviewed that as well, but under these circumstances I think it was appropriate, and I will give it such weight as I deem appropriate.

MR. BLUME: Thank you, Your Honor.

MS. WILKINS: Thank you, Your Honor.

THE COURT: Anything further?

MR. ZELENKA: Not that I can think of, Your Honor.

THE COURT: I think that anything that was pending, any motion that was pending before the Court has been addressed. Is there any other---

MR. BLUME: No, Your Honor.

THE COURT: All right. I'll leave it to -- to you to attempt to come up with a schedule, and, if successful, then either contact me directly or through law clerk, if we can put it on a conference, if you would please, or if I can just show a con- -- by a consent.

MR. BLUME: Thank you.

THE COURT: Then I'll sign it if it -- if it's in agreement with me, I mean, if I can agree to

that schedule as well.

Let me inform you that next week I am on vacation. I will not be available, but Jill Wright, my law clerk, will be available, so you can send it to her, and she can call me because I am in the area. Thereafter I'm much more available. All right. Okay. Very good.

MR. BLUME: Thank you for having us down to Horry County. We enjoyed being here.

THE COURT: Well, well, thank you for it really left just the one judge here since I -- since I was back. We don't have any other judges, and it's difficult to -- to not have a judge in this large a circuit, so I appreciate the co-operation very much. Thank you.

The file in this case is actually being sent here, and the exhibits will remain here pending a ruling in -- in this particular case at which time Orangeburg will -- will get it, and it can be shipped from there. All right. Just wanted to let you know.

MR. BLUME: Thank you.

END OF REQUESTED TRANSCRIPT OF RECORD

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STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Applicant v. **MICHAEL MOORE,** Commissioner, S.C. Department of Corrections, and **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	CA#: 98-CP-09-101

APPLICANT'S POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF THE THIRD AMENDED APPLICATION FOR POST CONVICTION RELIEF

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STATE OF SOUTH CAROLINA COUNTY OF CALHOUN **HERMAN LEE HUGHES, JR.,** Applicant, v. **MICHAEL MOORE**, Commissioner, Department of Corrections, and **CHARLES M. CONDON**, Attorney General, State of South Carolina, Respondents.	IN THE COURT OF COMMON PLEAS No. 98-CP-09-101 APPLICANT'S POST-HEARING MEMORANDUM IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION

INTRODUCTION

Applicant, Herman Lee Hughes, Jr., through undersigned counsel, files this post-hearing memorandum of law in support of his Third Amended Application for Post-Conviction Relief. After a brief overview of the factual background and procedural history of the case, and the main legal principles relevant to the court's resolution of the issues in this case, applicant will set forth in detail why he is entitled to post-conviction relief.

STATEMENT OF THE CASE

Applicant's trial counsel, Phillip Newsom, was well-intended, but he was clearly in over his head. He had never been counsel in a capital case that had actually gone to trial, and it had been years since he had been involved in a death penalty case in any capacity. He was also forced to try this case alone; a task that even the most experienced members of the capital defense bar would say is too difficult and likely to result in serious errors and omissions. Preparation for trial was

hampered by his father's terminal illness. In sum, Mr. Newsom was inexperienced, overwhelmed, and utterly alone during Herman's capital trial. As will be set forth in detail in this memorandum, this convergence of circumstances deprived the sentencing jury of information which was essential to any reasoned determination whether the death penalty was the appropriate punishment in this case.

Would it have made a difference if counsel had performed competently? Yes. Herman Hughes was only sixteen years old at the time of the offense. There are only a dwindling handful of countries in the world where it is even theoretically possible for a sixteen year old to be sentenced to death. Even within the United States, South Carolina is one of only a small number of jurisdictions which allows for a child of sixteen to be subjected to capital punishment. And even in South Carolina (and the other states that permit the execution of children), death sentences are extremely rare in cases where the defendant is Herman's age, reflecting a clear societal unease with imposing the ultimate punishment on someone who is not yet old enough to vote, buy tobacco products or alcoholic beverages, serve in the armed forces or marry without parental permission.

This is even more true when Herman's profound mental impairments are taken into consideration. Herman Hughes is mentally retarded and brain damaged. Again, the overwhelming majority of countries in the world do not permit people with mental retardation to be sentenced to death. And again, an ever growing number of states in this country do not authorize capital punishment for the mentally retarded, and even where it is legally authorized, juries rarely return death sentences.

So how can the death sentence in Herman Hughes' case be explained? The answer lies in the performance of trial counsel. This was not a highly aggravated case. One person was killed and another was shot during the course of a botched armed robbery at a video poker lounge. Herman had

no prior adult criminal record, and he was the youngest and slowest of the three individuals involved. While tragic and unjustified, this is not the type of case that inevitably results in the death penalty. This was the type of case that results in a death sentence only if things go seriously awry. And they did. Trial counsel failed to conduct an adequate investigation, perform reasonably or provide the judge or the jury with important information at a number of critical junctures. For example, no investigation was conducted in preparation for Herman's family court waiver hearing, and the defense did not present a shred of evidence. Counsel conceded Herman's competency to stand trial. Two jurors were seated without objection who had extensive personal contacts with members of the victim's family; one of whom was present when the victim's sister learned her brother had been killed. State's witnesses were not properly impeached with evidence of bias or prior inconsistent statements. And, at the sentencing phase of the trial, counsel failed to secure the assistance of any mental health professional with expertise in the two critical mitigation areas counsel did identify: child development and mental retardation.

In sum, Herman Hughes' death sentence is unreliable and post-conviction relief should be granted in order that a new jury -- with the benefit of all the facts -- determines whether this sixteen year-old child with mental retardation should live or die.[1]

PROCEDURAL HISTORY

Herman Hughes was charged in the Calhoun County Court of General Sessions with murder,

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[1]As Judge King recently noted in his order granting relief to another sixteen year old death sentenced inmate, Robert Conyers: "Death sentences for 16-year-old offender may not be wholly unknown, but they are undeniably rare. . . .Even given the aggravated crimes to which Conyers confessed, the fact that he committed them when he was only sixteen years old means that a life-without-parole sentence cannot be dismissed as an implausible outcome." Conyers v. Moore, 97-CP-14-506 (Clarendon Common Pleas, Feb, 10, 2000), order at 42..

armed robbery, assault and battery with intent to kill, and grand larceny of a vehicle. He was convicted of all charges and sentenced to death in September 1995. The South Carolina Supreme Court affirmed both his convictions and sentences. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997), cert. denied, 118 S. Ct. 1674 (1998). Mr. Hughes filed an Application for Post-Conviction Relief in June 1998. After discovery was completed and several amendments made to the application for post-conviction relief, an evidentiary hearing was held in October 1999. By consent of the parties, the hearing was conducted in Horry County.

GENERAL PRINCIPLES GOVERNING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Many of applicant's claims do not involve the Sixth Amendment right to the effective assistance of counsel. However, a substantial number do, and the same legal principles govern each of these claims. Therefore, this section of the memorandum briefly describes the legal standards delimited by the United States Supreme Court and the South Carolina Supreme Court relevant to petitioner's assertion that he was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment and the South Carolina Constitution.

Of all the constitutional rights the Framers designed to protect the accused, the Sixth Amendment right to counsel is perhaps the most sacred, for "it affects [the] ability [of a defendant] to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984)(quoting Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)). Both the United States Supreme Court and the South Carolina Supreme Court have long recognized that absent the *effective* assistance of counsel, the Sixth Amendment's guarantee of counsel is an empty promise. This is so because the "very premise" underlying the Sixth Amendment is that truth is best

discovered through a genuine adversarial process in which "powerful statements" are presented "on both sides of the question." Cronic, 466 U.S. at 655 (citations omitted). When defense counsel are ineffective, a trial loses its character as a "confrontation between adversaries," becoming instead the equivalent of "a sacrifice of unarmed prisoners to gladiators." Id. at 656-57 (quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975)).

Strickland v. Washington, 466 U.S. 668 (1984), established the standard for evaluating counsel's representation. To obtain relief, applicant must demonstrate that (1) his attorney's representation "fell below an objective standard of reasonableness," and (2) he was prejudiced as a result thereof. Id. at 687-88; see also Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991)(describing standard); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Counsel's performance falls below Strickland's "objective standard of reasonableness" if it is outside the "wide range of reasonable professional assistance." Strickland, 466 U.S. at 690. In analyzing trial counsel's performance. . . the Court must focus on the specific allegations before it. Simply put, the fact that trial counsel may have done some things rights does not excuse the court from a careful assessment of that which counsel is alleged to have done wrong." Conyers v. Moore, 97-CP-14-506 (Clarendon Common Pleas, Feb, 10, 2000).

Importantly, "reasonable professional assistance" encompasses the duty to investigate the charges against a defendant as well as any possible defenses:

> [C]ounsel's function as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. . . . Because that testing process generally will not function unless defense counsel has done some investigation into the prosecution's case and into various defense strategies . . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)(citations omitted); accord Wade v. Armontrout, 798 F.2d 304, 307 (8th Cir. 1986)("Investigation is an essential component of the adversary process."); see also Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997)(finding counsel's performance deficient under first prong of Strickland, where counsel did not contact witnesses or conduct independent investigation into charges against defendant). Strickland requires either a complete investigation or a professionally reasonable decision not to conduct a particular investigation. See, e.g., Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir.), cert. denied, 515 U.S. 1189 (1995). "[T]he mere incantation" of the word "strategy" does not "insulate attorney behavior from review." Breechen v. Reynolds, 41 F.3d 1343, 1369 (10th Cir. 1994), cert. denied, 515 U.S. 1135 (1995)(quoting Bolender v. Singletary, 16 F.3d 1547, 1558 n.12 (11th Cir.), cert. denied, 513 U.S. 1022 (1994)). If it is a capital case, counsel is obligated to "conduct a thorough investigation of the defendant's background" for mitigation evidence. Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000).

A petitioner establishes prejudice under Strickland by demonstrating there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 695. A reasonable probability is a probability "sufficient to undermine confidence in the outcome" of the proceeding. Id. This is not an outcome-determinative test. See id. at 693-94 (explicitly rejecting outcome-determinative test in favor of lower standard). In fact, the Supreme Court recently stated that the "reasonable likelihood" standard is less than a preponderance of the evidence standard. Williams v. Taylor, 120 S.Ct. at 1519. Rather, the test is whether counsel committed errors sufficiently serious as to "deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.

In assessing prejudice, the court must consider the cumulative effect of trial counsel's errors rather than evaluating item-by-item the prejudice caused by each individual error. See Whipple v. Moore, 97-CP-26-295 (Horry Common Pleas; Dec. 15, 1998) ("the reviewing court must examine the deficiencies collectively to determine whether applicant has proven that there is a reasonable probability that the outcome would have been different") (Order at 24); see also Strickland, 466 U.S. at 695 ("In making this determination [regarding prejudice], a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury")(emphasis added); Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995)(finding that cumulative impact of counsel's deficiencies prejudiced petitioner's defense); Henry v. Scully, 78 F.3d 51, 53 (2d Cir. 1996)(finding that because the "aggregate effect of . . . three instances of inaction by defense counsel" was prejudicial under Strickland, there was no need to determine "whether one or two of these errors would have constituted ineffective assistance"). Similarly, in assessing prejudice at the sentencing phase of a capital trial, the court must consider "the totality of the mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceedings. . . ." Williams v. Taylor, 120 S.Ct. at 1515. Or as recently noted by a South Carolina circuit judge: "What is required is a careful comparison of the quantity and quality of the actually presented with the evidence that counsel could reasonably have been expected to develop and present after adequate investigation." Conyers v. Moore, 97-CP-14-506 (Clarendon Common Pleas, Feb, 10, 2000)(Order at 45).

The South Carolina Supreme Court and the circuit judges of this state have vigorously safeguarded a capital defendant's right to the effective assistance of counsel. As one state circuit judge recently noted in his order granting post-conviction relief to death-sentenced inmate James Whipple on the basis of trial counsel's inadequate representation: "It is regrettable when a reviewing

Court must vacate the judgment of a jury that labored conscientiously to render an impartial, if flawed verdict. But I cannot overlook the serious and fundamental Constitutional errors that marred James Whipple's trial." Whipple v. Moore, 97-CP-26-295 (Horry Common Pleas, Dec. 15, 1998) (order at 25). Because of the finality of the death penalty and also because of the realization that in many cases the life/death decision is a close one that can be easily affected if trial counsel performs inadequately, South Carolina courts have found capital defense attorneys ineffective in a wide variety of contexts. For example, in Hudgins v. Moore, 1999 WL 114701 (S.C. Sup. Ct. Dec. 6, 1999), the South Carolina Supreme Court found trial recently held that trial counsel's assistance was unreasonable and prejudicial because of the failure to object to the State's improper use of psychological tests administered to the defendant. In Southerland v. State, 1999 WL 1140298 (S.C. Sup. Ct. Dec. 13, 1999), the Supreme Court found appellate counsel ineffective for failing to raise a meritorious argument on direct appeal. Many circuit court judges also have granted relief based on findings of ineffective representation in capital cases. In Conyers v. Moore, 97-CP-14-506 (Clarendon Common Pleas, Feb, 10, 2000) (petition for certiorari pending), the circuit court found trial counsel ineffective for failing to present an appropriate case in mitigation of punishment. In Patterson v. Moore, 98-CP-32-0097 (Lexington Common Pleas, Sept. 23, 1999) (certiorari denied), the circuit court found trial counsel ineffective for their failure to object to the prosecution's prejudicial closing argument impinging on applicant's Fifth Amendment privilege against self-incrimination and for their inadvertent presentation of evidence showing when the defendant would be eligible for parole. In Whipple v. Moore, 97-CP-26-295 (Horry Common Pleas, Dec. 15, 1998) (certiorari denied), counsel was deemed ineffective for their failure to interview, consult with and call as witnesses, necessary experts including a pathologist and an expert in the area of cocaine

addiction, as well as the failure to secure the attendance their own retained neurologist and psychiatrist. In Holmes v. Moore, 96-C)-46-966 (York Common Pleas, Jan. 15, 1998) (certiorari denied); and Franklin v. Moore, 96-CP-435-117 (Williamsburg Common Pleas, October 2, 1998) (certiorari granted), trial counsel were held to be ineffective for failing to safeguard applicant's right to make a closing statement at the guilt-or-innocence phase of their bifurcated capital trials).[2] These cases, individually and collectively, demonstrate the need for searching post-conviction review of trial counsel's performance in death penalty cases.

GROUNDS FOR RELIEF

Grounds 9(a) & 9(b)

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.

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 THE SOUTH CAROLINA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Introduction and Factual Background.

The hearing (hereinafter, "waiver hearing") to determine whether Applicant would be transferred from juvenile to General Sessions court occurred only two weeks after his arrest. Martin Banks, Applicant's counsel at the waiver hearing, was appointed only a few short weeks before the hearing. At that time, Mr. Banks had never handled a juvenile waiver hearing. PCR Tr. 251.

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[2]The unpublished circuit court orders referred to in this section of the memorandum are included in an appendix filed in conjunction with this memorandum for the court's convenience.

Moreover, he had no idea at the time that the State was considering seeking the death penalty against Applicant. PCR Tr. 250.

Due to his inexperience in the area in question and lack of time to prepare, Mr. Banks was unable to protect his client's interests. First, and perhaps most significantly, Mr. Banks did not request an evaluation by the Department of Juvenile Justice until the end of the waiver hearing itself. PCR Tr. 238. Such evaluations are routine in waiver cases, PCR Tr. 238, and assist the family court in determining, *inter alia*, a juvenile's potential for rehabilitation within the juvenile system. PCR Tr. 258 (waiver evaluation attempts to predict whether juvenile will have long-term behavior problems). These evaluations also can provide important information about a juvenile's level of maturity and sophistication, which is pertinent to the question of whether waiver to General Sessions Court is appropriate. At the PCR hearing, Mr. Banks explained that he failed to request a DJJ evaluation because he erroneously believed the State would ensure that such an evaluation be performed; that is, he thought requesting an evaluation was the *State's* responsibility. PCR Tr. 238.

Also because of time constraints and inexperience, Mr. Banks failed to gather records that would have shown Applicant's profound intellectual limitations and would have rebutted the State's demonstrably false contentions that Applicant was a "sophisticated" and "mature" sixteen year-old without any history of special education. Mr. Banks did not obtain a copy of Applicant's school records, which contained ample documentation of Applicant's consistently low IQ scores, rock-bottom standardized test scores, subnormal adaptive functioning, indications of untreated Attention Deficit Hyperactivity Disorder (ADHD), and history of and continuing need for special education.

Counsel also failed to interview witnesses who would have contradicted the State's theory of the case. Such witnesses could have testified that Applicant, an immature, mentally impaired,

life-long follower, acted at the behest of and, indeed, under the domination of, an older, more intelligent companion. Such testimony, as well as testimony that Applicant's companion had bragged about shooting people, would have shown the extent to which Applicant was dominated by his older co-defendant.

Finally, counsel failed to object to several misstatements and misapplications of the law by the family court. Mr. Banks did not object to the family court's impermissible reasons for transferring Applicant to General Sessions Court: specifically, Mr. Banks let slide the court's statements (1) that transfer would send a message to other juveniles; and (2) that DJJ did not provide rehabilitation for such serious crimes. Trial Tr. 1783-85. Mr. Banks offered no strategic explanation for his failures to gather more information, to interview and present the testimony of witnesses, and to object to the family court's improper rationale for transferring Applicant to General Sessions Court.

Dr. Jon Venn, formerly a psychologist with the Department of Juvenile Justice, testified at Applicant's PCR hearing. While at DJJ, Dr. Venn evaluated more than one-hundred alleged juvenile offenders to provide information for transfer hearings; moreover, as part of his duties at DJJ, he testified in approximately sixty juvenile waiver hearings. At the PCR hearing, Dr. Venn testified as to his retrospective evaluation of Applicant, based on the information that would have been available at the time of the original waiver hearing.

As part of his evaluation, Dr. Venn reviewed available records, including school records. PCR Tr. 257. He spoke with the school principal at the middle school Applicant had attended. PCR Tr. 257. He administered the Jesness Inventory, which is designed to measure factors relevant to the assessment of juvenile delinquents, and the Wender Utah Rating Scale, a test designed to detect

(retrospectively) signs of impulsivity, inattentiveness, and hyperactivity in children. PCR Tr. 257-58. Importantly, the Jesness Inventory existed as an accepted tool in the psychological community in 1994, when Applicant's waiver hearing was held. Finally, Dr. Venn conducted a clinical interview of Applicant. PCR Tr. 259.

Based on his review of materials, clinical interviews, and testing of Applicant, Dr. Venn concluded that, in his view, Applicant should have been retained in family court. PCR Tr. 259. Dr. Venn believed Applicant could have been rehabilitated within the juvenile system. His opinion was not based on mere supposition, but on the following objective factors.

First, Applicant had no record of antisocial or aggressive behavior as a young child; this is important because research predicting long-term behavior problems in children has found that the "earlier the onset of . . . behavior problems the more likely it is to continue." PCR Tr. 260. Second, Applicant's lack of a prior family court history–particularly for violent acts–was important because `research has shown that, for many juveniles, one appearance in juvenile court is enough; such juveniles do not continue to commit offenses. PCR Tr. 261.

Another factor showing Applicant's potential for rehabilitation was his internal locus of control. PCR Tr. 262. The term "locus of control" refers to whom people blame for their behavior: those with an external locus of control blame others, but those with an internal locus of control accept responsibility for their own actions. PCR Tr. 261-62. Persons with an external locus of control are more likely than those with an internal locus to "continue to commit offenses and get in trouble." PCR Tr. 262. Applicant accepted responsibility for his role in the crime, demonstrating an internal locus of control. PCR Tr. 262.

Dr. Venn also found that other factors supported his conclusion that the family court should

have retained jurisdiction over Applicant.[3] The Jesness Inventory categorizes juvenile offenders into certain subtypes, then assesses their risk of reoffending based on statistics existing for that type in a control group. PCR Tr. 264. Applicant's subtype indicated only an average risk for reoffending. PCR Tr. 264. Finally, Dr. Venn found that Applicant is not a particularly sophisticated person, especially given his low level of intellectual functioning. PCR Tr. 263. Importantly, Dr. Venn did not find the seriousness of Applicant's alleged crimes compelled a conclusion that Applicant presented a high risk for recidivism. In fact, he noted that research on juveniles who have committed homicide "indicates that most of them do not get into trouble again." PCR Tr. 265.[4]

B. Argument.

Applicant was denied both his right to the effective assistance of counsel and to due process of law at the family court hearing to determine whether he would be waived to General Sessions Court.

Juvenile court proceedings that affect young people's substantial rights must measure up to

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[3]It should be noted that Applicant's history since his incarceration in the Department of Corrections supports Dr. Venn's conclusions. Dr. Venn noted, accurately, that "[t]here have been no documented misbehaviors [by Applicant] of any kind at the Department of Corrections." PCR Tr. 264. Such a fact is significant for purposes of a waiver evaluation because "juveniles who act out while incarcerated are more likely to continue offending." PCR Tr. 265. Although this fact supported Dr. Venn's conclusion, he was quick to point out that his recommendation would have been the same even absent this information. PCR Tr. 265.

[4]Dr. Venn acknowledged certain negative factors that would point toward a risk of recidivism: the combination of Applicant's ADHD and conduct problems, drug and alcohol use, and his failure in school and limited intellectual functioning. PCR Tr. 266. He noted, however, that ADHD can certainly be treated. PCR Tr. 266. He also observed that many of Applicant's negative factors–misbehavior in school, etc.–coincided with his grandfather's stroke and deteriorating health. PCR Tr. 267. In light of that fact and Applicant's lack of any serious early childhood aggression or misbehavior, Dr. Venn concluded most of Applicant's negative factors constituted responses to situational stressors. PCR Tr. 267.

the essentials of due process and fair treatment guaranteed by the Sixth Amendment, as applied to the states by the Fourteenth Amendment. In re Gault, 387 U.S. 1, 30 (1967). The United States Supreme Court has specifically found that waiver hearings, which determine whether a juvenile will be transferred from juvenile to adult court, constitute a "critical" point in criminal proceedings against a juvenile. Kent v. United States, 383 U.S. 541 (1966). Recognizing that fact, the Court has found that "[t]here is no place in our system of law for reaching a result of such tremendous consequences [waiver] without ceremony–without hearing, *without effective assistance of counsel*, without a statement of reasons." Id. at 554-55 (emphasis added). Thus, the Sixth Amendment right to the effective assistance of counsel clearly attaches to an alleged juvenile offender at a proceeding to determine whether the family court should transfer the juvenile to the jurisdiction of the General Sessions Court.

The Strickland standard applies to juvenile waiver hearings. One of counsel's most important duties is to conduct a reasonable investigation or, at the least, to make a reasonable and informed decision not to investigate certain issues; similarly, counsel's decisions whether to present or not to present certain evidence must be supported by adequate investigation, knowledge of the pertinent body of law, and reasonable strategic decisions. See, e.g. Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000)(finding that counsel is obligated to "conduct a thorough investigation of the defendant's background" for mitigation evidence).

South Carolina's Guardian ad Litem Handbook, which is published by the South Carolina Bar, provides defense counsel for juveniles a checklist of responsibilities for transfer hearings. These guidelines provide in pertinent part that counsel should:

(B) Review all records (e.g., school, DJJ, medical, mental health);

(C) Retain an independent expert to perform a psychological or psychiatric evaluation;

(D) Obtain witnesses, including parents, teachers, clergy, neighbors and employers who may testify regarding the minor's character and background;

(E) Investigate and present any mitigating circumstances regarding the pending charge;

(F) Prepare an alternative comprehensive dispositional plan which may be implemented in family court; and

(G) If the child had prior contact with DJJ, document the actual services provided and the amount of supervision the child received. Determine the adequacy of prior rehabilitative efforts.

Here, counsel admittedly did not comply with *any* of these guidelines or with any other minimal standard of effective representation. First, he failed to obtain any records at all or to conduct any investigation beyond speaking with a police officer and possibly a few of Applicant's family members. Second, he failed to present any evidence, notwithstanding the plethora of evidence available both to show transfer was inappropriate and to rebut the misleading picture the State painted of Applicant, his involvement in the crimes, his DJJ record, and his misbehavior at school. Third, he not only did not retain an independent mental health expert to evaluate Applicant, but he even failed to timely request a Department of Juvenile Justice (DJJ) evaluation to determine Applicant's maturity, sophistication, potential for rehabilitation, and other factors pertinent to the waiver hearing. Additionally, counsel did not invoke Applicant's statutory right to a "full investigation" prior to the transfer hearing. Finally, he failed to object to the family court's numerous misstatements of law and inappropriate reasons for granting the State's motion for transfer to General Sessions court. Counsel had no strategic explanation for any of these failures.

Case law makes clear that failures to investigate and to present pertinent evidence at a juvenile waiver hearing constitute ineffective assistance of counsel. For example, in State v. Bryant, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988)(rev'd on other grounds), the court found an attorney ineffective in a waiver hearing for failing to introduce evidence of the juvenile's potential for rehabilitation in the juvenile system. Mr. Banks' failure to request an evaluation hearing here was similar to the attorney's behavior in Bryant, as the primary purpose for a DJJ evaluation is to determine the juvenile's potential for rehabilitation by the Department of Juvenile Justice.

In sum, counsel's complete failure to prepare and present any case at all at Applicant's transfer hearing deprived Applicant of the effective assistance of counsel to which he was constitutionally entitled. See, e.g., Bryant, supra; cf. Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999)(finding counsel ineffective for failure to investigate and present case in mitigation). Therefore, the only remaining question is whether Applicant was prejudiced by counsel's ineffectiveness. Here, there can be no question that Applicant suffered prejudice from counsel's ineffectiveness. Because of counsel's failure to investigate, to present pertinent evidence, and to demand a DJJ evaluation, the family court was deprived of a wealth of information relevant to the waiver determination:

- The family court did not hear that Applicant was either borderline mentally retarded or had borderline intellectual functioning;
- The family court did not hear that, directly contrary to the solicitor's statements, Applicant *had* been placed in special education at one point, and that his teachers repeatedly had expressed concern about Applicant's inability to succeed in the regular classroom;
- The family court did not hear that Applicant probably suffered from untreated ADHD that hindered his ability to exercise good judgment and inhibit his impulses;

- The family court did not hear that much of his misbehavior at school occurred in the period right after his grandfather's stroke;
- The family court did not have the benefit of a DJJ evaluation that would have shown Applicant showed good potential for rehabilitation within the Department of Juvenile Justice;
- The family court heard no rebuttal evidence as to Applicant's juvenile justice history;
- The family court heard no independent mental health evidence (such as could have been offered by experts like Dr. George Woods or Dr. Marty Beyer) about Applicant; and
- The family court heard very little about Kelsey Pearce's domination of Applicant at the time of the crime.

In short, instead of being given the full picture, the family court was just given the State's version of events: the court simply saw a number of crime scene photos, heard evidence that Applicant had confessed to shooting Kelly Hoffman, and heard evidence that Applicant got into lots of trouble at school.

The evidence Applicant's counsel did not present at the waiver hearing was directly relevant to the waiver determination. South Carolina courts employ the criteria stated by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966), for consideration in waiver cases. E.g., State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998). Kent's criteria are as follows:

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 wilful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint . . . .

5. The desirability of a trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .

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 . . . .

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

Kent, 383 U.S. at 567.

Because of counsel's ineffectiveness, the family court heard no evidence whatsoever concerning Applicant's prospects for reasonable rehabilitation (criteria 8), and heard only State evidence about Applicant's sophistication and maturity (criteria 6) and manner of the alleged offense (criteria 2). As discussed above, Dr. Venn, who would have supervised any DJJ waiver evaluation in Calhoun County in 1994, testified that Applicant likely could have been rehabilitated within DJJ and that Applicant is not a particularly sophisticated individual. Applicant's school records could have provided additional information showing Applicant suffered from very low intellectual functioning and was not at all sophisticated or mature. Testimony by teachers and family members could have further corroborated the information contained in Applicant's school records, and could have also given the court insight into Applicant's positive character traits and reasons for his rather sudden change in behavior.

In short, counsel's ineffectiveness resulted in the family court's being deprived of information crucial to the question of waiver. Counsel's failure to discover and to present this

information certainly undermines confidence in the outcome of the waiver proceeding. Accordingly, Applicant's transfer to General Sessions Court was invalid, and this case should be remanded to family court for further proceedings.

Additionally, wholly apart from counsel's ineffective assistance, Applicant's waiver proceeding did not comport with minimum standards of due process as set forth in Kent and its progeny. Specifically, the family court lacked critical information concerning Applicant's family and surroundings, potential for rehabilitation in the juvenile justice system, sophistication and maturity, and mental retardation. In Patton v. Toy, Civil Action No. 3:93-71-8AK (Dist. S.C. 1994), the federal district court for the district of South Carolina concluded the family court had a duty to conduct a full investigation into the juvenile's background before transferring jurisdiction to General Sessions court. Because the family court failed to conduct the full investigation and also failed to explain in its order its conclusion that the juvenile was not amenable to rehabilitation in juvenile court, the district court found the juvenile's right to due process had been violated. Patton Order at 14-15. In finding a due process violation, the court specifically noted the lack of any "records concerning the child's parents, her home conditions, her mental maturity, or her attitude, all of which are needed to determine whether or not she could be rehabilitated. Patton Order at 15-16.

If anything, Applicant's waiver hearing was more cursory than the juvenile in Patton. The family court certainly had no records concerning Applicant's family background, parents, or grandparents. The family court reached a conclusion about Applicant's mental maturity based solely on Applicant's age and on the misimpression (created by counsel's failure to secure necessary records) that Applicant was cognitively normal. Additionally, in its order, the family court offered no basis for its conclusion that Applicant could not be rehabilitated in the juvenile justice system;

in fact, because of the family court's lack of full investigation, there was no basis for knowing Applicant's potential for rehabilitation. Thus, as in Patton, Applicant's family court hearing–wholly apart from counsel's ineffective performance–failed to comport with minimum standards of due process. Accordingly, Applicant is entitled to relief.

Ground 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.

A. Introduction and Factual Background.

At the Blair[5] hearing to determine Applicant's competency to stand trial, counsel conceded that Applicant was competent. In fact, in lieu of live testimony, reports from the William S. Hall Psychiatric Institute and the Department of Disabilities and Special Needs were simply offered by the State without objection by defense counsel. See Trial Tr. 1918-20 (trial court's Order on competency). Trial counsel did not attempt to have the psychiatrist and psychologist who generated the report present for cross-examination, nor did he call any defense witnesses (expert or otherwise) to testify as to Applicant's competency. Instead, he simply accepted without question or comment the State's position, and conceded that Applicant was competent.

Given trial counsel's public concession of Applicant's competency, counsel's *personal* position on the matter is rather odd. At the PCR hearing, trial counsel testified he certainly had his doubts about whether Applicant was competent. PCR Tr. 327 ("I had my doubts just in the day-to-day dealing with him"). Despite his doubts, counsel simply deferred to his experts, none of whom

[5]State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

told him Applicant was not competent.[6] PCR Tr. 327. Nonetheless, trial counsel acknowledged that Applicant provided him little, if any, assistance in preparing the case:

> He–he'd be one of the, if not the, least intelligent, one of the least intelligent. *He was–he was very, very little help in his case.* I mean, he could answer questions like talking to–I had–I've got two biological sons and another son who I inherited when his parents died, and they were about the same age as–as Herman would be. They were about ten years old at the time of this case, eleven years old, and *I could hold a conversation more with them than I could with Herman when I represented him.*[7]

PCR Tr. 326 (emphasis added). He later said that "[w]e [defense lawyers] often are encountered with representing people that we feel aren't capable of assisting us that the medical profession will say under the law are competent to stand trial." PCR Tr. 414. He then freely admitted that because "nobody was able to suggest" to him "that we had a chance in getting him ruled incompetent," he did not pursue the question of competence. PCR Tr. 415.

At the PCR hearing, Dr. Marty Beyer testified that she had questions about Applicant's competency to stand trial. PCR Tr. 10-11, 34 ("Lastly, I have doubts about whether Herman was competent by–at this point I have difficulty evaluating that fully so many years later"). Dr. Beyer is very experienced in competency evaluations of adolescents, PCR Tr. 34, and testified that, even if they do not suffer from mental illness or low intelligence, some adolescents "may not be able to assist counsel because of their immaturity." PCR Tr. 34. Although Dr. Beyer could not reach a definite conclusion about Applicant's competence at trial, she explained her concerns at length:

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[6]An examination of the PCR transcript reveals that trial counsel was confused about the actual competency standard in South Carolina. When asked about Applicant's competency to stand trial, trial counsel referred to the McNaghten rule, which concerns insanity (and criminal responsibility), not competency. PCR Tr. 327.

[7]Dr. Marty Beyer testified in essence that communicating with Applicant may well have required a "skillful" interviewer. PCR Tr. 66-67.

> 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 difficulty 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. 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 involve 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, 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.

PCR Tr. 35-37.[8]

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[8]Dr. Beyer also suggested that the standard competency evaluation, which generally addresses questions of mental illness and low intelligence, is inadequate in determining the competency of an adolescent. PCR Tr. 52. This is because an adolescent's ability to assist counsel depends not only on his intelligence and mental health, but also on his maturity. PCR Tr. 52 ("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, competent to answer factual questions, which he was at that time"). See also PCR Tr. 65 (explaining how

Dr. George Woods also had questions about Applicant's competency to stand trial. Specifically, Dr. Woods testified there were "strong suggestions that Mr. Hughes, No. 1, was unable to rationally assist in the preparation of his defense; No. 2, that Mr. Hughes, except on the most simplistic level, truly understood what the possibility of charges against him could–could render in terms of sentencing." PCR Tr. 118. He also noted that Applicant had told him several times that he thought "that he was going to, as he put it, go home, that he was going to be set free." PCR Tr. 170-71. Dr. Woods found this belief inconsistent with competence, in that it indicated Applicant's lack of understanding of the evidence against him. PCR Tr. 171. Finally, Dr. Woods characterized the Hall Institute's competency evaluation as "limited in . . . scope." PCR Tr. 170.

B. Argument.

In order to be competent to stand trial, a criminal defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must have "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). The reason for requiring a defendant to be competent is "to ensure that he has the capacity to understand the proceedings and to assist counsel." Godinez v. Moran, 509 U.S. 389 (1993); Kelly, 331 S.C. at 148, 502 S.E.2d at 108.

A criminal defendant enjoys a Sixth Amendment right to the effective assistance of counsel during a competency hearing, because such a hearing constitutes a critical stage in the proceedings against the defendant. See, e.g., Hull v. Kyler, 190 F.3d 88 (3d Cir. 1999); Woods v. State, 994 S.W.2d 32 (Mo. Ct. App. 1999); State v. Green, 632 So. 2d 1187 (La. Ct. App.), writ denied, 637

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evaluating competency in juveniles should vary from competency evaluations for adults).

So. 2d 464 (La. 1994). An attorney's duties to a client regarding competency vary depending on the particular facts and circumstances of the case. At the very least, defense counsel should (1) request a hearing if issues of competency exist; (2) consult independent mental health professionals for assistance in determining and presenting issues of the client's competence; and (3) cross-examine any State experts regarding their conclusions as to the client's competence. See, e.g., Woods v. State, 994 S.W.2d 32 (Mo. Ct. App. 1999)(finding counsel ineffective for failure to request competency hearing); Curry v. Zant, 371 S.E.2d 647 (Ga. 1988)(finding counsel ineffective for failure to get independent psychiatric evaluation that would have shown defendant was not competent to waive his rights).

Here, trial counsel's performance was ineffective, as counsel did not take the necessary steps to assure the court reached a reliable determination regarding Applicant's competency. First and perhaps most egregious, counsel outright conceded Applicant's competence despite his own grave doubts about Applicant's ability to assist him or to understand the proceedings and also despite Applicant's youth and very low intellectual functioning. In Hull v. Kyler, 190 F.3d 88, 109 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit found trial counsel ineffective where, as here, counsel conceded the defendant's competency notwithstanding multiple indications that the defendant probably was not competent. In finding counsel ineffective, the Hull court specifically noted that defense counsel did not cross-examine the State psychiatrist who testified that the defendant was competent, and that defense counsel expressly "agreed to" the order finding the defendant competent. Id. This case is even more egregious than Hull, because Applicant's trial

counsel did not even insist upon live testimony in the competency hearing;[9] he just conceded competence.

Similarly, in Woods v. State, 994 S.W.2d 32 (Mo. Ct. App. 1999), the Missouri Court of Appeals found the defendant's attorney ineffective for failing to request a competency hearing prior to sentencing, where the defendant had attempted suicide that very morning. Here, counsel's concession of Applicant's competence notwithstanding strong indications to the contrary is tantamount to the Woods attorney's failure to request a competency hearing: If counsel is not going to contest Applicant's competency or even to insist that the State's witnesses be present for questioning, why bother having a hearing? Indeed, has a real hearing even occurred? This case is therefore indistinguishable from Woods on this point.

In addition to trial counsel's deficient performance *at* Applicant's competency hearing, counsel's preparation *for* the hearing was inadequate. As noted above, trial counsel testified in PCR that he had decided not to make an issue of competence, because none of his experts told him Applicant stood any chance of being found incompetent. Yet there is no indication trial counsel communicated to his experts the difficulty he himself was having communicating with and receiving meaningful assistance from his client. Cf. Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998)(noting need for defense counsel to furnish pertinent information to experts).

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[9]There were a plethora of topics upon which trial counsel could have cross-examined the State's psychiatrist and psychologist at the competency hearing, had counsel insisted on live testimony rather than submission of reports. For example, the Hall competency evaluation does not address the important question raised by Dr. Beyer regarding the effect of Applicant's youth and immaturity upon his ability to assist counsel (wholly apart from Applicant's intellectual understanding of the roles of the courtroom personnel, etc.). Counsel also could have questioned the State's witnesses regarding the adequacy of their competency evaluations, which, as Dr. Beyer pointed out, were cursory at best.

Providing this information to experts was extremely important. Merely retaining mental health professionals, unleashing them upon the defendant, then relying on their conclusions at the competency hearing did not discharge trial counsel's duty to Applicant. This is so for a simple reason: Although the perceptions of mental health experts are, of course, central to the determination of a defendant's competence, the observations of the defendant's *own lawyer* as to the client's ability to assist counsel also are highly relevant. See Drope v. Missouri, 420 U.S. 162 (1975). The United States Supreme Court observed in Drope that "an expressed doubt [regarding a defendant's competency] by one with 'the closest contact with the defendant' [the defense lawyer] is unquestionably a factor which should be considered." Id. at 177 n.13. Importantly, therefore, when a defense attorney consults experts to obtain assistance in determining a client's competency, the attorney should communicate to those experts his particular concerns about his client's understanding of the proceedings and ability to assist the attorney. Without such information, the expert is not able to reach a fully informed conclusion regarding the client's competence. Trial counsel obviously failed in this responsibility.

Moreover, Applicant was prejudiced by trial counsel's deficient performance. In assessing prejudice, the court must determine whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. This standard is less demanding than the preponderance of the evidence standard. Williams v. Taylor, 120 S. Ct. 1495, 1519 (2000). Thus, to show prejudice, Applicant need not prove that he definitely was incompetent at the time of trial, but only that there was a reasonable probability that he was. See Strickland, 466 U.S. at 695; see also Hull, 190 F.3d at 110.

Here, there are multiple indications that Applicant likely was incompetent at the time of trial.

First, trial counsel himself–who, as the Supreme Court noted, is the person best acquainted with a client's ability to assist with the litigation–considered Applicant unable to assist him and, in fact, characterized Applicant as unable to communicate at a level even as sophisticated as that of a ten or eleven year-old child. See PCR Tr. 326. Had counsel communicated this fact alone to his experts, there is a reasonable probability these experts would have concluded Applicant was not competent.

However, there are other indications that Applicant likely was not competent. As Dr. Beyer testified, Applicant still does not fully understand that his lawyer's role was to assist him, not to collude with the prosecutor to railroad him. See PCR Tr. 36. Anyone who believed his lawyer may have been working against him obviously would be far less likely to speak openly with the lawyer about facts and issues in the case. Furthermore, Dr. Beyer testified that Applicant's simple, concrete, slow thinking[10] made her doubt whether Applicant had the ability either to follow the courtroom proceedings or to communicate with counsel. PCR Tr. 35. Finally, had trial counsel insisted upon live testimony and cross examined the State's witnesses, he could have established that the evaluating psychiatrist did not "factor in" Applicant's level of maturity in assessing his ability to assist counsel.[11]

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[10]In addition to simply having low intellect, Applicant has brain damage that affects his judgment. See PCR Tr. 90-92 (testimony of George Woods). This brain damage further impairs Applicant's ability to interact with and assist counsel.

[11]Even forensic experts at the Hall Institute have recognized that competency evaluations for juveniles raise special considerations. See Vance L. Cowden & Dr. Geoffrey R. McKee (Hall psychologist), *Competency to Stand Trial in Juvenile Delinquency Proceedings–Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 639 (1995)("Many juveniles whose competence to stand trial [is questionable] may simply go through the system unrecognized. . . . Under-identification is especially problematic in cases involving mental retardation."). Given Hall's apparent recognition of some of the issues involved, one can only question why its competency evaluation of Applicant, a mentally retarded juvenile, was so cursory.

In short, there is a reasonable probability the trial court would have found Applicant incompetent if trial counsel had contested competency and performed effectively before and at the competency hearing. Accordingly, Applicant's convictions and sentence of death should be vacated, and this case remanded for a new trial.

Ground 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.

A. Introduction and Factual Background.

Two of the jurors actually seated at Mr. Hughes' trial not only were acquainted with Ken Pressley's family, but had even spoken with the family members about the crime and about their pain.

During *voir dire* questioning by Judge Cottingham, Juror Brenda Wise acknowledged that her daughter and the victim's sister, Amy Pressley, were friends. Trial Tr. 194. In fact, Ms. Wise's daughter spent time "trying to console" Amy for the loss of her brother. Trial Tr. 194. Upon further questioning, Ms. Wise said her daughter had told her about her conversations with Amy Pressley. Ms. Wise had heard about the "pain–the hurt . . . of the [Pressley] family." Trial Tr. 205-06. She admitted this knowledge, as well as the mere fact of her daughter's friendship with Amy Pressley, would make it "somewhat" uncomfortable for her to "fulfill her role as a juror" in Mr. Hughes' case. Trial Tr. 205. Ms. Wise also said at one point that if she was "one-hundred percent sure" of a defendant's actual guilt, she would impose a death sentence. Trial Tr. 197. Although she later agreed to "listen to" mitigating circumstances, no one in fact explained to her what mitigating

circumstances are or, more generally, the concept of mitigation.

William Barron, who was later made foreman of the jury, also acknowledged prior acquaintance with the crimes. In addition to reading newspaper articles in the local and Orangeburg papers, Mr. Barron actually notified Ken Pressley's sister that her brother had been murdered:

> On the night that this incident happened, the murder victim's sister was out at our farm. And . . . she [the victim's sister] 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.

Trial Tr. 296-97. Moreover, like Ken Pressley, Mr. Barron's daughter-in-law at one time had worked at the Blue Diamond Casino. Trial Tr. 297. Defense counsel did not ask Mr. Barron a single question about the circumstances of his notifying Mr. Pressley's sister of her brother's death. Instead, he asked only how long Mr. Barron had lived in Calhoun County and whether Mr. Barron's having a coroner as a relative would impair his ability to give a fair trial. Trial Tr. 301-02. Again, although defense counsel asked Mr. Barron whether he would "listen to all the evidence in mitigation" before returning a sentence, no one explained what mitigation actually was. Trial Tr. 302.

Throughout the *voir dire* of all prospective jurors, defense counsel failed to explain the concepts of mitigation or aggravation. He did not ensure that the jurors actually knew what murder was. He rarely attempted to rehabilitate or further question jurors who indicated any general opposition to the death penalty, or any prior acquaintance with the Hughes family. He did not challenge a single prospective juror for cause. He did not even seek to alternate with the solicitor as to who got to question prospective jurors first.

B. Argument.

"The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." State v. Council, 335 S.C. 1, 515 S.E.2d 508, 512 (1999); see also Irvin v. Dowd, 366 U.S. 717, 722 (1961)("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). Indeed, "[e]xtreme caution should be exercised in capital cases to insure that the defendant will be tried by a fair and impartial jury." State v. Reed, 293 S.C. 515, 518, 362 S.E.2d 13, 14 (1987).

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." Morgan v. Illinois, 504 U.S. 719, 729 (1992). In fact, courts have repeatedly recognized the centrality of the process of *voir dire* to protecting the defendant's right to an impartial jury:

> *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able to follow the court's instructions and evaluate the evidence cannot be fulfilled.

Id. at 729-30 (quoting Rosales-Lopez v. United States, 451 U.S. 182 (1981)(plurality opinion)). Although the United States Constitution "does not dictate a catechism for *voir dire*," id. at 729, a capital defendant is entitled to have prospective jurors questioned on certain topics pertinent to the question of impartiality. See, e.g., Turner v. Murray, 476 U.S. 28 (1986)(finding that, in an interracial crime, defendant is entitled to have prospective jurors questioned on the issue of racial bias).

South Carolina Code Ann. § 16-3-20(D) provides that, in capital cases, "a person called as a juror must be examined by the attorney for the defense." Although this provision is not a "license

to forage at will over the private lives of jurors," it does entitle defense attorneys to question prospective jurors to "determine specific and real bias or interest." State v. Smart, 278 S.C. 515, 523, 299 S.E.2d 686, 691 (1982). In other words, section 16-3-20(D) is an extra safeguard to the defendant's constitutional right to an impartial jury.

Where *voir dire* has revealed juror bias, defense counsel may move to challenge the juror for cause. Failing a challenge for cause, counsel may strike the juror by peremptory challenge. Notably, in determining whether a prospective juror has displayed bias and should, therefore, be excused, the court must resolve any doubt regarding bias in favor of the defendant. See Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991) ("Doubts regarding bias must be resolved against the juror"); United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976) ("Doubts about the existence of actual bias should be resolved against permitting the juror to serve").

However, unless counsel zealously protects the defendant through competent questioning and challenges during *voir dire*, the capital defendant's constitutional right to an impartial jury–the "most priceless" safeguard of individual liberty, Irvin, 366 U.S. at 721–stands as an empty promise and a dead letter. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 377 (1986)("Without counsel the right to a fair trial itself would be of little consequence, for it is through counsel that the accused secures his other rights")(citations omitted); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have"). Thus, ineffective conduct of *voir dire* can form the basis for relief under the Sixth Amendment's guarantee of effective assistance of counsel. See, e.g., Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992)(finding counsel ineffective for failing to challenge for cause two biased jurors); State v.

Chastain, 947 P.2d 57 (Mont. 1997)(finding counsel ineffective for failing to follow up with additional questions or to challenge for cause two jurors whose *voir dire* answers indicated potential bias).

Strickland v. Washington, 104 S. Ct. 2052 (1984), delineates the standard for determining whether defense counsel's representation has fallen below what the Sixth Amendment requires. A petitioner is entitled to relief under Strickland if he shows that (1) his attorney's representation "fell below an objective standard of reasonableness," and (2) he was prejudiced as a result thereof. Id. at 2064; see also Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991)(describing standard); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). See General Principles Governing Claims of Ineffective Assistance of Counsel, supra (delineating standard).

When the performance of Mr. Hughes' trial counsel is evaluated in light of the foregoing standards, it is clear Mr. Hughes was deprived of his Sixth Amendment right to the effective assistance of counsel and is entitled to a new trial. The following two sections will address, respectively, the first and second prongs of the Strickland test.

1. Trial counsel's conduct of *voir dire* was ineffective.

In capital trials, defense counsel has multiple responsibilities during *voir dire*. Counsel must: (1) identify and challenge for cause any jurors who either would be unable to consider a life sentence or would not be able to consider certain evidence in mitigation; (2) ensure that jurors are not struck for cause for their general opposition to or reluctance to impose the death penalty, where they are nevertheless capable of fulfilling their oath; (3) identify and challenge for cause any jurors who are biased for whatever reason, either because of exposure to publicity about the case, their racial attitudes, acquaintance or friendship with the victim or witnesses, or their own experiences. This

is the bare minimum that counsel must do to protect the defendant's right to an impartial jury and, by extension, the right to a fair trial. Unless counsel adequately performs these tasks, there can be no guarantee of a meaningful adversarial proceeding: In fact, with biased or unqualified jurors seated, the deck is stacked against the defendant before even the first item of evidence has been offered.

As the foregoing discussion will illustrate, petitioner's trial counsel failed to perform any of these essential functions.

a) Failure to Ensure Jurors Understood Meaning of Legal Terms Used to Determine Qualification.

First, Mr. Hughes' trial counsel failed to ensure that the prospective jurors understood the meanings of the pertinent legal concepts of murder, aggravation, and mitigation. Without an accurate understanding of these terms, the jurors could not give reliable answers to the questions asked to determine whether they were qualified to serve.

Jeff Bloom, an experienced capital defense attorney and jury consultant, testified by deposition that most jurors do not understand many of the legal terms used during *voir dire*. For example, many jurors do not understand the legal meaning of the word "murder" and may equate it with homicide more generally. Therefore, counsel should explain the concept or ask the judge to do so:

> It's not only . . . 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. . . . He didn't know how 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 Shuler offered to define murder and tell the

jurors what murder is not.

Bloom Deposition Tr. at 37-38. Defining murder is essential because otherwise actually unqualified jurors could appear qualified:

> 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 it if 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.

Bloom Deposition Tr. at 38.

In addition to ensuring that jurors understand the legal definition of murder, defense counsel must ensure that they understand the concepts of aggravation and mitigation. These concepts are central to the determination of a defendant's punishment. If a juror cannot consider mitigating circumstances, he is not qualified to serve. See Morgan v. Illinois, 504 U.S. 719 (1992). However, it's impossible to know whether a particular juror can consider mitigating circumstances if he doesn't have any idea what a mitigating circumstance is. Defense counsel cannot simply assume jurors walk into court with a horn book understanding of these concepts; indeed, words like aggravation and mitigation are "gobbledygook" to most jurors. Bloom Deposition Tr. at 22. Accordingly, it is incumbent upon defense counsel either to explain or have the court explain these concepts to the prospective jurors:

> 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.

Bloom Deposition Tr. at 24. Mr. Hughes' trial counsel did not explain these concepts to the jurors, nor did he ask the judge to explain them. Without such a foundation, one cannot assume that trial

counsel's questions about whether jurors could consider any applicable mitigating circumstances elicited meaningful, accurate answers.

Third, petitioner's trial counsel didn't even ask most jurors their opinion of the death penalty. As both Mr. Bloom and Mr. Mauldin explained, jurors' opinions of the death penalty are the pay dirt in capital *voir dire*; in fact, the primary function of capital *voir dire* is to determine whether potential jurors' attitudes about the death penalty render them ineligible to serve. Yet trial counsel asked only one seated juror her opinion on the subject:

> One example [of counsel's inadequate *voir dire*] 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.

Bloom Deposition Tr. at 22-23; see also PCR Tr. 552 ("[I]t appeared very, very rarely in his questioning did he actually just come right out and ask the juror or prospective juror how they felt about capital punishment or the death penalty, and–and the thing that–that is of significance to me is that that is, in fact, the point. The point is–I mean, the questions about employment and what kind of cars you drive and all of that, those are–those are nice things for us to know but as litigators we have got to know the central and focused issue, and that is how this prospective juror really feels about the imposition of the death penalty for a murder case")(testimony of John Mauldin).

Petitioner's trial counsel did not articulate any strategic reason for his failure to define (or have the judge define) murder or to explain the concepts of aggravation and mitigation. Nor did he

offer any reason for his failure to question the prospective jurors about their general attitudes toward the death penalty. At the PCR hearing, trial counsel said that he was interested in jurors' religious views, because often religious people value compassion and forgiveness and, therefore, might be less likely to impose a death sentence. PCR Tr. 401. Although counsel's opinion about religious persons may or may not be correct, such a strategy does not explain why counsel would not ask jurors *directly* about their opinion of the death penalty (in addition to trying to infer it based on the jurors' religious affiliations). Moreover, counsel's stated strategy does not explain why he would not make sure the jurors understood the definition of murder and the concepts of aggravation and mitigation. In fact, counsel often asked in *voir dire* whether jurors could consider the evidence in mitigation. If counsel had a strategic reason for failing to ensure jurors' understanding of pertinent terms like mitigation, surely he would not have questioned jurors about their ability to consider mitigating circumstances.

Importantly, that the judge asked the jurors some preliminary questions about their attitudes toward the death penalty did not excuse defense counsel from his duty to conduct a competent *voir dire* and to probe further. It was not enough for defense counsel sit back and rely on information elicited by the judge and solicitor. As Mr. Bloom pointed out, the judge's initial inquiries provide a starting point, but, standing alone, are insufficient to determine whether a juror is qualified:

> [The judge's initial questions are] 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 [automatic death penalty] 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.
>
> * * *

So that's why the initial questions the judge asks is really kind of a beginning inquiry . . . .

Bloom Deposition Tr. at 87-88. Mr. Mauldin agreed, particularly noting that the judge's typical inquiry about the "three types of jurors" often does not adequately identify unqualified jurors, and that, therefore, independent questioning by defense counsel constitutes an indispensable part of effective representation:

> Q: Mr. Mauldin, I want to ask you this. In your opinion would any confident [sic–should read competent] defense lawyer make a decision whether to take a juror or not based upon their answers to the three categories, which are usually given by a judge at the beginning of individual voir dire?
>
> A: None.
>
> Q: Why?
>
> A: In my experience you have as many jurors who end up changing from one number to the other as you do those that stay the same from that preliminary question, if–if I'm understanding your question correctly. They're given a–a form that essentially lists out the–the characteristics of three different types of people in a capital case. They don't know anything about the–the–the law in South Carolina. They haven't had any questions to them at that point. They come in, and they just say what they might think comes off the top of their head based on–off that piece of paper. You will find in many, many voir dire transcripts, you'll find jurors that come in and say that they are–they'll consider the facts, but Juror No. 3, for example, who end up being automatic death penalty jurors, as soon as you go through the process of what is called stripping, which is taking away self-defense, accident, mistake, other–what are considered technical defenses, so that they end up going from a No. 3 to a No. 1. That's the reason why we have sequestered individualized voir dire by counsel.
>
> Q: And that's why it's important to make sure that the juror understands that you're talking about murder and what murder in this state means?
>
> A: That's right. I mean, if–if–you've got a lot of people who will say, "I'll have to listen to the facts. I'll have to listen to the facts," but once they are informed by the Court and by both attorneys in–in good voir dire what happens is both attorneys talk to the jurors about the fact that it's a bifurcated system, that when you go into the second phase, you as a juror have already participated and have already voted that this defendant is guilty of first-degree murder. He's a convicted murderer at that

> point. If you don't ask those, just at least those simple questions, then they've got absolutely no clue about what's going on.

PCR Tr. 606-08.

Both Mr. Bloom and Mr. Mauldin concluded that 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 . . . has to pose his own questions . . . 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." Bloom Deposition Tr. at 89-90. Unfortunately, that is exactly what petitioner's trial counsel failed to do. His acts of omission constituted constitutionally ineffective assistance.

A. (i) Failure to Challenge for Cause or Exercise Peremptory Challenges upon Jurors Brenda Wise and William Barron.

Counsel was also ineffective in failing to further question, challenge for cause, or exercise peremptory challenges on Jurors Brenda Wise and William Barron. Each of these jurors not only was acquainted with Ken Pressley's family, but actually had been exposed to victim impact evidence before the trial. As noted above, William Barron broke the news to Ken Pressley's sister of her brother's murder. Brenda Wise had conversations with her daughter, who was a friend of Ken's sister, about the pain and loss of the Pressley family. Ms. Wise even admitted she would be somewhat uncomfortable serving on the jury.

Both Mr. Bloom and Mr. Mauldin considered counsel's failure to remove these jurors particularly egregious. As they observed, Mr. Barron and Mrs. Wise "could have been victim impact witnesses for the state at sentencing." Bloom Deposition Tr. at 45; PCR Tr. 557. Mrs. Wise could have testified about the pain of Ken's family, based on her daughter's conversations with Amy Pressley. Mr. Barron, who informed Ken's other sister of his murder, 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." Bloom Deposition Tr. at 50-51.

Despite Mr. Barron's central role in conveying the devastating news of Ken's death to his sister, defense counsel did not ask a single follow-up question about that topic. Mr. Bloom noted that defense counsel "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 question on that." Bloom Deposition Tr. at 51; PCR Tr. 560 ("[T]he attorney . . . did not ask Mr. Barron one single question about how that circumstance . . . could affect his ability to be fair and impartial. Not one single question was asked by defense counsel."). Mr. Bloom and Mr. Mauldin opined that counsel should have asked additional questions and also moved to challenge for cause or exercised a peremptory challenge. In fact, Mr. Mauldin characterized these two jurors' placement on the jury as "absolutely extraordinary," and a "very, very bad error . . . just a nightmare." PCR Tr. 557.

In State v. Chastain, 947 P.2d 57 (Mont. 1997), the Montana Supreme Court found an attorney ineffective because he failed to question two jurors further about potential bias and then failed to challenge them for cause. One of the jurors had read a newspaper article about the crime. When asked whether her having read the article would impair her judgment, she replied, "It's hard for me to say. I do have–when I read about something like that, I do kind of evoke some strong feelings." Id. at 59. Defense counsel's failure to probe the issue further or to challenge the juror for cause was deemed ineffective. The other juror had an experience unrelated to the Chastain case itself and she felt it "could taint" her judgment. Id. The court found counsel ineffective as well for failing to challenge this juror for cause.

The facts in the present case are more egregious than those in Chastain, and the attorney's

ineffectiveness more glaring. Most significantly, neither juror in Chastain had any direct knowledge about the case or any outside exposure to victim impact testimony. Obviously, the jurors at issue here had ample direct knowledge. Moreover, the jurors in both cases equivocated about their ability to be impartial: in Chastain, the juror said her attitude "could taint" her judgment; in this case, Mrs. Wise admitted it would make her uncomfortable to serve on the jury. Because counsel did not question him about the topic, it is unclear whether Mr. Barron was aware of any bias on his part.

At the PCR hearing, trial counsel admitted there was a reasonable basis for moving to excuse for cause both Mr. Barron and Ms. Wise. PCR Tr. 407-08. He also admitted he failed to bring such motions or to exercise peremptory challenges to remove these jurors. Trial counsel's explanations for allowing Mr. Barron and Ms. Wise to be seated on the jury panel were simply unreasonable. He wanted Mr. Barron on the jury because he had heard that Mr. Barron's wife was quite religious and that his daughter was a missionary. PCR Tr. 401. Trial counsel speculated that missionaries are "more likely to be forgiving." PCR Tr. 401. Counsel explained that he picked Ms. Wise because of her "sympathetic" demeanor:[12]

> There was something about her that came across as being–it's not what she said, okay, because I questioned her probably longer than I questioned anybody else. It was her demeanor, okay. All we needed was somebody–we wanted some sympathetic kind of people, okay. She came across with that . . . .

PCR Tr. 403.[13]

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[12]One must wonder whether trial counsel considered with whom Ms. Wise's sympathy would most likely reside: with the Pressley family, whom she or her daughter obviously knew rather well, or with the defendant, whom she did not know and who was accused of killing the brother of her daughter's close friend.

[13]Mr. Barron's religiosity and Ms. Wise's demeanor were the primary reasons counsel cited for his failure to challenge these jurors for cause or to exercise peremptory challenges to remove them. He also testified that he was not particularly concerned about these jurors' personal

As attorney expert Mr. Mauldin testified, issues like whether and where a juror might attend church constitute "soft" issues that, while nice to know, do not touch *directly* upon the "hard," central issues in any capital case–the juror's opinion of the death penalty and the juror's ability to be impartial. PCR Tr. 588. In jury selection, the "hard" issues should trump the "soft" issues. See PCR Tr. 588 ("You don't make your decisions on the soft issues. You make your decisions on the hard issues, and you break ties with the soft issues."). Accordingly, Mr. Newsom's decision to go with the soft issues when hard issues were screaming for action–or, at the least, attention in the form of additional questioning–was professionally deficient.

(ii) Miscellaneous Errors.

In addition to his most egregious errors, as described above, trial counsel committed a hodgepodge of other missteps during *voir dire*. First, during the general *voir dire*, he completely failed to question a number of potential jurors who asked to be excused because of their acquaintance with Applicant or his family. See Trial Tr. 109-26. Importantly, the judge gave him ample opportunity to question these persons, e.g., Trial Tr. 123-24; nonetheless, trial counsel made no attempt to rehabilitate these particular jurors or to determine whether they were, in fact, biased by their knowledge of Applicant's family. See Trial Tr. 109-24 (trial counsel repeatedly declining opportunity to question potential witnesses). At the PCR hearing, trial counsel did not recall any reason he had for failing to question these witnesses, and, in fact, admitted he probably should have done so: "As a matter of fact, looking back on it now, I probably should have asked some questions to see if I could rehabilitate them . . . ." PCR Tr. 395. Attorney expert John Mauldin noted the

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involvement with Mr. Pressley's family, given his theory that Kelsey Pearce, not Herman Hughes, shot Ken Pressley. PCR Tr. 405.

practical effect of counsel's error:

> It appeared in my review of the transcript that this was a–that there were an awful lot of jurors that were excused for–for various reasons. The–the concern I had as a capital litigator is that–that one of the things that I would want to do as a defense counsel is keep as many people in the pool as I possibly could . . . . there were a number of occasions where Judge Cottingham even stated into the record that he was giving counsel an opportunity to question the jurors, and he–and counsel was apparently choosing not to.

PCR Tr. 545.

Second, counsel did not object to the solicitor's questioning each potential juror about his or her ability to sentence a person to death for a crime committed at age sixteen. South Carolina Supreme Court jurisprudence is replete with cases disallowing lawyers from qualifying capital jurors on the facts of their cases. See, e.g., State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986)(disallowing hypothetical questions by defense attorney in *voir dire*); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985)(same). Despite this clear and well-known precedent, trial counsel neither objected to the solicitor's question nor attempted to ask any hypothetical questions of his own. At the PCR hearing, trial counsel admitted his failure to object or to take advantage of the latitude granted by the judge resulted not from any strategic considerations, but from ignorance of the law of capital *voir dire*: "I didn't have the knowledge at that point. If–if there was something that would have allowed me to object to that question, I had no knowledge of it at that time because I didn't ask it." PCR Tr. 398. Counsel's failure to raise this meritorious objection constituted ineffective assistance. Cf. Green v. State, 2000 WL 60938 (S.C. Sup. Ct. Jan. 24, 2000)(finding counsel ineffective for failing to raise valid objection regarding the admissibility of evidence).

Finally, trial counsel also failed to seek to alternate with the solicitor as to who got to question potential jurors first during *voir dire*. S.C. Code Ann. § 16-3-20(D) grants a capital

defendant the right to have his attorney question the jurors during *voir dire*. In contrast, the solicitor has no absolute statutory right to question jurors; rather, the judge has discretion to allow or disallow such questioning. State v. Plath, 277 S.C. 126, 284 S.E.2d 222 (1981). The statutory scheme alone indicates that, presumptively, the defendant's attorney should be given preference in the order of questioning. As attorney expert John Mauldin observed at the PCR hearing, allowing the solicitor to go first with each potential juror is "an absolute no-no," because when the solicitor always goes first, "it's difficult to . . . get an objective view of how all these jurors feel." PCR Tr. 549-50. Mr. Mauldin also noted that no judge had *ever* denied his own requests for alternating *voir dire*; Mr. Bloom also indicated judges routinely grant such a request. PCR Tr. 551-52; Bloom Depo. Tr. 63. Trial counsel articulated no strategic reason for his failure to make this utterly uncontroversial, yet important request; thus, his failure constituted ineffectiveness.

2. Applicant suffered prejudice from trial counsel's ineffectiveness during *voir dire*.

The quantum of prejudice to Applicant resulting from counsel's errors during *voir dire* is almost staggering. Perhaps most significantly, two persons were seated on the jury who likely were biased by their direct, personal knowledge of issues that were particularly pertinent to sentencing.[14] The presence of even one biased juror taints the entire process and, indeed, cannot be deemed harmless or nonprejudicial. See, e.g., Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992)(finding that presence of even one biased juror constitutes a "fundamental defect in the trial mechanism itself" not subject to harmless error analysis and presumptively prejudicial); see also People v.

[14]Importantly, any doubt as to these jurors' bias must be resolved in Applicant's favor. See, e.g., Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991) ("Doubts regarding bias must be resolved against the juror"); United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976) ("Doubts about the existence of actual bias should be resolved against permitting the juror to serve").

Presley, 750 S.W.2d 602 (Mo. Ct. App. 1988)(en banc)(finding prejudice should be presumed when even one biased juror is seated, because presence of even one biased juror is "tantamount to a denial of the right to trial by jury"). Moreover, there is certainly a reasonable likelihood that, if nothing else, the jury's sentencing recommendation would have been different absent the presence of these biased jurors: Applicant's youth and low intellectual functioning constituted powerful evidence in mitigation, and, apart from the facts of the crime itself, the State's primary evidence during the penalty phase was victim impact evidence–precisely the kind of evidence to which the two biased jurors were already most connected.

Just as significantly, counsel's failures to explain the concepts of murder, aggravation, and mitigation and to ask potential jurors their opinions of the death penalty resulted in the seating of jurors whose actual qualification to serve were unknown. Importantly, as noted above, the judge's and prosecutor's questions to the jury did not remedy trial counsel's error or otherwise cure the prejudice. Although the judge asked the potential jurors about whether they would always, never, or sometimes impose the death penalty, he never explained to them the legal definition of murder or of aggravating and mitigating circumstances; and absent such definitions, the jurors likely did not have a sufficient understanding of the questions posed to give meaningful, accurate answers.[15] See PCR Tr. 606-08 (Mauldin testimony); Bloom Depo. Tr. 87-90 (Bloom testimony).

Finally, counsel's other errors, the effect of which must be considered in combination with

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[15]Applicant does *not* contend the jurors answered untruthfully the questions asked by the judge and prosecutor. Applicant simply suggests that the jurors could not give accurate answers, because they cannot be presumed to understand the legal nuances–such as the distinction between murder and homicide–of the questions asked. Moreover, S.C. Code Ann. § 16-3-20(D) certainly anticipates that judge-conducted *voir dire* is insufficient in capital cases to protect fully the constitutional and other rights of the capital defendant and that the defendant's attorney should be allowed a role during *voir dire* to safeguard his client's life and liberty.

the effect of the errors outlined above, see Strickland, 104 S. Ct. at 2052 ("In making this determination [regarding prejudice], a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury."), compounded the already substantial prejudice to Applicant. As a result of counsel's errors in *voir dire*, Applicant was denied a fair trial by an impartial jury capable of following the law, and, therefore, his convictions and death sentence should be set aside.

Ground 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 TO THE UNITED STATES CONSTITUTION.

A. Introduction and Factual Background.

At the guilt-or-innocence phase of Herman's trial, two of the State's primary witnesses against Applicant were Henry Daniel Owens, Jr. and Kelly Hoffman. Daniel Owens was one of Herman's co-defendants, and Kelly Hoffman was the surviving victim.

Not surprisingly, the testimony of Mr. Owens and Ms. Hoffman was quite damaging to Herman. Mr. Owens testified, *inter alia*, that Herman had bragged about "bucking" the victims down. Trial Tr. 852. Ms. Hoffman testified quite confidently that Herman Hughes was the sole perpetrator entering the Blue Diamond and robbing the store, killing Ken Presley, and shooting her. Trial Tr. 1168-69.

Substantial reasons existed to doubt the reliability of these witness' testimony, but trial counsel largely failed to elicit important admissions from these witnesses that would have called the reliability of their testimony into question. Most significantly, counsel did not elicit from Mr. Owens

an admission that, prior to his deal with the State to testify against Herman, he had been indicted for accessory before the fact of murder. Accessory before the fact carries a potential sentence of life imprisonment. Because of his deal with the State, Mr. Owens faced only a conviction for misprison of a felony, an offense carrying a maximum sentence of ten years' imprisonment. Despite the substantial difference in Mr. Owens' exposure to imprisonment before and after his deal--and, more importantly, the consequent motivation Mr. Owens could have to say whatever the State wanted him to say--trial counsel asked Mr. Owens nothing about the charges or penalty he faced prior to the State's entry into its plea bargain with him. Thus, the jury was denied important information about the full extent of Mr. Owens' potential motivation to implicate Herman as persuasively as possible.

Similarly, ample material was available to impeach Ms. Hoffman's credibility. First, since the crime, Ms. Hoffman had given a variety of inconsistent statements about the number of perpetrators; the height of the person(s) who shot her and Mr. Presley; whether she had seen the person shooting Mr. Presley or whether, in the alternative, she had been looking down during the shots, etc. Additionally, there were questions about her motivation to deny Kelsey Pearce's involvement in the crimes in order to avoid facing questions about whether she and Mr. Pearce had a sexual relationship.[16]

Finally, there were witnesses whom trial counsel did not call. These witnesses would have offered information suggesting Kelsey Pearce's planning of the robbery and actual participation in the shootings. Amy Presley, victim Ken Presley's sister, had encountered Kelsey Pearce at Hardee's

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[16]Ms. Hoffman is white and Mr. Pearce is African American. At PCR, trial counsel testified that many people in Calhoun County, a small, rural county, would disapprove of an interracial relationship and that, therefore, Ms. Hoffman had some incentive to deny any knowledge of Mr. Pearce's involvement in the crime in order to keep her relationship with Mr. Pearce from coming to light. PCR Tr. 436.

a few days before the crime, and Kelsey had asked her when she next planned to be working at the Blue Diamond. PCR Tr. 513-16. Indeed, at Mr. Pearce's trial, Amy Presley testified about this interaction. PCR Tr. 513-14 (acknowledging testimony at Pearce trial). Additionally, Duane Gilmore had given law enforcement a statement that Kelsey Pearce had bragged about shooting people at the Blue Diamond and had stated plans to flee the jurisdiction. See Applicant's Exhibit 12 (statement of Duane Gilmore). Trial counsel did not call Duane Gilmore as a witness; however, the State called Mr. Gilmore to testify at Mr. Pearce's trial as to the information in his statement. See PCR Tr. 362. Finally, trial counsel did not question Officer Danny Kirkland, who testified for the State, about a statement he had made that, on the evening of the crime, Ms. Hoffman had said two persons were in the Blue Diamond. See Trial Tr. 1100-07 (testimony of Danny Kirkland); PCR Tr. 341 (trial counsel testifying about Kirkland information); Applicant's Exhibit 11 (letter containing information about Kirkland's recollection of Ms. Hoffman's statements the evening of the crime).

B. Argument.

Trial counsel was ineffective during the guilt-or-innocence phase of trial for failing to present readily available evidence impeaching the credibility of Henry Daniel Owens and Kelly Hoffman. Counsel was also ineffective for failing to present the testimony of witnesses who would have buttressed the defense argument that Kelsey Pearce was the primary perpetrator of the crime.

Although counsel intended to concede Herman's involvement in the crimes, his guilt phase strategy was "to put as much responsibility on Mr. Pierce [sic; should be Pearce]" as possible. PCR Tr. 314-17, 330. In light of this theory of the case, trial counsel could offer little explanation for his failures to present evidence that would have "put [more] responsibility" on Kelsey Pearce and less

on Herman Hughes.

First, counsel could give no reason for failing to question Henry Daniel Owens, Jr. about the potential sentence he faced absent his testimony against Herman. PCR Tr. 356-57. Counsel was aware of the potential sentence, PCR Tr. 356-57, and agreed the jurors probably would not know that the penalty for accessory before the fact is life imprisonment. PCR Tr. 358. He also acknowledged that it would have been helpful to the jury, in assessing Mr. Owens' credibility, to know "what [Owens'] exposure was versus what he was going to receive." PCR Tr. 358. In fact, trial counsel candidly admitted he "could have done a better job on Mr. Owens." PCR Tr. 432. In short, counsel had no strategic reason at all for not questioning Mr. Owens about this issues; in fact, such a question would have furthered the defense's theory of the case by calling into question the credibility of a witness who pointed to Herman as the primary perpetrator.

Similarly, trial counsel could offer no explanation for not calling Duane Gilmore to testify about Kelsey Pearce's statements to him. PCR Tr. 362 ("I don't know why we chose not to use him. I don't know"). Trial counsel also could not explain his failure to question Officer Danny Kirkland, who testified for the State at trial, regarding Ms. Hoffman's statements to him on the evening of the crime. PCR Tr. 341.

Counsel admitted that Amy Presley's testimony "would have been consistent with Kelsey's planning the robbery," but that he doubted her willingness to testify for the defense. PCR Tr. 406-07.[17] Similarly, counsel was aware of the many inconsistencies in Kelly Hoffman's various

[17]Generally, the failure to call a witness due to doubts about the witness' desire to testify does not constitute a reasonable strategic decision. Here, counsel could have subpoenaed Amy Presley to the hearing. At the PCR hearing, Ms. Presley testified that, had she been called as a witness at Herman's trial, her testimony would have been consistent with what she later testified to at Kelsey Pearce's trial. PCR Tr. 514-15.

statements, but said he had made a decision "not to go after Ms. Hoffman on the stand as hard as I wanted." PCR Tr. 332-33. He wanted to question someone (Ms. Hoffman or Mr. Pearce) about the possible sexual relationship between Ms. Hoffman and Mr. Pearce, but testified the judge would not permit him to get into that area.[18] PCR Tr. 436.

Absent a reasonable strategic explanation, a defense counsel's failure to impeach the testimony of central prosecution witnesses is deficient performance. See, e.g., Steinkuehler v. Meschner, 176 F.3d 441 (8th Cir. 1999)(finding defense counsel ineffective for failing to impeach law enforcement witness); Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991)(finding trial counsel ineffective for failing to impeach State witness with prior inconsistent statements suggesting defendant's brother was triggerperson); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(finding counsel ineffective for failing to confront State witness with prior inconsistent statements at trial of other defendant being tried for same murder); State v. Delgado, 535 N.W.2d 450 (Wis. Ct. App. 1995)(finding counsel ineffective in murder case for failing to impeach the state's primary witness with readily available evidence that would have shown that the witness had been promised a reduction in charges from murder to aiding a felon and had received a reduction from a $250,000 bond to personal recognizance in exchange for testimony). Similarly, a non-strategic failure to present witnesses who have information primarily implicating persons other than the defendant, or otherwise exonerating the defendant, constitutes ineffective assistance. See, e.g., State v. Dillard, 998 S.W.2d 750 (Ark. 1999)(finding counsel ineffective for failing to present two witnesses who could have testified that the victim was untruthful and had planned, out of malice, to accuse the

[18]Kelly Hoffman (now Kelly Hoffman Driggers) denied at the PCR hearing that she had any sexual or romantic relationship with Kelsey Pearce. PCR Tr. 646-49. However, she also denied having any criminal record, a denial that proved to be demonstrably false. PCR Tr. 658-59.

defendant of rape); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(finding counsel ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness, where nurse could have testified as to statements made by the alleged victim).

For example, in State v. Delgado, 535 N.W.2d 450, the Wisconsin Court of Appeals found defense counsel ineffective for failing to elicit testimony regarding the extent of the "deal" given by the state. There, the witness' charges were dropped from murder to aiding and abetting, and his $250,000 bond was reduced to release on personal recognizance, all in exchange for his testimony against the defendant. Delgado is remarkably similar to the present case: Here, counsel did not question Henry Daniel Owens, Jr. about the extent of his "sweetheart" deal with the State. This alone was ineffective, as counsel lacked any strategic reason for not eliciting this evidence. See PCR Tr. 562-64 (testimony of John Mauldin regarding counsel's failure to impeach Mr. Owens with the magnitude of the deal he received).

Given counsel's plain concessions that he lacked strategic reasons for his failure to impeach Daniel Owens or to call other witnesses who would have shown Kelsey Pearce's planning of and involvement in the crimes, his ineffectiveness is clear. Counsel also was ineffective for failing to confront Kelly Hoffman with all the inconsistencies in her statements.[19] Although counsel did not want to alienate the jury by bullying Ms. Hoffman, he acknowledged he still could have pointed out the inconsistencies in her statements. See PCR Tr. 432 ("I could have approached Ms. Hoffman

[19]Ms. Hoffman had given inconsistent statements regarding: (1) the number of shots that were fired; (2) the order of the shots; (3) whether one or two persons were inside the Blue Diamond (and the height of the persons involved); (4) whether she saw everything that transpired during the robbery (that is, whether she was looking up the whole time, or whether she slumped over); and (5) the amount of time that elapsed between Herman's initial and subsequent entry into the Blue Diamond. At the PCR hearing, Ms. Hoffman (now Driggers) admitted these inconsistencies. PCR Tr. 654-58.

differently and gotten more information from her"); PCR Tr. 565-67 (testimony of John Mauldin describing need for full impeachment of Kelly Hoffman).

Applicant was certainly prejudiced by trial counsel's failure to impeach the State's witnesses and to present the testimony of witnesses who could have pointed to Kelsey Pearce as the instigator of the robbery and as actively involved in the shootings themselves. Kelly Hoffman and Daniel Owens were the sole witnesses who identified Herman as having shot (or as having admitted to shooting) Ken Presley. Impeachment of their testimony alone likely would have provided reasonable doubt for whether Herman was the trigger person.

In Steinkuehler v. Meschner, 176 F.3d 441 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit found the defendant had been prejudiced by his lawyer's failure to impeach two law enforcement witnesses. In finding prejudice, the court expressly relied on the fact the two witnesses were the only witnesses who testified about one of the central contested issues in the case. Steinkuehler, 176 F.3d at 445. The same certainly holds true here.

Moreover, even assuming (without conceding) that there is no reasonable possibility the jury would have reached a different conclusion in the guilt-or-innocence phase, the prejudicial effect of counsel's failures spills over into sentencing issues. Residual doubt–particularly about whether the defendant was an actual trigger person–constitutes a powerful justification for imposing a life sentence rather than a death sentence. Cite. Indeed, this intuitively obvious point was made during *voir dire* by juror Brenda Wise, who said she would impose a death sentence if she was "100% sure" of the defendant's guilt. Trial Tr. 197.

Accordingly, Applicant was denied the effective assistance of counsel during the guilt phase of his capital trial, and he is entitled to a new trial.

Ground 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.

A. Introduction.

Applicant had a potentially powerful case in mitigation: He was sixteen years old at the time of the crime, suffered from what even the State conceded was sub-par intellect, had no criminal or juvenile convictions whatsoever, and, during the crime, had acted primarily at the behest of older, more sophisticated men. Yet counsel failed to present this evidence to full effect in a way the jury could understand; specifically, counsel did not retain appropriate experts to explain the issues counsel himself recognized as most mitigating and, in fact, did not even question the experts he *did* have regarding pertinent mitigating circumstances. Furthermore, the power of the mitigating evidence counsel did present was substantially diluted by the State's introduction of evidence to which counsel failed to object, notwithstanding its inadmissibility.

This section will discuss separately trial counsel's various mistakes during the penalty phase of Applicant's trial, and will then assess the cumulative prejudice resulting from these mistakes. Even considered in isolation, each of counsel's penalty phase errors or omissions prejudiced Applicant; however, the prejudice resulting from the cumulative effect of counsel's errors was overwhelming.

B. Counsel failed to secure necessary expert testimony supporting Applicant's developmental, mental, and social impairments.

1. Introduction and Factual Background.

Trial counsel Phillip Newsom was absolutely certain of two things: (1) Herman was only

sixteen years old at the time of the charged offenses; and (2) Herman was very, very slow. See PCR Tr. 326 (describing Herman as perhaps the most limited client whom trial counsel had ever represented). His purported sentencing phase strategy was to urge the jury to return a life sentence because of Herman's age and low intellectual functioning. PCR Tr. 375, 380, 523 (describing theory of mitigation case as centering on Herman's youth and mental retardation)

With this strategy, what would reasonably competent counsel do? To pose the question is to hear the answer. Retain the service of professionals with expertise in the two critical areas: child development and mental retardation. Only by consulting with trained professionals in the two key fields could counsel hope to fully explain to the sentencing jury how Herman's youth and retardation were mitigating. Unfortunately, however, Mr. Newsom did not retain experts in either field.

Drs. Harold Morgan and John DeWitt, trial counsel's retained psychiatric experts, did not profess to have any specific expertise in the area of child development. See Affidavits of Drs. Morgan and DeWitt. Counsel did not question these expert witnesses at all about how Herman's youth mitigated his culpability. See Affidavit of Harold Morgan (explaining that, though he had no particular expertise in child psychology, he could have opined on the effect of Herman's youth had trial counsel asked him to do so). Counsel also did not question social worker Annette Boette, who works with children and families, see Trial Tr. 1528-29, about what it means, developmentally, to be sixteen years old, or, more accurately, what it means to be a developmentally disabled sixteen year-old.

Similarly, despite his awareness of Herman's extraordinary mental limitations, counsel did not retain any expert who was qualified to perform psychological testing or to review and assess the adequacy and scoring of the testing performed by others. See Affidavits of Drs. Morgan and DeWitt

(disclaiming any expertise in psychological testing and stating that a psychologist could have been helpful in the case). Nor did counsel retain the services of anyone whose primary area of expertise was mental retardation.

As was established at the PCR hearing, had counsel retained the services of qualified experts with experience in the two relevant areas, the evidentiary picture presented to the jury would have been completely different. For example, an expert in the area of mental retardation have explained, *inter alia*, the importance of assessing adaptive functioning in evaluating whether someone is mentally retarded. See PCR Tr. 493-94 (testimony of Denis Keyes). He or she also could have pointed out to the jury the serious shortcomings in the State experts' evaluations of Applicant. See PCR Tr. 490-91, 499 (criticizing the State experts' use of 70 as an absolute cut-off for mental retardation and also criticizing State experts' failure to assess Herman's adaptive functioning). Finally, an expert familiar with psychological testing would have observed testing patterns highly suggestive of brain damage, and would, therefore, have recommended additional testing. Ultimately, the expert would have concluded and testified that, in addition to Herman's low intelligence, Herman suffers from damage to his frontal lobes and other portions of his brain. See PCR Tr. 92-93 (testimony of Dr. George Woods summarizing Applicant's brain damage).

Counsel's failure to take these actions and to retain appropriate experts resulted in the jury's hearing a fundamentally incomplete picture of Herman's disabilities and hearing *nothing* about Herman's immaturity.

2. Argument.

Herman was a child. Family court waiver or no family court waiver, a sixteen year-old is still a child. Thus, trial counsel was ineffective for failing to discover and present evidence regarding (1)

child and adolescent development in general and Applicant's development in particular; (2) the proper assessment of mental retardation and the significance of Applicant's psychological test results; and (4) Applicant's brain damage and its effect on his culpability. This section will address each of these issues separately.

i) Child Development.

First, trial counsel should have retained an expert in child development, or, at the least, should have questioned his own psychiatric experts about the effect of Applicant's youth.

At the PCR hearing, Dr. Marty Beyer first testified about child development generally, then specifically discussed Herman's development. Dr. Beyer has ample experience in this field: She has a PhD in Clinical Psychology from Yale University, has worked as a psychologist in a juvenile detention facility in Washington, D.C., and has served as a consultant in the areas of juvenile justice and child welfare. PCR Tr. 5. In fact, the United States District Court for the District of South Carolina appointed her to serve as a neutral court expert in litigation involving the adequacy of detention facilities run by the South Carolina Department of Juvenile Justice. PCR Tr. 37-38. She has also worked with the Special Litigation Unit of the Federal Department of Justice, assisting them with their investigation of conditions and lack of treatment in juvenile facilities. PCR Tr. 6. Additionally, she has published articles on child development, the emotional needs of juveniles in correctional facilities, the evaluation of juveniles in court proceedings (as pertains to issues of waiver), and the childlike aspects of juvenile delinquents. PCR Tr. 7.

Dr. Beyer testified that adolescents differ from adults in several crucial respects. First, adolescents have not reached cognitive or moral maturity, nor have they yet developed a solid identity. PCR Tr. 9-10. Cognitively, adolescents are oriented to the present. PCR Tr. 13. This

means, among other things, that adolescents frequently take risks without first imagining the consequences of their actions; unlike adults, many adolescents are *incapable* of foreseeing the long-term results of a series of actions. Also unlike adults, adolescents often are unable to envision alternatives; that is, they frequently see only one choice in a particular situation and will continue with an activity even when it unfolds in a way they have not anticipated. PCR Tr. 13.

Similarly, adolescents have not fully developed morally. Although young persons may know right from wrong, they are less able than adults (and in some instances, incapable) of abiding by this knowledge when stressed. PCR Tr. 14-15. Loyalty constitutes a particularly important moral value of adolescents, and, at times, may actually dictate their decisions and actions. PCR Tr. 14-15. Although the typical adolescent is capable of experiencing strong feelings for others, he or she may experience difficulty showing empathy in stressful circumstances. PCR Tr. 14-15.

Finally, unlike adults, adolescents do not have crystallized identities. Instead, they "try out" different identities in an effort to determine what their stable, adult identity is going to be. PCR Tr. 15-17. Naturally, this experimentation leads adolescents to act at times in ways that are inconsistent with the adult character they ultimately will develop. PCR Tr. 16. Importantly, for teenagers to develop a stable identity, they must experience success in some area. PCR Tr. 16-17. Moreover, trauma can delay child and adolescent development, particularly the development of a solid identity. PCR Tr. 17.

Even given the ordinary limitations or immaturity of adolescents, Herman was not a "normal" sixteen year-old at the time of the crime. PCR Tr. 18. Instead, he "functioned . . . in more immature ways than a typical young person." PCR Tr. 32. Much of this stemmed from Herman's cognitive limitations, which resulted in his thinking in simplistic and concrete ways. PCR Tr. 18. This

concrete, simplistic thinking rendered Herman less able even than the average adolescent to plan and to imagine the consequences of his actions. PCR Tr. 18-19. It also made him less capable of envisioning alternatives: Dr. Beyer testified that Herman appeared to have felt boxed in–without a choice–in following his co-defendant. PCR Tr. 21. His cognitive immaturity and low intellect, and their consequent disabilities in planning and other defects, were exacerbated by his intoxication at the time of the crime. PCR Tr. 21. Moreover, although Dr. Beyer believed Herman knew robbing and harming persons was morally wrong, Herman's loyalty–as described above, a prominent moral trait in adolescents–played an important role in his following and complying with the wishes of his co-defendant. PCR Tr. 22.

Finally, Dr. Beyer testified that Herman had no stable sense of self whatsoever. PCR Tr. 23. Herman "was not able to describe his being successful at anything," and success is an essential component of a stable identity. PCR Tr. 23. Additionally, the many traumas Herman suffered, including his grandfather's stroke and the consequent loss of both a nurturing companion and a disciplinarian, the school system's failure to meet Herman's needs, and his abandonment by his parents, further compromised Herman's ability to develop a positive sense of identity. PCR Tr. 25-32.

The information about ordinary adolescent development and the developmental information about Herman certainly were available at the time of trial. Moreover, trial counsel and Patti Rickborn, trial counsel's investigator and mitigation specialist, testified at the PCR hearing that their overall strategy was to urge the jury to impose a life sentence for three principal reasons: (1) Herman's youth; (2) his mental and intellectual impairments; and (3) the involvement and influence of older co-defendants who were not facing the death penalty. PCR Tr. 375, 380, 523.

Notwithstanding this strategy of focusing the jury on Herman's youth, trial counsel neither retained a specific expert in the area of child development, nor, apparently, did he even ask the psychiatric experts who testified anything about the differences between youth and adults. See Affidavit of Harold Morgan. The natural result of counsel's failure was that the statutory mitigating circumstance concerning Herman's age had no substance: counsel simply allowed the jury to be told Herman was sixteen, then left them on their own to decide what that meant in terms of Herman's culpability.

At the PCR hearing, trial counsel also admitted that he had no reason for failing to present an expert on child development or, at the very least, to direct questions to his retained mental health experts about child development. PCR Tr. 381. He simply stated he was unaware such experts existed. PCR Tr. 381. He offered no reason whatsoever for failing to question his own experts about the topic.

Failure to present specific evidence about Herman's immaturity and the way in which his incomplete development mitigated his culpability was ineffective given counsel's articulated strategy of emphasizing Herman's youth as mitigation. Courts have repeatedly found trial lawyers ineffective for their failures to present expert testimony in support of strongly mitigating evidence. For example, in Conyers v. Moore, Case No. 97-CP-14-506, the South Carolina circuit court for the Third Judicial Circuit found a trial lawyer ineffective for failing to present readily available expert testimony concerning petitioner Robert Conyers' adaptability to confinement. That court noted that defense counsel's duties in criminal litigation may not be reduced to a "checklist," Conyers Order at 38, but counsel's duties instead must be shaped by the central issues in the particular case. The court found that in Conyers, preventing imposition of a death sentence depended largely on two factors: (1) whether counsel could explain Robert Conyers' frightening behavior; and (2) whether

a sentence of life without parole "would adequately protect society against further violence by Conyers." Conyers Order at 40. Because an expert in the field of adaptability to confinement would have been able to answer the second crucial question quite favorably for Mr. Conyers (and differently from how the unqualified social worker answered it at Mr. Conyers' trial), the court found counsel ineffective for failing to retain such an expert and present such evidence. Conyers Order at 46. See also Whipple v. State, No. 97-CP-26-295 (Horry County)(granting post-conviction relief in capital case for counsel's failure to retain independent pathologist and expert in cocaine addiction, where State's case in aggravation was highly dependent on State pathologist's conclusions about the occurrence of criminal sexual conduct and on State's argument that defendant's drug use was aggravating).

Importantly, counsel's admitted ignorance regarding the existence of experts in child and adolescent psychology does not excuse his failure to present mitigating evidence about Applicant's youth. As noted above, counsel certainly was aware Herman Hughes was an adolescent at the time of the crime; counsel also knew Herman's youth was a potentially powerful mitigator. Given these facts, counsel should have conducted sufficient independent research to determine what expert might best be equipped to address the effect of Herman's youth. As the United States Court of Appeals for the Ninth Circuit explained in Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999), "[c]ounsel have an obligation to conduct an investigation which will allow a determination of what experts to consult." Notwithstanding counsel's knowledge of Herman's youth, counsel retained no one to explain this powerful mitigating circumstance.

Indeed, counsel failed even to question his own psychiatric experts about adolescent development or Herman's maturation. This is inexplicable. Had he even asked a few simple

questions at trial, Dr. Morgan could at least have supplied *some* expert information to the jury regarding adolescent development. Moreover, had counsel discussed the issue with his experts before trial, they could have explained their lack of professional specialization in the area and recommended retention of another expert.

The prejudice to Applicant from counsel's failure to present any evidence regarding child and adolescent development is obvious: because of counsel's deficient conduct, the jury heard *nothing* about why youth in general–and Herman's youth in particular–is mitigating.[20] As Dr. Beyer's testimony makes clear, ample evidence exists to demonstrate that adolescents are less capable than are adults of wise, moral decision-making, and should, therefore, suffer somewhat less severe consequences for their behavior. Moreover, in granting relief in Conyers v. Moore, supra, the circuit court specifically pointed out the extremely powerful mitigating quality of a defendant's youth:

> But while this [the horrific nature of Conyers' crimes] is true, it does not disprove the essential point, which is simply that an offender's status as a 16-year-old at the time of a murder is an exceptionally powerful mitigating factor weighing against infliction of the death penalty. Death sentences for 16-year-old offenders may not be wholly unknown, but they are undeniably rare.

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[20]This fact alone distinguishes this case from State v. Jones, 332 S.C. 329, 504 S.E.2d 822 (1998), in which the South Carolina Supreme Court held that a slightly more "dressed up" version of similar mitigating evidence as to an issue precluded (in that case) a finding of prejudice. Here, trial counsel presented *no* evidence (and virtually no argument) about the effect and mitigating quality of Herman's youth. That is to say, rather than being a change of clothing from, say, Sears to Nieman Marcus, as was the case in Jones, presentation of a child development expert or other testimony about child development amounted to a change from utter nakedness to basic, functional clothing.

Additionally, the Conyers court observed that, notwithstanding Jones, the PCR court must examine both the "quantity and quality of the evidence actually presented with the evidence that counsel could reasonably been expected to develop and present after adequate investigation." Conyers Order at 45. Here, the quantity at trial was simple: no evidence was presented. Of course, one cannot compare the quality of what was not presented at trial to what was presented at the PCR hearing.

Conyers Order at 42.

In sum, if the jury had heard the testimony of someone with expertise in child development, there is a reasonable probability it would have returned a sentence of life rather than of death. Accordingly, Applicant is entitled to a new sentencing trial.

1. Psychological Testing and Mental Retardation.

Counsel also was ineffective in failing to retain a psychologist with specific expertise in mental retardation or who could conduct a review of psychological testing. Counsel also was ineffective in his failure to have his own experts explain the consequences of being mentally retarded or even of having borderline intellectual functioning.

An expert in these areas could have served multiple important functions: First, such an expert could have assisted trial counsel in the preparation for the cross-examination of the State's experts. Second, a psychologist could have reviewed the plethora of psychological testing that had been performed on Applicant throughout his life and identified warning signs for brain damage that would have warranted additional testing. Because psychiatrists typically do not administer psychological tests and are not trained in their interpretation, the two psychiatrists retained by trial counsel were unable to perform any of these functions. See Affidavits of Harold Morgan and John DeWitt. Furthermore, had counsel retained someone with specific expertise in testing, counsel could have provided additional information to his psychiatric experts to enable them to achieve an accurate psychiatric diagnosis.

Dr. Denis Keyes, an expert in mental retardation, testified at Applicant's PCR hearing. Dr. Keyes, who has a PhD in Special Education/Mental Retardation, opined that the State's analysis of the question of Applicant's mental functioning was flawed in several respects. Perhaps most

significantly, the State experts (and, for that matter, the defense experts) treated 70 as an absolute cut off for mental retardation; that is, they assumed that, because Applicant's IQ had tested slightly above 70, Applicant could not be mentally retarded. Dr. Keyes explained that 70 is *not* an absolute cut off, but that persons with slightly higher IQs (such as Applicant's) may still be classified as mentally retarded if they show deficits in their adaptive skills. PCR Tr. 490-93. In fact, the DSM-IV, which was in effect at the time of Herman's trial, expressly notes that 70 is *not* an absolute cut-off, but that the clinician should assess the subject's adaptive functioning as well. See DSM-IV at 39-40 (describing flexible IQ range for diagnosis of mental retardation).

The State's analysis of Applicant's potential retardation also was flawed by the State experts' nearly complete failure to address Applicant's adaptive functioning. PCR Tr. 494. To be mentally retarded, a person must have deficits in adaptive functioning. To determine whether there are deficits in adaptive functioning, an expert should assess such functioning in a number of areas, including functional academics, self-direction, and social skills. PCR Tr. 494. The *only* factor the State could point to as an indication it assessed Applicant's adaptive functioning was Applicant's use of legal terminology; however, as Dr. Keyes noted, this is not a legitimate basis for concluding Applicant was not mentally retarded, both because everyone has specific strengths and weaknesses and because of the prevalence of legal jargon on television and in popular culture. PCR Tr. 497-98.

Finally, although Dr. Keyes did not evaluate Applicant for the presence of mental retardation, he did conclude that, contrary to the State's evidence at trial, there was nothing in Applicant's test scores or background that precluded such a diagnosis. PCR Tr. 499.

Significantly, Dr. Keyes also testified about the mental characteristics of persons with mental retardation. Some of the characteristics of mentally retarded persons include:

> [a] level of impulsivity that would not be seen in the general public . . . difficulty with communication skills, getting one's points across . . . . They have difficulty with transference of generalization skills, which is to say that they do not take situations from one place and experience them in--in more than one way nor will they . . . . They have problems with concentration and focusing. . . . The coping and planning skills are typically impaired.

PCR Tr. 483-84.

Dr. Keyes also testified about indications of brain damage contained in Applicant's school records. Dr. Keyes reviewed all of Applicant's school records and noted that Applicant's Bender Gestalt tests, which were administered to Applicant when he was in second and sixth grade, contained indications that Applicant suffered from brain damage:

> Yeah, there were several distortions and integration problems, rotation difficulties throughout the--the different administrations of the test, which would from day one have suggested that there was evidence of brain damage.

PCR Tr. 501. Dr. Keyes said that, based on Applicant's Bender Gestalts, comprehensive neuropsychological testing should have been performed to assess for the presence of brain damage. As Dr. Woods testified later, neuropsychological testing performed by Dr. James Evans confirmed suspicions that Applicant had brain damage.

Trial counsel offered no strategic explanation for his failure to retain expert assistance in interpreting the psychological tests administered to Applicant or to find an expert who specialized in mental retardation. Instead, he said that some people said psychologists were better, while others said psychiatrists were better. PCR Tr. 376-77. However, counsel had a duty to make a reasonable investigation into the issues presented by his case. As noted above in the section on child development, a defense lawyer cannot effectively discharge his duties by a "cookbook" approach, but must tailor his case to the central issues. See Conyers Order, at 45 (noting that the "mere fact

that defense counsel presented some sort of mental health evidence to the sentencer does not foreclose the possibility that trial counsel's performance was deficient under Strickland"). Had trial counsel performed an adequate investigation and done adequate research, he would have discovered that psychologists administer and interpret psychological testing. He also would have learned that mental retardation is a developmental disability, not a mental health diagnosis *per se*. Given counsel's actual knowledge of Applicant's potential mental retardation and of the large quantity of existing test records, counsel should have conducted sufficient research and investigation to find an appropriately qualified expert. See, e.g., Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1994)(finding counsel ineffective for failing to investigate and present evidence that defendant was retarded); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1990)(finding counsel ineffective for failure to investigate and present evidence of defendant's mental retardation); see also Whipple, supra (finding counsel ineffective for failure to retain appropriate expert given facts of the case).

At the very least, counsel should have asked Dr. Morgan, who opined that Applicant was likely retarded, what disabilities retarded persons face. As with the mitigator of Applicant's youth, trial counsel apparently expected simply to throw the fact of retardation to the jury without providing any context for why retardation is mitigating. A few simple statements, such as those made by Dr. Keyes regarding the greater impulsivity and impaired coping and planning abilities of retarded persons, would have shown the jury why mentally retarded persons are less culpable for their actions than are mentally normal persons: in short, mentally retarded persons are simply less capable of controlling themselves. Yet trial counsel did not even ask his own experts a few simple questions about the emotional and behavioral implications of retardation. This was certainly ineffective.

Applicant suffered prejudice from counsel's errors. First, because of counsel's errors,

Applicant did not rebut the false statements by State experts that Applicant could not be retarded because his IQ was above 70; indeed, Herman's own experts substantially agreed with the State experts that an IQ over 70 foreclosed a diagnosis of mental retardation. Dr. Woods testified at the PCR hearing, Applicant does have significant impairments in adaptive functioning that qualify him for the diagnosis of mental retardation notwithstanding the fact his IQ slightly exceeds 70. PCR Tr. 112. Second, because counsel failed to have a psychologist examine the testing records, no one detected clear signs of brain damage or recommended further testing to determine the nature and presence of brain damage. As Applicant does have substantial brain damage, see infra, counsel's failure deprived him of additional mitigating evidence that would have put Applicant's moral culpability in greater perspective.

Again, this case is unlike Jones, where the supreme court found the PCR petitioner could not show prejudice because the evidence that counsel could have presented was only a more elaborate version of what was actually presented. Here, the testimony of the defense experts tended to lead the jury to find Applicant was *not* retarded; in other words, both the State and the defense experts provided the jury with fundamentally inaccurate information. But for counsel's errors, there is a reasonable likelihood the jury would have imposed a life sentence.

2. Brain Damage.

Because counsel failed to conduct a full investigation and failed to retain appropriate experts, see supra, he did not discover some very powerful mitigation evidence: namely, that Applicant suffered from "significant neurological damage [brain damage] that IQ just doesn't in any way reflect." PCR Tr. 81 (testimony of Dr. George Woods).

Dr. Woods testified at the PCR hearing that Applicant suffers from brain damage and a

developmental disability (mental retardation). PCR Tr. 86. He furthered testified that neurosyphilis (congenital) was a likely cause of or contributor to Applicant's brain damage.[21] PCR Tr. 86-87, 108-11. Relying, *inter alia*, on the neuropsychological testing performed by psychologist Dr. James Evans,[22] Dr. Woods found that three of the four parts of Applicant's brain were damaged: the frontal lobes, the parietal lobes, and the temporal lobes. PCR Tr. 92.

Damage to the frontal lobes can be particularly debilitating. The frontal lobes, which are not fully developed during adolescence, are inhibitory--that is, they are designed "to help the rest of the brain slow down, to think about what's going on, to understand the process, to be able to weigh and deliberate." PCR Tr. 90-91. Another characteristic of persons with frontal lobe damage is that they have trouble stopping a behavior once they have started, which is called perseveration. PCR Tr. 102. Persons with frontal lobe damage have difficulty creating plans. PCR Tr. 103.

The mere description of frontal lobe function makes it clear why having frontal lobe damage would be a mitigating circumstance even standing alone. However, as Dr. Woods testified, Applicant was not simply dealing with damaged frontal lobes. Because Applicant was sixteen years old, his frontal lobes--in addition to not being normal in the first place--were not fully developed. PCR Tr. 125-26. Moreover, there was substantial evidence that, at the time of the offense, Applicant had consumed a substantial amount of alcohol, which acts "directly on the frontal lobe of the brain." PCR Tr. 125. The practical effect of alcohol on the frontal lobes is that it acts as "a disinhibiting .

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[21]Importantly, regardless whether Applicant's developmental disability and additional brain damage were caused by congenital syphilis, the fact of the brain damage and developmental disability are quite clear.

[22]Dr. Woods also relied on Applicant's psychoeducational evaluations and other, similar records. PCR Tr. 93-100.

. . chemical where it often impairs judgment." PCR Tr. 125. Thus, on the evening of the crime, Applicant was faced with a triple whammy to his frontal lobes. Moreover, since his grandfather's stroke, his life had lacked the structure and supportive environment that constitutes the best remedy for frontal lobe damage. PCR Tr. 124.

Based on these factors, Dr. Woods actually concluded that Applicant met South Carolina's definition of guilty but mentally ill:

> No, I'm not saying that it was an accident. I am saying though that someone without the neurological impairments that Mr. Hughes had would be able to control their behavior more effectively.

PCR Tr. 129.

If counsel had retained a psychologist or an expert in psychological testing, all the issues regarding Applicant's brain damage would have been discovered. See, e.g., Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992)(finding counsel ineffective where adequate investigation and consultation with experts would have revealed defendant suffered from frontal lobe dysfunction); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1994)(same). The prejudice to Applicant from counsel's failure to take this simple action is manifest: Applicant was deprived of additional, scientifically validated information showing that he was far less able than the ordinary person to make plans, to adjust to others' reactions, or to control his behavior.[23] Although juries tend not to be sympathetic to the insanity defense, they are far more sympathetic to claims of organic brain damage:

> [W]hile juries tend to distrust claims of insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems such as mental retardation

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[23]Dr. Woods noted that Dr. Kragh, a neurologist, had found that Applicant retained some primitive startle reflexes. PCR Tr. 129.

Glenn, 71 F.3d at 1211.

Counsel's failure to discover and present this evidence undermines confidence in the jury's sentencing decision, and Applicant is, therefore, entitled to a new sentencing trial.

C. 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.

Applicant was clearly a failure in school. He failed several grades, and was only in the eighth grade at age sixteen. Given his grades, one may reasonably infer that he was typically socially promoted whenever he was not actually retained in the same grade. He was frequently absent from school. After his grandfather's stroke, his disciplinary referrals dramatically increased. There is no indication Applicant performed even adequately at any school activity.

Trial counsel argued that the school system failed Applicant, but presented no real evidence as to how the school system actually failed him. In reply, the State argued that the school system took action everytime a problem--a disciplinary referral--arose, and that it was Applicant who failed the school system, not vice versa. See Trial Tr. 1652 (Solicitor Bailey's closing argument in sentencing).

Ample evidence was available to show how the school system never met Applicant's needs. At the PCR hearing, a number of witnesses discussed this topic. First, Denis Keyes testified that the school failed to comply with federal law governing evaluations of students who have been classified, as Applicant had at one time, in need of special services. PCR Tr. 510. Dr. Keyes also said that if Applicant "had been appropriately placed [in school], he would not have been failing." PCR Tr. 510. Similarly, Dr. Marty Beyer testified the school system's treatment of Applicant was based on a "complete misunderstanding of the federally funded special education programming," and that "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." PCR Tr. 27.

Counsel's failure to present this readily available evidence constituted ineffective assistance prejudicial to Applicant.

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

1. Factual Background.

The State's written Notice of Evidence in Aggravation of Punishment provided, at best, only extraordinarily vague notice of some of the non-statutory aggravating circumstances the State intended to introduce during the penalty phase of Applicant's trial. See Trial Tr. 1903-06 (notice form). Specifically, the Notice did not give Applicant reasonable notice of the State's intention to introduce school disciplinary records. The relevant portion of the Notice provides only that:

> The State will present 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 the 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.

Trial Tr. 1904. Although this language may provide notice of the State's intention to introduce evidence as to Applicant's prior DJJ record, illegal acts, or acts of violence, it certainly does not encompass school disciplinary violations.

Notwithstanding its failure to provide the defense with proper notice, the State introduced

Applicant's middle school records during the sentencing phase of trial.[24] Trial Tr. 1325-26. The records documented numerous school disciplinary referrals and suspensions for various infractions ranging from "disrespect," to "horseplaying," to "refusal to serve lunch detention." Trial Tr. 1920-35 (containing records). Despite the lack of notice that the State would seek to introduce these records, Applicant's trial counsel did not object to their admission. Additionally, trial counsel failed to cross examine the custodian of records about her complete lack of personal knowledge regarding the documented incidents. Trial Tr. 1327-28. Finally, counsel failed to object to these records or certain portions thereof as inadmissible hearsay.

In his closing argument in sentencing, Solicitor Bailey exploited Applicant's middle school records for all they were worth. He argued they illustrated Applicant's character, used them to rebut the case in mitigation, and even argued they were pertinent to whether Applicant deserved to live:

> You can look at other stuff too besides the aggravating circumstances. You can look at Herman Hughes's characteristics, his prior conduct, what kind of person he is. *You can look at his school records. Y'all will have this in the jury room. From 1991, October of '91 until he got kicked out of Job Corp*[25] *at middle school a month before he killed Ken Presley, he's written up 51 times at school.*
> * * *
> The first one [mitigating circumstance] that you will be charged to consider is that the defendant has no significant history of prior criminal convictions involving the use of violence against another person. That's true. He doesn't have any significant criminal conviction history, a violation against another person. *But again, I ask you to look at the school record, which is where he's been and where he's amassed his–his–his record. Written up 51 times from everything from disrespect to destruction of school property , fighting, sexual misconduct. I'm not going to go through all 51, but consider that.*

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[24]Not content simply to introduce them, the State had Applicant's school disciplinary records enlarged, thereby calling special attention to the records.

[25]This statement was inaccurate. Applicant did *not* get kicked out of Job Corps, and there was no evidence to indicate he did. Applicant left Job Corps because he was homesick and missed his grandmother.

> * * *
> And Ms. Boette and Dr. Morgan describe this man as passive. As passive. *Look at the 51 infractions he's got for fighting, sexual misconduct, disrespect to the teachers.*
> * * *
> The defense when I sit down is going to get up here and they are going to play a blame game with you. They are going to blame society for what he did. They are going to blame the school system. We've already heard some of that from Ms. Boette. You know, school failed him. *He didn't fail the school 51 times he got written up and didn't show up for school and failed them.*

Trial Tr. 1635-36, 1637, 1641, 1652 (emphasis added). Not having objected to the improper introduction of the disciplinary records, trial counsel had no basis for objecting to these portions of the solicitor's closing argument.

At the PCR hearing, trial counsel said that if there was one time during the trial he felt inadequate, that was when the solicitor was introducing Applicant's school disciplinary records:

> Okay, but I–I did feel overwhelmed, okay, and I think I covered this in the deposition, that if there was a time I felt–I felt inadequate, okay, it was like once that floodgate opened, I couldn't stop it, and we were flooded because they certainly–there were a number of instances where they reported something, but the–the punishment to him was minor, so–but it sounded terrible, okay. My wife teaches early childhood education. She has children to this day that three times–I'm talking about four-year-olds–three times a week she has to call their parents in. Well, you go over three times a week with a kid, and these are just immature kids, and if you write those up as–as infractions, it sounds terrible that this child was written up thirty-eight times as a four-year-old. Well, it may not have been all that bad, but it sounded terrible, like Herman was Public Enemy No. 1, when the truth of the matter is he had never been convicted of anything in his life, okay, do I–I did feel, if there was something, and I felt bad then that I had opened up a Pandora's box I couldn't close, I felt inadequate at that time. *Now, I don't know whether there was anything that I missed.* Nobody has told me that "Hey, you should have made this objection." Nobody has said that since that time, but I felt terrible.

PCR Tr. 450-51 (emphasis added). In addition to admitting he did not know whether he could have objected (and thus could not have had a strategic reason for failing to object), trial counsel "couldn't say for certain" whether Annette Boette had Applicant's school disciplinary files. PCR Tr. 452.

2. Argument.

Section 16-3-20(B) of the South Carolina code provides that "[o]nly such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible." As the supreme court recognized in State v. Riddle, 291 S.C. 232, 237, 353 S.E.2d 138, 141 (1987), "[t]he purpose of § 16-3-20(B) is to ensure the defendant in a capital case is given a fair and complete opportunity to respond to each factual allegation used by the State as a justification for a sentence of death." This statute has its roots in the due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain. See Gardner v. Florida, 430 U.S. 349 (1977).

The State's statutory duty to provide notice of evidence in aggravation extends to both statutory and non-statutory aggravating circumstances. In Riddle, the South Carolina Supreme Court rejected the State's argument that § 16-3-20(B) only required notice of statutory aggravating circumstances. Riddle, 291 S.C. at 236-37, 353 S.E.2d at 141. Noting the due process concerns underlying the statute, the court found a statutory violation in the State's failure to provide notice of its intent to introduce the defendant's juvenile record as non-statutory aggravating evidence. Id. at 237, 353 S.E.2d at 141.

The present case falls squarely within Riddle's ambit, and is, in fact, more egregious than Riddle. Here, the State introduced for the jury's consideration *middle school disciplinary records*; that is, the records in question were not even in the nature of law enforcement documents. And as in Riddle, the State gave the defendant no notice of its intent to introduce this evidence.[26] In light

[26]If Respondents argue the notice was, in fact, sufficient, one can only wonder what else would be encompassed by the notice: records indicating a defendant cursed during a fifth-grade Sunday School class? Official documentation of a defendant's poor sportsmanship and disobedience

of the similarity between Riddle and Applicant's case, trial counsel had strong statutory and constitutional arguments that the evidence should be excluded for lack of notice.

Courts repeatedly have found trial counsel ineffective for failure to object to the introduction of inadmissible evidence. See, e.g., Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994)(finding counsel ineffective for failing to object to introduction of inadmissible hearsay). Trial counsel plainly had no strategic justification for his failure to object, so his deficient performance is clear.

Applicant was prejudiced by trial counsel's mistake. Given Applicant's youth, low level of intellectual functioning, and the involvement of others in the crime, the sentencing case was a close call. Therefore, there is a reasonable probability the introduction of school records containing documentation of multiple disciplinary violations had an impact on the jury's sentencing decision. Importantly, Solicitor Bailey obviously felt the school disciplinary records were significant; otherwise, he would not have felt the need to return to them four times during his closing argument. In fact, even assuming (without conceding) that the mere introduction of the records did not prejudice Applicant, Solicitor Bailey's emphasis on them during closing certainly prejudiced Applicant. See, e.g., Hudgins v. Moore, 1999 WL 1114701 (S.C. Sup. Ct. Dec. 6, 1999)(finding prejudice in counsel's failure to object to improper admission of evidence, where solicitor specifically relied on improper evidence in his closing argument).

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to the coach in organized sports? In short, the notice provided by the State was too vague to give the defendant fair notice of what the State actually intended to introduce outside, perhaps, of violations of the criminal law.

Moreover, the fact trial counsel might have had Applicant's middle school records does not cure any prejudice. Had the State provided notice of its intention to introduce these records, trial counsel could have researched potential bars to admissibility or, more likely, have investigated the disciplinary violations in order to rebut, explain, or place the disciplinary referrals in context. Given the lack of notice, defense counsel had no reason to prepare to do any of these things.

In sum, trial counsel was ineffective in failing to object to the introduction of Applicant's school disciplinary records, and Applicant was prejudiced thereby. Accordingly, Applicant is entitled to a new sentencing trial.

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

1. Introduction and Factual Background.

During the penalty phase of applicant's capital trial, the jury learned more about the life of Ken Presley than it did about that of Herman Hughes. Three of Ken's relatives testified about Ken's life, his dreams and ambitions, his personality, and the loss they felt. This testimony included a number of letters Ken had written family members. It included information about honorary citations he had received in the Navy. The jury saw several pictures of Ken. In fact, the jury heard three times as much testimony from Ken's family members as they did from Herman's family members.[27]

Yet petitioner's counsel did nothing whatsoever to limit this testimony. Counsel did not move *in limine* to limit the quantity of victim impact testimony, despite clear precedent that the jury should be permitted only a "brief glimpse" into the life of the victim. See Payne v. Tennessee, 111 S. Ct. 2597 (1991). Counsel did not object when the solicitor actually presented excessive victim impact testimony. He did not even object to portions of the victim impact testimony that plainly constituted hearsay.

Counsel's conduct was deficient and prejudiced petitioner. Accordingly, this Court should vacate petitioner's death sentence and remand the case for a new sentencing hearing.

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[27]Herman's grandmother, Lucille Hughes, was the only member of Herman's family who testified during the penalty phase of trial.

2. Argument.

"Victim impact evidence, by its very nature, is emotionally charged material which involves the risk of injecting arbitrary factors into a capital sentencing hearing." State v. Bernard, 608 So. 2d 966, 968 (La. 1992). Therefore, although there is no *per se* Eighth Amendment bar to the admission of victim impact testimony to show the specific harm caused by the defendant, such testimony may not be excessive or otherwise unduly prejudicial. Payne, 501 U.S. 808, 825 (noting that if victim impact evidence renders trial unfair, Due Process Clause entitles petitioner to relief); see also State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993)(same); Cargle v. State, 909 P.2d 806, 826 (Okla. Crim. App. 1995)("[T]he ability to present victim impact evidence does not . . . mean the 'floodgates have opened' and that everything the prosecution wishes is admissible"); Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994)("Indeed, even some legitimate victim impact evidence could inflame or unduly prejudice a jury if admitted in excess"). The trial must, at all times, remain focused on the issue of the defendant's culpability.

In finding no *per se* bar to victim impact evidence in capital trials, the United States Supreme Court has focused on the need for a balanced view of the defendant in light of all his acts. Thus, in Payne the Supreme Court found it incongruous for the defendant to be allowed to present unlimited evidence from family members and friends about the defendant's affectionate and caring nature, but for the State not to be permitted to counterbalance this presentation with specific evidence about the harm the defendant caused by his crimes. Payne, 501 U.S. at 825-26. Nonetheless, the United States Constitution does not permit the sentencing trial to become a forum for extended, unlimited eulogization of the victim. Id.

Therefore, in order to safeguard the defendant's right to a fair sentencing trial, the defense

lawyer has the right and, in fact, the duty to move *in limine* to limit victim impact testimony, to object contemporaneously when victim impact evidence becomes excessive or otherwise injects arbitrariness into the sentencing trial, and to insist upon scrupulous adherence to all the ordinary rules of evidence.

In the present case, faced with unlimited victim impact evidence and the introduction of significant amounts of hearsay, trial counsel did nothing. First, the Record reflects that he filed no pre-trial motions to limit victim impact evidence. Second, during the extensive testimony of Ken Pressley's family members, trial counsel did not lodge a single objection. See Trial Tr. 1382-1434 (victim impact testimony of Gary Presley, James Presley, and Lynell Williamson). In fact, counsel did not even object when the State offered ample hearsay evidence (letters) to show the victim's actions, hopes, dreams, and relationship with his family. Absent a reasonable strategic justification, a defense attorney's failure to object to inadmissible evidence, such as excessive victim impact evidence or hearsay testimony, constitutes deficient performance. See, e.g., Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994)(finding trial counsel ineffective for failure to object to State witness' hearsay testimony inculpating defendant); Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)(finding counsel ineffective for failing to object to inadmissible evidence greatly prejudicial to defendant); see also Mason v. Scully, 16 F.3d 38 (2d Cir. 1994)(finding counsel ineffective for failing to object to hearsay testimony about statements of non-testifying co-defendant).

At the PCR hearing, trial counsel offered no strategic explanation for his failure to seek to limit or to object to the unlimited victim impact evidence at trial. He also had no strategic justification for his failure to object to the portions of the victim impact testimony that constituted inadmissible hearsay. Indeed, trial counsel admitted he was unaware of any basis for an objection

or a motion to limit the testimony, and that, if such a basis existed, he should have taken appropriate action:

> If there was something, but if there is case law that suggests there was something I could have objected to, and I didn't, then I–I–I blew it. . . . If–if there were limits [on the amount and nature of victim impact testimony that is permissible], and I let it go past, I can't–I can't deny. The record would speak for itself what was put in there and what I didn't object to.

PCR Tr. 386-87. In light of counsel's frank admission, ineffective performance is clear. The only remaining question is whether Applicant was prejudiced by counsel's errors regarding the victim impact evidence.

Applicant suffered significant prejudice resulting from counsel's ineffectiveness. Particularly given the paucity of testimony by Applicant's family members about Applicant and his life, the amount of testimony about Ken Pressley and about his family members' loss was excessive and diverted the jury from its focus on *Applicant's* life and culpability. See, e.g., State v. Lambert, 675 N.E.2d 1060 (Ind. 1996)(finding victim impact evidence excessive and prejudicial when it was "not brief"–29 transcript pages); Burns v. State, 609 So. 2d 600 (Fla. 1992)(finding error in introduction of victim impact evidence that was "extensive" and "frequently referred to by the prosecutor"). For example, in Cargle v. State, 909 P.2d 806 (Ok. Ct. Crim. App. 1995), the Oklahoma Court of Criminal Appeals found victim impact excessive and more prejudicial than probative, where the testimony was not "quick." The Oklahoma court also condemned the large number of photographs introduced of the victim performing various activities as cumulative and unduly prejudicial. Id.

Here, as in Cargle, the testimony was extensive and highly emotional, and included the introduction of many photographs. In fact, the testimony in this case was more prejudicial than that in Cargle because it also included several letters from Ken Pressley to his family members.

Furthermore, the prejudice suffered by Applicant was compounded by the composition of the jury, which included two jurors who were directly acquainted with the Pressley family and who had already been exposed to direct victim impact information before trial. Given these facts, the prejudice to Applicant was both plain and overwhelming.

3. Conclusion.

In State v. Bernard, 608 So. 2d 966, 971 (La. 1992), the Louisiana Supreme Court observed that:

> the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence to the circumstances of the crime or the character and propensities of the defendant. And the more marginal the relevance of the victim impact evidence, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations.

Here, the detailed, unlimited victim impact evidence diverted the jury from its proper focus–the life and culpability of Herman Hughes–and thereby injected an arbitrary factor into the jury's sentencing deliberations. Trial counsel's failure to seek to limit or to object to this evidence violated Applicant's Sixth Amendment right to the effective assistance of counsel. Accordingly, Applicant is entitled to a new sentencing trial.

F. Counsel failed to object to the solicitor's prejudicial and inflammatory closing argument during the sentencing phase of trial.[28]

1. Introduction and Factual Background.

At the closing argument of Mr. Hughes' capital sentencing trial, Solicitor Walter Bailey

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[28]In addition to asserting this as a Sixth Amendment ineffectiveness claim, applicant also asserts directly and independently the impropriety of the Solicitor's argument under South Carolina law and the Eighth and Fourteenth Amendments to the United States Constitution. See State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985). Applicant is entitled to relief under both Sixth and Eighth Amendment jurisprudence, as well as under South Carolina law.

argued passionately that the jury should sentence Mr. Hughes to death. Solicitor Bailey argued that death was the appropriate punishment because a life sentence was, for all practical purposes, a walk in the park at the State's expense:

> Let's look at life imprisonment for a minute as an alternative sentence to the death penalty. Is life imprisonment the appropriate, just punishment for the horror story that y'all have heard over the last few days? Herman Hughes gets life imprisonment, goes to prison. *He's cared for by the State of South Carolina. He's fed, he's clothed, he's given medical attention.* . . . Is that justice, a life sentence for what he's done?

Trial Tr. 1651 (emphasis added). Trial counsel did not object to this argument concerning the conditions of life imprisonment.

At the PCR hearing, trial counsel asserted no strategic reason for his failure to object to this argument. PCR Tr. 390. Instead, he admitted that if he had identified objectionable portions of the prosecutor's argument, he would have objected. PCR Tr. 389-90. In fact, during the solicitor's closing argument, trial counsel intended to object at least once (although he did not remember what in particular he found objectionable), but the moment passed before he had gathered his thoughts sufficiently to lodge the objection; thus, he let the issue slide. PCR Tr. 389. Trial counsel also said that he was "jotting down notes" for his own closing argument during Solicitor Bailey's closing, and, because of that, was more focused on other issues:

> I can tell you my focus was more on what I was going to say, okay, and when I sat down for the next probably ten minutes, in my mind I was thinking of eight million things–that's an exaggeration–of what I had forgotten to say to the jury or wasn't sure I said, okay.

PCR Tr. 390.

Joseph Savitz, the Deputy Chief Attorney at the Office of Appellate Defense, represented Applicant on direct appeal. Mr. Savitz testified at the PCR hearing that, if trial counsel had objected

to the State's above-described argument, he would have raised the issue on direct appeal. PCR Tr. 287. Mr. Savitz's basis for the appellate issue would be that "there's a lot of law in the death penalty that says that you can't suggest that a defendant's going to get a light sentence if they sentence him to life or that it's not really punishment to be sentenced to life imprisonment." PCR Tr. 287. Mr. Savitz further opined that Solicitor Bailey's argument, though perhaps factually accurate, was misleading in that it "makes it sound, like is that life imprisonment is some kind of vacation or free ride, and it most definitely is not." PCR Tr. 299.

2. Argument.

In closing arguments, a solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). So long as he stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), cert. denied, 460 U.S. 1088 (1983). Nonetheless, final argument in the penalty phase of a capital trial must be carefully tailored not to appeal to the personal bias of a juror, nor calculated to arouse his passion or prejudice. State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987). Inflammatory appeals for a verdict based on factors outside these boundaries such as emotion or personal opinion, constitute an arbitrary factor in violation of the Eighth Amendment and S.C. Code §16-3-25 (C). State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982).

South Carolina case law is replete with improper prosecutorial arguments based on appeals to passion or prejudice. For example, in State v. Cockerham, 294 S.C. 380, 383, 365 S.E.2d 22, 23 (1988), the state supreme court condemned a solicitor's arguments that a life sentence would reflect

the jury's "softness" and "lack of courage." Similarly, in State v. Hawkins, 292 S.C. 418, 422, 357 S.E.2d 10, 13 (1987), the supreme court found the solicitor's repeated use of the term "Mad Dog" in describing the capital defendant "infected the trial with unfairness by arousing the passion and prejudice of the jury."

Most importantly for purposes of this proceeding, the South Carolina Supreme Court has also disapproved solicitors' disparagement of the severity of life sentences. In State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987), the solicitor referred in closing argument to "those bad life sentences." In its opinion, the supreme court directly quoted the solicitor's language, then said:

> We again remind solicitors their final argument in the penalty phase of a capital trial must be carefully tailored so as not to appeal to the personal bias of a juror, nor calculated to arouse his passion or prejudice. *The argument must be confined to the record and its reasonable inferences* and must focus on the characteristics of the defendant and the nature of the crime.
>
> This Court's decisions condemning arguments by solicitors are so numerous, the principle is elementary. Yet, solicitors continue to ignore the law as set forth by this and higher courts. We hope the dictates of this opinion may finally be heard by the solicitors of this State.

Id. at 519, 362 S.E.2d at 15 (emphasis added). This language makes it crystal clear that arguments minimizing the punitive quality of life sentences are inappropriate, at least absent some basis in the record for such a comment.[29]

Other courts have also condemned similar arguments, observing that they improperly inject the issue of *cost* of imprisonment versus of execution into the jurors' deliberations. For example,

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[29]In State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989), the court upheld the solicitor's comments about the nature of life imprisonment. However, the basis for the court's finding was that the solicitor was directly quoting the defendant's own witness and was commenting on material that the defendant had placed in evidence. Id. at 282, 384 S.E.2d at 701. Here, unlike Patterson, the defendant presented no evidence about the nature of life imprisonment; thus, Solicitor Bailey's comments fell wholly outside the record evidence.

in Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995), the federal court of appeals condemned a solicitor's extra-record penalty phase closing argument regarding the cost of feeding, clothing, and housing the defendant for the rest of his life. The court said that the prosecutor's reference "to the cost of life imprisonment violated the Eighth Amendment by . . . injecting irrelevant factors into the jury's consideration." Id. at 683; see also Blair v. Armontrout, 916 F.2d 1310, 1323 (8th Cir. 1990)("There is simply no legal for ethical justification for imposing the death penalty" on the basis of the cost of life imprisonment); Tucker v. Kemp, 762 F.2d 148 (11th Cir.)(en banc), vacated on other grounds, 474 U.S. 1001 (1985)(admonishing prosecutor for advancing economic argument for desirability of death penalty over life imprisonment). Although Solicitor Bailey did not directly say the word "cost," his use of the passive voice certainly indicated that *someone else*–not applicant–was shouldering the burden for his food, clothing, and medical care.

Notwithstanding the clear prohibitions of state and federal law, Solicitor Bailey directly commented on the conditions of life imprisonment (and indirectly commented on the cost) in urging the jury to sentence Applicant to death. This argument was improper for at least two reasons: First, as the supreme court recognized in Reed, such a comment–whether based on conditions or cost of life imprisonment--is inherently prejudicial and designed to arouse the passion and prejudice of the jury. Second, and equally important, Solicitor Bailey had no evidentiary basis whatsoever for this argument.[30] Had Applicant presented evidence about the conditions of life imprisonment, such prosecutorial argument might have been justified. However, Applicant presented no such evidence,

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[30]Solicitor Bailey testified at the PCR hearing that the evidence of Herman's adaptability to confinement injected this issue into the proceedings. PCR Tr. 625. Solicitor Bailey's plainly post hoc rationalization is belied by the trial testimony, which concerned only Herman's conduct in prison, *not* the amenities available for the confined. See Trial Tr. 1351-60 (testimony regarding Herman's adaptability to confinement).

so Solicitor Bailey's comment was wholly improper.

Notwithstanding this plainly objectionable argument, Applicant's trial counsel failed to object. Moreover, trial counsel acknowledged that he was not aware of any strategic reason for his failure to object. PCR Tr. 389-90. When not justified by strategy, a defense counsel's failure to object to a prosecutor's inflammatory and prejudicial closing argument constitutes ineffective assistance. For example, in Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), the South Carolina Supreme Court found trial counsel ineffective for failing to object to the solicitor's comments in closing argument concerning the meaning of a life sentence. See also Fossick v. State, 317 S.C. 375, 453 S.E.2d 899 (1995)(finding counsel ineffective for failing to object to solicitor's closing argument that the defendant had shown no remorse); State v. Storey, 901 S.W.2d 886 (Mo. 1995)(finding counsel ineffective for failing to object to solicitor's closing argument, which argued facts outside the record); Commonwealth v. Lacava, 666 A.2d 221 (Pa. 1995)(finding counsel ineffective for failing to object to the solicitor's closing argument suggesting the defendant should be sentenced to death not for his crime, but because he was a drug dealer).

Applicant suffered prejudice from counsel's failure to object to Solicitor Bailey's improper argument.[31] In essence, counsel's failure to object to the solicitor's closing argument allowed the State to mischaracterize the nature of a life sentence. Although the solicitor's comments about life imprisonment–that Applicant would be fed and clothed and would receive medical care–may have been true, they certainly omitted many pertinent details about life imprisonment. Trial counsel's failure to object to the solicitor's argument gave the State a freebie: It could paint a benign picture

[31]Even standing alone, counsel's failure to object to this argument prejudiced Applicant. Nonetheless, in assessing prejudice, this Court must consider the cumulative effect of counsel's errors.

of life imprisonment while giving the defense no real opportunity to illustrate the actual, harsh nature of the punishment. Accordingly, Applicant was prejudiced by counsel's error, and is, therefore, entitled to a new sentencing trial.

G. Cumulative Prejudice.

Although Applicant was prejudiced by each of counsel's errors during the sentencing phase of his trial, the cumulative impact of counsel's errors was devastating. Because of counsel's errors in investigation, preparation, and presentation of evidence, the jury had a highly inaccurate view of Applicant and of his culpability:

- The jury did not know Applicant had frontal lobe dysfunction which impaired his ability to plan and to resist his impulses;
- The jury did not know youth do not have fully developed frontal lobes even if their brains (unlike Applicant's) are otherwise normal;
- The jury heard unchallenged, inaccurate evidence suggesting Applicant could not be retarded because his IQ was over 70;
- The jury heard highly prejudicial evidence about Applicant's school disciplinary records, even though much of this evidence was hearsay and, more significantly, even though the State had not provided the defense with notice of its intention to introduce this evidence;
- The jury heard more from Ken Presley's family than from Applicant's family, and, in the process, heard considerable inadmissible hearsay to which trial counsel did not object; and
- The solicitor was permitted to reach outside the record for his prejudicial, objectionable closing argument on the "easy" nature of life imprisonment.

In short, the jury was deprived of substantial mitigation about the nature and extent of Applicant's serious developmental disabilities, and was exposed to inadmissible aggravating evidence Applicant had a right to have excluded. These errors cast significant doubt on the

reliability of the jury's sentencing decision, and deprived Applicant of a fair sentencing. See, e.g., Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998)(finding prejudice from the cumulative effect of numerous errors in sentencing phase of trial, including counsel's failure to provide all necessary information to mental health expert); Claborne v. Lewis, 64 F.3d 1373 (9th Cir. 1995)(finding counsel ineffective for multiple errors during sentencing phase of trial). Accordingly, Applicant's Sixth and Fourteenth Amendment rights were violated, and he is entitled to a re-sentencing trial.

Grounds 9(g) and 9(h)

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER SOUTH CAROLINA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 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.

APPLICANT'S DEATH SENTENCE VIOLATES INTERNATIONAL TREATIES AND CUSTOMARY INTERNATIONAL NORMS BINDING UPON THE UNITED STATES.

A. Introduction.

This section encompasses two claims in Applicant's Third Amended Application for Post-Conviction Relief. Applicant first argues directly that his sentence of death violates both binding international treaties and customary norms that do not allow execution of juvenile offenders. Applicant next argues that his trial counsel was ineffective for failing to raise these international claims. Obviously the two arguments are related: only if international treaties and customary norms bar the United States from permitting the imposition of the death penalty upon juvenile offenders was counsel ineffective in failing to raise the issue. Therefore, Applicant will first discuss the

straight international law claim, then will address the question of counsel's ineffectiveness.[32]

B. Factual Background.

Applicant was born [redacted] 1977. The crimes for which Applicant was sentenced to death occurred on March 18, 1994, when Applicant was sixteen years old. Upon information and belief, Respondents do not contest Applicant's age at the time of the crimes.

Trial counsel did not raise any international law issues as a bar to imposition of the death penalty upon Applicant. He had no strategic reason for failing to raise this issue, but simply said he was unaware of the issue and that no one with whom he had spoken apprized him of the possibility of an argument based on international law. PCR Tr. 457.

C. Argument.

Article 6 of the Constitution of the United States provides: "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

On September 8, 1992, the United States ratified the International Covenant on Civil and Political Rights ("ICCPR"). Article 6, Paragraph 5 of the Covenant provides: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." It further provides that no derogation shall be made to the rights contained in Article 6 of the Covenant. That restriction notwithstanding the Senate purported to place a "reservation" on Article 6, Paragraph 5 of the Covenant, attempting to reserve to the United

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[32]Importantly, Applicant asserts he is entitled to relief regardless whether his counsel acted ineffectively in failing to raise the international law issues.

States the right to execute juveniles.

By continuing to approve the application of the death penalty to juveniles, the United States joins a small number of rogue countries that have carried out executions of children in the past fifteen years: Iran, Iraq, Bangladesh, Nigeria Saudi Arabia, Yemen, and Pakistan.

1. The state of South Carolina is bound through the Supremacy Clause of Article VI of the United States Constitution to abide by the International Covenant on Civil and Political Rights entered into by the United States which prohibits the execution of children under eighteen years of age.

a. The Several States are Prohibited from Ordering the Execution of a Juvenile Under Article 6, Paragraph 5 of the International Covenant of Civil and Political Rights.

On September 8, 1992, the United States ratified the International Covenant on Civil and Political Rights. 999 U.N.T.S. 171; S. 4783-84 102nd Congress (June 8, 1992). Article 6 paragraph 5 of the International Covenant states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." In the ratification, the Senate placed a "reservation" to this provision. The International Covenant, however, contains a provision prohibiting derogation from Article 6 paragraph 5, even in times of public emergency. Art. 4 (2). The United States Constitution states: "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI.

It is undisputed that at the time of the crime in this case, petitioner was seventeen years old. Therefore, if the "reservation" to the International Covenant is invalid, his execution is in violation of the treaty.

The Supreme Court has long held that a treaty, like the one at issue in this case, entered into by the United States is the law of the land. Edye v. Robertson, 112 U.S. 580, 598-99 (1884); United

States v. Rauscher, 119 U.S. 407, 418 (1886). International agreements of the United States are laws of the United States and supreme over the law of the several states. Restatement (Third) of Foreign Relations Law of the United States § 111 (1) (1987). The law is clear that if a treaty conflicts with state law, the treaty controls. Zschernig v. Miller, 389 U.S. 429, 440-41 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947). "[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. [citation omitted]" United States v. Pink, 315 U.S. 203, 230-31 (1942). Therefore, the state of South Carolina is bound by the International Covenant and cannot seek the death penalty for petitioner.

International legal scholars and commentators, including Justice O'Connor, have noted the necessity of enforcing international law obligations in the courts of this country: "I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, Federalism of Free Nations, in International Law Decisions in National Courts 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996). The president has even found it necessary to issue an executive order, adopting a "policy and practice of the Government of the United States" to implement international human rights treaties. Exec. Order No. 13107,- C.F.R.- (December 10, 1998). President Clinton specifically referred to the International Covenant when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"

b. The Senate's Purported "Reservation" to Article 5 of the ICCPR is Invalid

It has been assumed, without analysis under the separation of powers doctrine, that the Senate has the right to place conditions and reservations on the provisions of a treaty to which it gives its "consent" under the Treaty Clause. This assumption does not survive analysis under the Supreme

Court's recent decisions regarding the separation of powers, culminating in Clinton v. City of New York, 524 U.S.-, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (line-item veto held invalid because the Constitution does not authorize the president "to enact, to amend or to repeal statutes"); see also Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

The Treaty Clause gives the president the power to "make" treaties, and the same clause subjects that power to the "advice and consent" of two-thirds of the Senate. Nothing in the Constitutional structure suggests that the Senate can simply pick and choose among the provisions of a proffered treaty, and "consent" to only those it likes. This would allow the Senate to exercise, in effect, a "line-item veto" over the treaty provisions and thus "ratify" a treaty that is materially different from the one negotiated with, and accepted by, multiple treaty partners. This is a legislative usurpation of the president's powers, and it is particularly offensive when, as here, the treaty itself prohibits derogation from the very article the Senate places a "reservation" upon.

c. Assuming the U.S. Senate has the authority to make a "reservation" which is binding on state courts, the "reservation" to Article 6 Paragraph 5 is invalidated by the non-derogation clause prescribed by the International Covenant.

Drafters of international human rights treaties have deemed certain rights so fundamental that they can never be suspended. The Restatement (Third) of Foreign Relations Law of the United States § 313(1)(a) (1987) indicates: "A state may enter a reservation to a multilateral international agreement unless reservations are prohibited by the agreement." Article 4 paragraph 1 allows for the derogation of certain provisions of the International Covenant in times of "public emergency which threatens the life of the nation." However, within the substantive provisions of the treaty, a relatively small number of provisions are classified as non-derogable provisions---rights so fundamental and so essential that they brook no exception, even in emergency situations. Article 4 paragraph 2, which the United States did not make a "reservation" to, specifically provides that no derogation may be

made to Article 6 (the right to life) ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2 15, 16 and 18 may be made under this provision").

The International Covenant established a Human Rights Committee to monitor and matters relating to the treaty. By ratifying the International Covenant, and participating election of officers to the committee, the United States agreed to the power of the Human Committee to monitor the implementation of, and determine non-compliance with, the treat report issued April 6, 1995, the committee declared the reservations by the U.S. to A paragraph 5 and Article 7 to be invalid. See Consideration of Reports Submitted by States Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53d Sess. mtg. para. 14, at 4, U.N. doc. CCPR/C/79/Add.50 (1995). Additionally, the Unitec reservation to Article 6, taken alone, has provoked direct objection from at least elev signatory countries condemning these reservations as invalid. See Multilateral Treaties D with the Secretary-General, supra; see also Lawrence A. Grayer, Comment, A Parad Penalty Flourishes in U.S. While Declining Worldwide, 23 Denv. J. Int'l & Pol'y 555 becoming the one hundred and fifteenth state party to the International Covenant, the Un ratified a treaty that specifically denied nations the ability to derogate from the prol executing children. Therefore, the "reservation" the Senate put on Article 6 paragraph 5 h effect and the State's seeking of the death penalty for petitioner is in violation of interna

d. Assuming the U.S. Senate has the authority "re "reservation" which is binding on state courts, the Article 6 paragraph 5 is not valid because it violates th purpose" of the treaty.

The Vienna Convention on the Law of Treaties states that a "reservation" is not incompatible with the object and purpose of the treaty." Vienna Convention on the Lav opened for signature May 23, 1969, art. 19, 1155 U.N.T.S.331, 336-37 (entered into

Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53d Sess., 1413th mtg., at para. 14, U.N. Doc. ICCPR/C/79/Add.50 (1995). "The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purposes of the Covenant." Human Rights Committee, Comments on the United States of America, U.N. Doc. CCPR/C/79/Add.50 (1995).

Since the United States' "reservation" to Article 6 paragraph 5 violates the object and purpose of the International Covenant, it is void. A treaty is an international instrument governed by international law. A reservation which is not valid under international law has no independent validity under United States jurisprudence, because an invalid reservation is not part of a treaty. If the "reservation" is void, then the U.S. is bound by the treaty and South Carolina is prohibited from seeking the death penalty against petitioner.

2. The State of South Carolina is bound by customary international law and *jus cogens* to refrain from seeking the death penalty for someone who was under the age of eighteen at the time of the offense.

a. The execution of those who were under the age of eighteen at the time of the offense is prohibited under international customary law.

Even if the Senate's purported "reservation" to Article 6 of the ICCPR is valid, seeking the death penalty for a juvenile is in violation of customary international law and *jus cogens*. The Supreme Court has recognized that, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900); see also Restatement (Third) of Foreign Relations Law of the United States § 111 (1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States"); Id. at § 702 cmt. c ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal

courts"). International human rights law has now become an established, essential and universally accepted part of the life of the international community. Louis Henkin, The International Bill of Rights: The Covenant on Civil and Political Rights at 1 (Louis Henkin ed. 1981). Individuals, including the citizens of the United States, are now understood to possess remediable rights based on international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); see generally Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal 1987); Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984). Under the Supremacy Clause, customary international law trumps state law. Kansas v. Colorado, 206 U.S. 46 (1906); see Zschernig v. Miller, 389 U.S. 429, 441 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947); Missouri v. Holland, 252 U.S. 416, 433-35 (1920).

A particular norm has attained the status of customary international law if two conditions are met: the norm must be (1) reflected in a general practice by nations and (2) *opinio juris* ("a sense of legal obligation"). See Article 38, Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1005, 1060 (1945); see also Connie de la Vega, The Right to Equal Education: Merely a guiding Principle or Customary International Legal Right, 11 Harv. BlackLetter J. 37 (1994). Presently, 123 nations prohibit the execution of minors by treaty or legislation, a list which notably includes Russia, South Africa, Syria, Cuba, and China. Amnesty International, Juveniles and the Death Penalty (Nov. 1998). A continued toleration of the execution of children would place the United States in the company of only a small number of rogue countries that have carried out executions of children in the past fifteen years. See Domingues v. State, 961 P.2d at 1280-81 (Springer, C.J., dissenting) ("Under Nevada's interpretation of the treaty, the United States will be joining hands with such countries as Iran, Iraq, Bangladesh, Nigeria and Pakistan in approving death sentences for children"). Clearly, the international community prohibits the execution of those who were under the age of eighteen at the time of the offense.

Through treaty ratification, nations promote the growth of customary international law norms that then become binding law. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." Restatement (Third) of Foreign Relations Law of the United States § 102 (3); see also § 102 comment (i). State practice may be deduced from treaties, whether ratified or not. See North Sea Continental Shelf Cases, 1969 I.C.J. 3; Connie de la Vega, The Right to Equal Education: Merely a guiding Principle or Customary International Legal Right, 11 Harv. BlackLetter J. 37, 41 (1994). The Restatement (Third) of the Foreign Relations Law of the United States also provides that "an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states." Id. at § 324 cmt. e; see also cmt. i (1987). The adoption of those treaties dealing with this issue makes it clear that international law prohibits the execution of children. Because there is such a wide consensus that the International Covenant is an authoritative statement of human rights law, the treaty has the status of customary international law. See generally, M. G. Kaladharan Nayar, Introduction: Human Rights: The United Nations and United States Foreign Policy, 19 Harv. Int'l L.J. 813 (1978). In fact, the *traveaux preparatoires* of the International Covenant indicates that Article 6 was considered to be a codification of existing customary law representing a consensus of nations and existing norms. The 138 participating countries far exceeds the threshold numerical figure for establishing a customary international law norm. Cf. Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980) (customary international law prohibition against torture reflected in torture convention to which only 95 countries were state parties).

A United Nations General Assembly resolution has also recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all member states, not only ratifying states. The International Covenant was unanimously adopted by the United Nations by a vote of

106-0. Nayar, supra, at 816 n. 18.

Other international agreements similarly prohibit executing children who were under eighteen at the time of the offense, including the Convention on the Rights of the Child ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below 18 years of age."), the Fourth Geneva Convention, ("[I]n any case, the death penalty may not be pronounced against a protected person [one held by a party to the conflict or an occupying force of which he/she is not a national] who was under eighteen years of age at the time of the offence [sic]."), and the American Convention on Human Rights (capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age).

Finally, the United Nations Commission on Human Rights, at its 53rd session in 1997, passed a resolution calling on states to consider abolishing the death penalty. It urged states that retained a death penalty to limit it to only the most serious crimes and to refrain from imposing it on children. The commission on Human Rights again considered the issue at its 54th session. The commission passed another resolution calling on states that maintained the death penalty to (among other things) comply with the International Covenant by not imposing the death penalty for crimes committed by persons below eighteen years of age. The United Nations Economic and Social Council has also adopted standards relating to the death penalty which forbid the execution of children who committed their crimes when they were under eighteen, and those standards were endorsed by the General Assembly. Those safeguards have also been endorsed by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice adopt the same position. The customary international law prohibition of executing children is clearly established not only by the significant number of countries that refuse to partake in this unconscionable act, but also by all

the treaties and U.N. Resolutions codifying this inalienable human right.

b. The execution of those who were children at the time of the offense is prohibited under *jus cogens*.

What separates *jus cogens* from general international law is that the norm or practice in question is non-derogable. Article 4 of the International Covenant states: "No derogation from articles 6, 7, (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." Because of the importance of these rights, other treaties have similar non-derogation clauses regarding the right to life. The language in these treaties, governing the non-derogability of the right to life, is nearly identical; therefore, the non-derogability of the prohibition of executing children is clear and precise. The fact that these major treaties specifically include the prohibition of executing children for committing crimes under the age of eighteen as part of their right to life guarantee demonstrates that this prohibition is a *jus cogens* norm.

In 1987, the Inter-American Commission held that the execution of those who were under the age of eighteen at the time of the offense violated a regional *jus cogens* norm: "The commission finds that in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States. The response of the U.S. Government to the petition in this case affirms that '[a]ll states, moreover, have juvenile justice systems; none permits its juvenile courts to impose the death penalty.'" Pinkerton and Roach v. United States, Resolution No. 3/87, Case 9647, Inter-Am. Cm. H.R., Annual Report of the Inter-American Commission on Human Rights 1986-1987 147, OES/Ser.L/V/II/71, doc. 9, rev. 1 (1987) para. 55. Furthermore, the United Nations Special Rapporteur has taken the position that the implementation of the juvenile death penalty is per se a violation of the *jus cogens* norm. See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/68/ (Add.3) para. 49; see also Donald T. Fox,

Inter-American Commission on Human Rights Finds United States in Violation, 82 Am. J. Int'l L. 601-02 (1988).

In Pinkerton and Roach, the Inter-American Commission on Human Rights also determined that "[t]he failure of the United States government to preempt the states as regards this most fundamental right–the right to life–results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively. Pinkerton and Roach, supra, at para. 62.

Federal courts of appeals have held that customary international law which has attained the stature of *jus cogens* is legally binding on domestic courts. See, United States v. Mata-Ballesteros, 71 F.3d 754 (9th Cir. 1995); In re Estate of Ferdinand E. Marcos Human Rights Litigation ("Marcos II"), 25 F.3d 1467 (9th Cir. 1994); In re Estate of Ferdinand E. Marcos Human Rights Litigation ("Marcos I"), 978 F.2d 493 (9th Cir. 1992); In Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, (D.C. Cir 1988); White v. Paulson, 997 F.Supp. 1380 (E.D. Wash. 1998).

There is thus a clear *jus cogens* norm that does not permit the execution of persons who committed crimes as children under eighteen. The final criterion of the Vienna Convention on treaties allows modification of this norm only by a new norm of the same status. There is no emerging norm allowing the execution of children; quite to the contrary, the practice is forbidden in virtually every civilized nation on the globe.

The prohibition on executing those who were under the age of eighteen at the time of the offense is a global *jus cogens* norm that is further reflected in multilateral human rights treaties as well as the case law of an international tribunal whose competence has been accepted by the United States. Just as South Africa could not overcome the prohibition against apartheid, the United States

should not be able to overcome the prohibition against killing children. The decision of the State to seek the death penalty in this case is thus clearly inconsistent with international law and *jus cogens*.

Applicant is therefore entitled to relief both because binding international law mandates it and because trial counsel failed to raise this issue.

Ground 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.

A. Introduction/Factual Background.

Herman is one of only three men on South Carolina's death row–Herman Hughes, Benji Powers, and Robert Conyers--who was sixteen years-old at the time of the charged offenses.[33] Of the crimes of these three young men, Herman's are the least aggravated.

Robert Conyers was convicted of beating two year-old Kimberly Sims to death after breaking into the home of Kimberly's mother ("Mrs. Sims); beating Mrs. Sims with a blunt object and breaking and breaking nearly every bone in her face; then raping her and inflicting a six-inch tear in her vagina with a foreign object. When young Kimberly called for her mother, Conyers beat Kimberly to death, then beat five-year-old Ronnie Sims severely about the head. State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997). In addition to the crime (and its aggravators) for which he was convicted and sentenced to death, Conyers also confessed to similar crimes committed between the ages of fourteen and seventeen, including raping and stabbing one woman to death; and raping

[33]More accurately, Herman is currently one of only two death-row inmates who was sixteen at the time of the charged offenses. The third sixteen year-old offender, Robert Conyers, recently received a new sentencing trial. See Conyers v. Moore, Order, 97-CP-14-506 (Order filed 2/10/2000). Thus, although Mr. Conyers remains physically on death row, he is no longer under sentence of death.

another woman and beating her face with a board with nails in it until her left eye came out of its socket. Id. He broke into the home of another woman, attempting to rape her; she resisted and he merely succeeded in breaking her jaw. Id.

Benji Powers was convicted of murder, first degree burglary, and assault and battery with intent to kill. The trial evidence indicated that Mr. Powers broke into the home of a sixty-eight year-old man and his wife. He entered their bedroom and stabbed the man in the chest, shoulder, and arms; the man bled to death. Mr. Powers also beat the wife in the face and chest, breaking her collar bone and fracturing six of her ribs. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

Notwithstanding the evidence that the crimes of the other two sixteen year-old offenders was more serious than Herman's, as well as the powerful mitigation of Herman's age, his extremely low intelligence, his lack of a prior record, and evidence of his submission to older, more intelligent co-defendants, appellate counsel, Joseph Savitz, failed to challenge the proportionality of Herman's death sentence. At the PCR hearing, Mr. Savitz testified that he does not "normally raise proportionality" because the supreme court conducts its own analysis of proportionality and because he has "never had much luck with proportionality." PCR Tr. 282, 293. However, he admitted that, in this case, the supreme court might have "done a better job" on proportionality if he had "made more of his age and his mental condition." PCR Tr. 283. Mr. Savitz also said that, based on the hundreds of murder cases he had handled, Herman's case "was not an extreme case," and that, in fact, he did not believe the case "was a death penalty case." PCR Tr. 283.

B. Argument.

S.C. Code Ann. § 16-3-25(B) requires the South Carolina Supreme Court to review the proportionality of a defendant's sentence of death. The court must consider three factors in its

review:

> With regard to the sentence, the court shall determine:
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
> (3) Whether the sentence of death is excessive to or disproportionate to the penalty imposed in similar cases, *considering both the crime and the defendant.*

S.C. Code Ann. § 16-3-25(C) (emphasis added). This language plainly requires the court to consider both the crime and the characteristics of the defendant.

In the state supreme court's opinion affirming Herman's conviction and death sentence, the court cited three cases as involving crimes proportional to those for which Herman was convicted. See State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997)(listing proportionality cases). Notably, the court apparently did not fulfill its duty of considering the characteristics of the defendant. Of the cases the court cited as comparable, none of those cases had a juvenile defendant (much less a sixteen year-old), nor did they involve persons with mental retardation.

Plainly, the supreme court would have found appellate briefing of this issue helpful. Such briefing would have focused the court on an incontrovertible fact: when both the crimes *and* the characteristics of the defendant are considered, as § 16-3-25(C) requires, Herman's death sentence is plainly disproportionate and, therefore, unlawful under § 16-3-25.

Mr. Savitz' statements that he usually does not raise proportionality because he has not "had much luck" with it and because the court addresses the issue itself do not constitute strategic justifications for his failure to raise this meritorious issue. Moreover, the fact that he mentioned

Herman's youth and sub-par intellectual functioning in passing in the brief did not discharge his duty to raise proportionality; as Mr. Savitz testified on cross-examination, "that's like, you know, a bunch of ingredients. They're not the same thing as–as the–finished dish." PCR Tr. 295.

Therefore, appellate counsel's ineffectiveness is clear. See State v. Southerland, 1999 WL 1140298 (S.C. Sup. Ct. Dec. 13, 1999)(finding appellate counsel ineffective for failing to raise meritorious issue). Had appellate counsel raised this issue on direct appeal, there is a reasonable probability the supreme court would have reversed Herman's death sentence. Accordingly, Applicant's death sentence should be vacated.

Grounds 9(k) and 9(l)

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.

ALTERNATIVELY, IN THE EVENT THE COURT FINDS THAT THE ISSUE CONCERNING THE SOUTH CAROLINA CONSTITUTION WAS NOT PRESERVED FOR APPEAL, APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL 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 ALLEGED CRIME VIOLATES THE SOUTH CAROLINA CONSTITUTION.

A. Introduction and Factual Background.

Prior to trial, Applicant's counsel moved to bar the imposition of the death penalty based on the arguments that the death penalty for juvenile offenders violates both the United States Constitution and the South Carolina Constitution. See Motion to Bar Imposition of the Death

Penalty. The trial court plainly rejected the federal constitutional argument, Trial Tr. 1886, but it is less clear whether the court even ruled on the state constitutional issue. See Trial Tr. 1887 (court noting that "the appropriate case law, including that of South Carolina, does not suggest" that a sixteen year-old cannot be sentenced to death).

Given the ambiguity regarding the scope of the trial court's ruling, Applicant here makes alternative arguments. Assuming the trial court's ruling encompassed Applicant's state constitutional claim, appellate counsel was ineffective for failing to raise the issue on direct appeal. In the alternative, if the issue was not preserved, trial counsel was ineffective for his failure to preserve the issue.

Obviously, resolution of these ineffectiveness claims rests on whether the execution of juvenile offenders violates the South Carolina. Therefore, the argument in this section will directly address the state constitutional question.

B. Argument.

On March 18, 1994, Herman Hughes was a child. See S.C. Code Ann. § 20-7-30(1) (defining "child" as "a person under the age of eighteen"). Indeed, in the eyes of the law, Herman lacked sufficient maturity to vote, to serve on a jury (ironically!), or to drive at night unsupervised. He hadn't even finished middle school. Yet the State of South Carolina, with its express policy of protecting, treating, and rehabilitating children, including those who have violated the law, see S.C. Code Ann. § 20-7-20, now seeks to strap Herman down to a gurney and kill him–for acts that occurred while he was still a child.

However, article I § 15 of the South Carolina Constitution prohibits cruel or unusual punishments. As the foregoing discussion will illustrate, the execution of a person for an act

committed at age sixteen is both cruel and unusual, and, consequently, offends the state constitution. Accordingly, Applicant requests this Court commute his death sentence to a sentence of life imprisonment.

1. General Principles.

Article I § 15 of the South Carolina Constitution provides, in pertinent part: "Excessive bail shall not be required; nor shall excessive fines be imposed; *nor shall cruel, nor corporal, nor unusual punishment be inflicted* . . . ." The Eighth Amendment of the United States Constitution contains a corresponding, albeit slightly less expansive, prohibition, and the South Carolina Supreme Court generally has employed the same constitutional test for determining whether either clause has been violated. See, e.g., State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992).

A court's determination of whether a punishment is cruel or unusual is not solely an historic inquiry. E.g., Stanford v. Kentucky, 492 U.S. 361, 369 (1989). Of course, if the punishment at issue, either per se or as applied to a particular class, was deemed cruel or unusual at the time of the adoption of the Constitution, then it remains cruel or unusual now. For example, if burning at the stake was prohibited when South Carolina adopted its provision against cruel or unusual punishments, it remains forbidden.

However, the scope of the proscription against cruel or unusual punishment is not static. See, e.g., Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349, 378 (1910)("The clause [prohibiting cruel and unusual punishment] . . . is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"). Rather, the clause "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society." Id. at 101 (emphasis added); see also Wilson, 306 S.C. at 509, 413 S.E.2d at 26. Thus,

what society may have deemed acceptable one-hundred years ago might now be recognized as cruel or unusual, based on advances in scientific understanding, changed social conditions, more enlightened public opinion, or a combination of such factors.

In determining whether evolving standards of decency render the punishment at issue cruel or unusual, courts rely upon "objective indicator[s] of contemporary values." Penry v. Lynaugh, 492 U.S. 302 (1989). Such indicators include: (1) legislation concerning the pertinent issue, e.g., Thompson v. Oklahoma, 487 U.S. 815 (1988)(examining state statutes regarding minimum age for imposition of death penalty, in support of conclusion that Eighth Amendment forbids execution of fifteen year-olds); (2) the actual decisions of prosecutors and juries regarding the subject, e.g., Enmund v. Florida, 458 U.S. 782 (1982)(basing finding of Eighth Amendment violation on, in part, evidence that legislatures, juries, and prosecutors typically reject the death penalty for the crime at issue); (3) other legislation indirectly related to the subject at hand, e.g., Thompson, 487 U.S. at 823-25 (examining general legislation concerning juveniles in evaluating Eighth Amendment claim); (4) pertinent psychological and scientific evidence, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989)(majority of the Court rejecting plurality's contention that such evidence is irrelevant to Eighth Amendment analysis, with four justices expressly noting that "[w]here organizations with expertise in a relevant area have given careful consideration to the question of a punishment's appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards"); and (5) international standards and the practices of other jurisdictions, e.g., Trop, 356 U.S. 86 (relying in part upon international standards as support for finding that denationalization as a criminal sanction violates the Eighth Amendment). Although legislative enactments and decisions by prosecutors and juries play the largest role in the discernment of

evolving standards of decency, the adjudicator must weigh all pertinent factors.

However, analysis of the cruel or unusual punishments clause does not end with an examination of whether the punishment at issue violates evolving standards of decency. Additionally, both the federal Eighth Amendment and Article I § 15 of the South Carolina Constitution recognize an inherent proportionality requirement. Since at least 1778, the South Carolina Constitution has recognized that a sentence must be proportionate to the crime. See Stockton v. Leeke, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977). Similarly, the Eighth Amendment of the United States Constitution contains a proportionality component that is applicable to capital cases. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977)(finding that death penalty is "grossly disproportionate" punishment for crime of rape, and, accordingly, imposition of death penalty for rape violates the Eighth Amendment).

Three criteria are used in assessing proportionality under Article I § 15 of the South Carolina Constitution: "(1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions." State v. Kiser, 288 S.C. 441, 443, 343 S.E.2d 292, 293 (1986)(citing Solem v. Helm, 463 U.S. 277 (1983)). These criteria are borrowed from those used in analysis of Eighth Amendment challenges. As to the first criterion–the gravity of the offense compared to the harshness of the penalty–a majority of the Supreme Court has made clear that this factor encompasses the question of the "blameworthiness of the offender," also sometimes described as the "degree of moral depravity" of the offender. Stanford v. Kentucky, 492 U.S. 361, 393 (1989)(Brennan, dissenting); see also Coker, 433 U.S. 584; Enmund, 458 U.S. 782. For example, in Penry v. Lynaugh, 492 U.S. 302, the Court addressed the question whether the death penalty as

imposed upon mentally retarded defendants violated the Eighth Amendment because it was disproportionate to a mentally retarded person's degree of culpability. In this case, analysis of the first prong would include examination of whether death is a disproportionate punishment for sixteen year-old offenders, given the characteristics of such offenders which reduce their culpability. Analysis of prong one also requires the court to "consider whether the application of the death penalty to [the pertinent class of offenders] 'measurably contributes' to the social purposes that are served by the death penalty." Thompson, 487 U.S. at 833.

The imposition of a death sentence upon a sixteen year-old offender violates the South Carolina Constitution's prohibition on cruel or unusual punishment. First, such a practice offends contemporary mores and standards of decency, as shown by the practices of the overwhelming majority of prosecutors and sentencing juries in the state, as well as by legislation embodying the clear public policy of the State as regards children. Second, the death penalty constitutes a grossly disproportionate punishment for a sixteen year-old offender, given the emotional and cognitive immaturity, poor judgment, and greater potential for rehabilitation of such a youthful offender. This Memorandum will first discuss the question of evolving standards of decency in South Carolina, and will then address the question of proportionality.

2. The Execution of a Person for a Crime Committed at Age Sixteen Violates the Current Standard of Decency Recognized in South Carolina.

i) Actual Legislation

S.C. Code Ann. §§ 16-3-20 and 16-3-26, South Carolina's death penalty statutes, do not exempt sixteen year-olds from the death penalty (if they did, Applicant would not be here). However, S.C. Code Ann. § 16-3-20(C)(b)(9) specifically recognizes a defendant's juvenile status

as a mitigating circumstance, indicating the legislative recognition that youth are less culpable than are adults for the same action.

ii) Practices of Prosecutors and Sentencing Juries

In more than twenty years, South Carolina juries have sentenced only three sixteen year-old offenders–Herman Hughes, Robert Conyers, and Benji Powers–to death.[34] This is not because these three youth are the only sixteen year-old children who have committed crimes, but because very few juries sentence sixteen year-old offenders to death.

Information on how frequently prosecutors seek the death penalty against sixteen year-old offenders in South Carolina is more elusive, and Applicant cannot accurately say how frequently that occurs. However, in Conyers v. Moore, supra, the circuit court noted that that "[d]eath sentences for 16-year-old offenders may not be wholly unknown, but they are undeniably rare." Conyers Order at 42.

iii) Other Pertinent Legislation

South Carolina's policy toward its children is expressed most fully in Title 20 of the South Carolina Code. Title 20, or the "Children's Code," as it is commonly known, see S.C. Code Ann. § 20-7-10, defines many of the state's obligations to its children and contains a number of provisions designed for the protection of children. Under South Carolina law, sixteen year-olds cannot, *inter alia*:

- purchase or possess alcoholic beverages, S.C. Code Ann. § § 20-7-8920, -8925;
- play video poker, S.C. Code Ann. § 12-21-2804;

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[34]This information is based on statistics kept by the Center for Capital Litigation regarding death sentences imposed in South Carolina, and on information contained on the web site for the Death Penalty Information Center, **http://www.essential.org/dpic/.**

- attend certain movies without adult supervision, § 20-7-8905;
- marry without parental consent, § 20-1-250;
- enter into contracts or legally binding agreements, § 20-7-250;
- vote, U.S. Const. amend. 26; or
- drive alone at night, § 56-1--180.

These laws and others relating to child welfare demonstrate a recognition that sixteen year-olds simply lack the maturity and judgment to enjoy adult responsibilities. Given that fact, it is certainly incongruous for sixteen year-olds to be subject to the full wrath of the law when they misuse their immature judgment.

iv) Empirical Evidence Regarding Child Development

Dr. Marty Beyer testified at Applicant's PCR hearing regarding child development. Her testimony is summarized earlier in this Memorandum and will not be repeated in full here. Briefly put, Dr. Beyer testified that the average sixteen year-old has not reached cognitive, emotional, or moral maturity, and does not yet have a crystallized character or identity. She also explained how these factors make adolescents less capable than adults of good judgment and of compliance even with their own moral values.

v) Foreign Law: Law and Practices of Other States and Nations

Finally, the practices of other states and countries indicates that the death penalty for crimes committed at age sixteen violates evolving standards of decency. Sixteen death penalty jurisdictions in the United States have explicitly chosen eighteen as the minimum age of death eligibility: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Montana, Nebraska, New Jersey, New

Mexico, New York, Ohio, Oregon, Tennessee, and Washington.[35] Additionally, application of the federal death penalty is limited to persons eighteen and older. Five jurisdictions have chosen seventeen as the "floor" for death eligibility: Florida, Georgia, New Hampshire, North Carolina, and Texas. Only four states–Indiana, Missouri, Nevada, and Wyoming–expressly set the minimum age at sixteen, and the remainder of death penalty statutes do not specify a minimum age.[36]

The practice in the four states that technically have set sixteen as their floor is instructive as to what judges and juries actually consider the appropriate minimum age. In Indiana and Wyoming, juries have not sentenced *any* sixteen year-old offenders to death in more than twenty-five years. Since 1973, Missouri and Nevada have each sent two sixteen year-old offenders to death row; however, in each state, one of the two death sentences have been reversed. Thus, even in the four states that expressly allow imposition of the death penalty upon sixteen year-old offenders, only *four* such sentences have been imposed in more than twenty-five years, and only *two* of those four

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[35]Current statistics are available from the Death Penalty Information Center (DPIC), **http://www.essential.org/dpic/.** The statistics cited above were compiled based on documentation available from the DPIC web site, most specifically Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes Over the Last Quarter Century, June 1973-June 1999.*

[36]Fifteen states have no express minimum age for death-eligibility: Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia. However, as Justice O'Connor pointed out in Thompson, this fact should not be read as a particular state's endorsement of the death penalty for sixteen year-old offenders, any more than it should be viewed as an endorsement for, say, ten year-old offenders. Cite. Given the silence of these statutes regarding the question of age, the actual practices in such states provide a better indication of the standards extant in those jurisdictions. Notably, five of the fifteen states–Delaware, Idaho, Montana, South Dakota, and Utah–have not returned death sentences against *any* sixteen or seventeen year-old offenders in more than twenty-five years. A sixth, Kentucky, has not returned a death sentence against a sixteen year-old offender in more than twenty-five years. Of the remaining nine states that do not specify a minimum statutory age, only three–Virginia, Alabama, and South Carolina–currently have more than one sixteen year-old offender sitting on the state's death row.

sentences have, thus far, been sustained in the appellate process.[37] None of the four states have actually *executed* anyone for a crime committed at age sixteen. Indeed, since 1973, only one such execution has taken place in the entire United States: that of Sean Sellers in Oklahoma.

International practices point even more conclusively to a standard prohibiting the imposition of the death penalty on juvenile offenders. In the past decade (the 1990s), only six countries are known to have executed juvenile offenders: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States. DPIC Report, *International Perspectives on the Death Penalty* (Oct. 1999). Yemen has since outlawed the death penalty for those who were less than eighteen years old at the time of their crimes.

Numerous international treaties and statements indicate the nearly universal condemnation of the death penalty for juvenile offenders. For example, the International Covenant on Civil and Political Rights contains an explicit prohibition on this question: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." ICCPR art. 6 § 5. One-hundred forty-four countries, including the United States, are parties to this treaty.[38] Another treaty, the U.N. Convention on the Rights of the Child, also prohibits the death penalty for juvenile offenders. See Article 37(a), U.N. Convention on the Rights of the Child. Apart from the United States and Somalia, every country in the world has ratified this treaty. Finally, the American Convention on Human Rights, which the United States

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[37]Importantly, the petitioners in those cases continue to challenge their sentences. One of the petitioners, Miguel Domingues, a sixteen year-old sentenced to death in Nevada, has filed a petition for certiorari in the United States Supreme Court. The Court has requested the United States Solicitor General and others to provide additional briefing of the issue raised.

[38]The United States has lodged a "reservation" to Article 6 § 5. The validity of this reservation is a point of sharp contention.

has signed but not yet ratified, provides that "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age."

The international norms forbidding the juvenile death penalty are, in fact, so well established that many nations and commentators believe the principle has reached the level of *jus cogens*, *i.e.*, a law so universally accepted that it binds even those who have not signed specific laws and treaties concerning the matter in question. Other international norms that rise to this level include the prohibitions on torture, slavery, and genocide.[39]

The five above-described factors provide powerful evidence of the standard of decency extant in South Carolina. This standard prohibits imposition of death sentences upon juvenile offenders and, therefore, as applied to sixteen year-olds, § 16-3-20 is unconstitutional.

Additionally, however, the death penalty for sixteen year-olds must fail under the proportionality prong of South Carolina's cruel and unusual punishments clause.

3. Given current knowledge about child and adolescent development, the death penalty is a disproportionate punishment for sixteen year-old offenders.

An examination of "(1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions," State v. Kiser, supra, makes it clear the death penalty is a disproportionate penalty for a sixteen year-old offender.

First, although murder is obviously an exceedingly grave offense, the death penalty is excessively harsh given the reduced moral culpability of sixteen year-old children. As Dr. Beyer

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[39]This Memorandum contains a separate section on international law issues regarding the death penalty for juvenile offenders.

testified, sixteen year-olds are simply not as culpable as adults.

As to factors (2) and (3), it is clear that these factors also dictate a finding that the death penalty is a disproportionate punishment for sixteen year-old offenders. A death sentence for a sixteen year-old, in South Carolina and elsewhere in the United States, is a freakishly rare occurrence. In Brennan v. Florida, Op. No. 90, 279 (Fla. Sup. Ct. 1999)(per curiam), the Florida Supreme Court recognized this freakish arbitrariness, and, based on that, found the death penalty for sixteen year-olds violated the Florida Constitution:

> In this case, the defendant presented the court with unrefuted data that at least since 1972, more than a quarter of a century ago, no individual under the age of seventeen at the time of the crime has been executed in Florida. Since 1972, only three defendants other than Brennan who were sixteen at the time of the crime, were sentenced to death. For each of these three defendants, the death sentence was vacated.... We agree that our decision in Allen interpreting the Florida Constitution compels the finding that the death penalty is cruel or unusual if imposed on a defendant under the age of seventeen.

Id. at *5. Just as in Florida, the imposition of the death penalty upon sixteen year-olds in South Carolina is so rare as to be almost wholly arbitrary. Given that fact, the death penalty's unconstitutionality for sixteen year-old offenders is plain.

Accordingly, appellate counsel was ineffective for failing to appeal this issue to the South Carolina Supreme Court.

Grounds 9(m) and 9(n)

APPLICANT WAS DENIED HIS STATUTORY RIGHT TO THE APPOINTMENT OF TWO ATTORNEYS TO REPRESENT HIM AT HIS CAPITAL TRIAL.

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO 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.

A. Introduction and Factual Background.

When he was arrested for murder in 1994, Herman Hughes was sixteen years old and lived with his grandmother. He had not finished eighth grade. He did not have a job, and had negligible, if any, assets to his name. Both then and now, Applicant was unquestionably indigent.

Despite Applicant's personal indigence (and consequent right to court-appointed counsel), his grandmother retained attorney Mary Miles to represent him. Ms. Miles represented Applicant until shortly after the State served its Notice of Intent to Seek the Death Penalty. Ms. Miles then withdrew from the case, and the trial court appointed two attorneys, Clyde Dean and Ronald Hutto.

Ignorant about where to turn or what to do, Applicant's grandmother ultimately called Phillip Newsom, the attorney whom an investigator from Nickel & Dime Investigations had recommended. Mr. Newsom agreed to represent Applicant for a fee.[40] Mr. Newsom had never tried a capital case, see PCR Tr. 1308, so he sought advice from several experienced capital defense lawyers. PCR Tr. 418-19. Among the lawyers with whom he spoke was Jeff Bloom, the Richland County Public Defender.[41] Bloom Depo. 6. Although Mr. Bloom did not remember everything he told Mr. Newsom, he was emphatic about one thing: He advised Mr. Newsom in no uncertain terms that he needed the help of a second lawyer:

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[40]Mr. Newsom testified at the PCR hearing that Applicant's grandmother never paid him all he was owed, that money was extremely tight in the case, and that he had to make hard decisions about how to use his time. PCR Tr. 307, 415. He also said his practice suffered significantly from the time spent on the case, as case monies did not cover his the high overhead for his practice.

[41]Mr. Bloom has retired from his position as Public Defender, and currently works in private practice as a jury consultant and criminal defense lawyer. Bloom Depo. Tr. 4. Mr. Bloom is no relation to John Blume, one of Applicant's current attorneys. Bloom Depo. Tr. 3.

> . . . 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 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.
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> 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.*
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> * * *
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> The only thing I really remember from that brief [second] 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.*

PCR Tr. 6-8 (emphasis added).

Mr. Newsom apparently agreed that the assistance of another lawyer would be helpful. At the PCR hearing, he testified that he approached the trial court regarding appointment of a second lawyer to assist him. PCR Tr. 311. He said that the judge "would have none of that. . . . It was either going to be me or them [Clyde Dean and Ronald Hutto], so he–he relieved them." PCR Tr. 311. Mr. Newsom testified that he argued to the trial court that the judge in the Susan Smith case had appointed a second lawyer despite the family's having retained one lawyer, but that the judge "was not impressed." PCR Tr. 312.

Mr. Newsom acknowledged that "some of these conversations [regarding appointment of second counsel] took place in chambers." PCR Tr. 312. The transcript of a pre-trial hearing held on July 27, 1995, at which the trial court addressed the compensation of experts given Applicant's indigence, reveals that Mr. Newsom did not place on the Record his motion for appointment of a second attorney. See Transcript of July 27, 1995 hearing. Mr. Newsom has asserted no strategic reason for requesting a second lawyer but failing to preserve that request for appellate review.

B. Argument.

Applicant's argument in this second is two-fold. Applicant first argues directly that he was

denied his statutory right under S.C. Code Ann. § 16-3-26 to the appointment of a second lawyer. Next, Applicant asserts trial counsel was ineffective for failing to preserve for appellate review the issue of Applicant's entitlement under § 16-3-26 to a second lawyer. Obviously, the arguments are related: trial counsel's ineffectiveness depends on whether Applicant was, in fact, entitled to a second lawyer. Therefore, Applicant will demonstrate his statutory entitlement to two lawyers at trial and will then address trial counsel's failure to preserve this meritorious issue.

S.C. Code Ann. § 16-3-26 (B)(1) provides for the appointment of two qualified attorneys for any indigent person against whom the State seeks the death penalty:

> *Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action.* One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

(emphasis added). The statute's plain language evinces a legislative intent that an indigent capital defendant receive the assistance of two attorneys. In State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988), the South Carolina Supreme Court strictly construed § 16-3-26. The court held the statute contains specific requirements from which trial judges are not free to deviate. Id. at 237-38, 371 S.E.2d at 794; see also State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986)(holding section 16-3-26(B)(1) provides exclusive procedure for appointment of counsel for indigent persons charged with capital murder).

Applicant plainly was entitled to the protection provided by § 16-3-26(B)(1): He was indigent; he was charged with murder; the State was seeking the death penalty against him. Presumptively, then, he met all the prerequisites for the vesting of his statutory right to two lawyers.

The court's failure to appoint a second lawyer constituted a clear violation of the statute.

Importantly, a third party's retention of a lawyer (as with the retention of Mr. Newsom by Applicant's grandmother) does not necessarily effect a waiver of the protections of § 16-3-26(B). In fact, the trial court inherently recognized as much when it allowed funds from the Office of Indigent Defense to be advanced to pay the experts and investigators the court found reasonably necessary for the effective representation of Applicant. If the fact that Applicant's grandmother retained private counsel waives the provisions of § 16-3-26, then the trial court should not have permitted *any* funds to be paid by the Office of Indigent Defense.

Moreover, other judges certainly have appointed second counsel where a third party has retained one lawyer to represent an indigent capital defendant. For example, in the State's capital case against Susan Smith, Ms. Smith was indigent, but her family retained the services of David Bruck, an attorney in Columbia. Despite the family's retention of a private attorney, the trial court recognized Ms. Smith's indigence and, acting pursuant to § 16-3-26, appointed a second lawyer who was compensated by the Office of Indigent Defense. Apart from the publicity the Smith case received nationally, which did not necessarily make the legal issues more complex, there is no appreciable difference in the two cases. Indeed, if anything, the indigent Ms. Smith's family likely was far better able than Applicant's family to retain experienced defense counsel.

In addition to the obvious legal justifications for Applicant's reading of the statute, Applicant's interpretation of § 16-3-26(B)(1) makes far more sense as a matter of public policy. If a third party's retention of *one* lawyer for an indigent capital defendant effects a waiver of the defendant's right to the court-ordered appointment of a *second* lawyer, what possible incentive would family members or other third parties have for paying for one lawyer? In other words, if the

indigent defendant can get two lawyers "for free" if the family does not offer the defendant help, why in the world would a defendant ever waive his right to two lawyers just so his family could spend money to get only one lawyer? Ultimately, allowing the family to pay for one lawyer, yet still appointing a second lawyer for an indigent client, saves the State far more money–the State must pay for only one of those two lawyers.

In sum, the language of the statute, the court's interpretation of that language, the practice of other judges, and common sense public policy all support Applicant's reading of the statute.[42] Accordingly, Applicant was entitled to the appointment of a second attorney to represent him at trial. Furthermore, trial counsel's failure to preserve this meritorious claim for direct appeal constitutes ineffective assistance. Cf. Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994)(finding counsel ineffective for failing to raise a meritorious pretrial motion).

The only remaining question is whether Applicant was prejudiced by the court's failure to appoint a second attorney[43] or trial counsel's failure to preserve the issue. Even a cursory examination of the trial and PCR transcripts reveals substantial prejudice. Indeed, at the PCR hearing, trial counsel frequently explained his failures to take reasonably necessary actions by citing the lack of a second lawyer to assist him. For example, in explaining why he failed to pay full

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[42]Even assuming a capital defendant must waive the provisions of §16-3-26(B)(1) if a third party retains counsel for him, Applicant did not knowingly and intelligently waive his statutory right to two lawyers.

[43]Diddlemeyer left unresolved the question whether a capital defendant deprived of a right under § 16-3-26 need even prove prejudice. Given the abundant evidence of prejudice in that case, the court found it unnecessary to resolve the issue. Here, Applicant asserts the court's failure to appoint a second lawyer is, in itself, sufficient to entitle him to a new trial. However, as in Diddlemeyer, Applicant suffered obvious prejudice from the deprivation of his right to a second attorney. That prejudice is discussed in more detail in the text.

attention to the solicitor's closing argument and to object to objectionable statements, trial counsel testified that he "was alone and exhausted." PCR Tr. 390. In explaining his failure to take certain actions during *voir dire*, trial counsel said he lacked knowledge of the law and "that's where if I had had co-counsel, we'd have divided up the responsibilities, okay. I didn't have that." PCR Tr. 398. These errors alone, as well as many of the other attorney errors and omissions described in this Memorandum, resulted, at least in part, from an inexperienced, underpaid, retained counsel who was spread far too thin.

In sum, Applicant was deprived both of his statutory right to two lawyers and of his Sixth Amendment right to the effective assistance of counsel. Therefore, he is entitled to a new trial.

Ground 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 I § 3 OF THE SOUTH CAROLINA CONSTITUTION AND BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction and Factual Background.

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 crimes, but not to his guilt of the charged offenses. Trial Tr. 761-63. The trial court 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, and a part of it." Trial Tr. 765. Applicant replied that he had been so informed and agreed. Trial Tr. 765.

Insofar as there was an understanding between Applicant, defense counsel, and the court with

respect to Applicant's admission of involvement (not guilt), trial counsel betrayed that understanding during his opening statement. During the opening statement, counsel not only conceded Applicant's "involvement," but actually said Applicant was guilty of murder:

> 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.*

Trial Tr. 809 (emphasis added).

Plainly, counsel's opening statement went far beyond the scope of a mere admission of involvement. However, Applicant was never asked whether he wished or agreed to admit his guilt to the charged offenses, and there is no evidence he understood the trial court's questions as encompassing an admission of guilt. Moreover, at the PCR hearing, trial counsel testified that he did not know whether Applicant *or* his grandmother ever understood that he could be guilty of murder even if he was merely "involved," but had not actually shot the person who died. PCR Tr. 372-73. Counsel also agreed that the trial court questioned Applicant about his willingness to admit involvement, not guilt, and that there can be a legal distinction between guilt and involvement. PCR Tr. 370-71.

B. Argument.

Applicant was deprived of his right to due process of law as guaranteed by Article I § 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution by counsel's concession of Applicant's guilt, where Applicant had not knowingly and intelligently waived his right to present a case in defense of his innocence.

As with other constitutional and statutory rights, a capital defendant may waive his right to

present a case in defense, provided that he does so knowingly and voluntarily. Cf. State v. Reed, 293 S.C. 515, 518, 362 S.E.2d 13, 14 (1987)(finding defendant's waiver of right to present final statement must be knowing, intelligent, and voluntary).

Counsel has an elementary duty to be aware of a client's statutory and constitutional rights and to take appropriate measures to safeguard those rights. See Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992) ("counsel's failure to fulfill such a basic tenet of criminal defense brings his representation of the petitioner below the standard of reasonableness under the prevailing standards of the profession"). A failure to be aware of and protect a client's rights, whether constitutional or statutory, is the classic type of error that can satisfy the first prong of the two-part test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Here, trial counsel failed to ensure that Mr. Hughes made a knowing, intelligent, and voluntary waiver of his right to present a case in defense. See State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991); State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988). Indeed, trial counsel admitted that he there was a distinction between the trial court's questioning of Mr. Hughes concerning his awareness of counsel's intention to concede "involvement" and counsel's actual, on-the-record concession of legal guilt. PCR Tr. 370-71. He further admitted that he did not know whether Mr. Hughes was even *capable* of understanding that he could legally be guilty notwithstanding the fact he had not shot the deceased victim. PCR Tr. 372-73.

To waive a right, a defendant must make "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The courts must "indulge every reasonable presumption against waiver [and not] presume acquiescence in the loss of fundamental rights." Id. Whether there has been an intelligent waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background,

experience, and conduct of the accused." Id. Moreover, an alleged waiver of a fundamental right can only be ascertained from a "penetrating and comprehensive" examination of all the circumstances. Von Moltke v. Gillies, 332 U.S. 708, 724 (1948).

In Arthur, the South Carolina Supreme Court held that a defendant's purported waiver of his right to trial by jury was insufficient in light of three considerations: the failure of the court to inform the defendant of the "essential ingredients" of the right he was waiving, the failure to propound questions of "the nonleading character essential to a meaningful response," and because of the defendant's mental retardation. Id., 296 S.C. at 498-99, 374 S.E.2d at 293-94.

The same concerns apply here: The trial judge certainly never informed Mr. Hughes of the actual right he apparently (based on counsel's actions) was waiving–the right to present a case in his own defense; instead, the only right about which the trial judge informed Mr. Hughes was the right to deny any involvement. The court did not distinguish in any way between a concession of involvement and one of guilt. Moreover, defense counsel doubted Mr. Hughes understood what counsel himself tried to tell him regarding a concession of legal guilt. PCR Tr. 372-73. Finally, Applicant's borderline intellectual functioning militates against any finding that he voluntarily waived his right to present a case in defense of innocence.

Accordingly, Applicant's waiver was involuntary, and he is entitled to a new trial.

Ground 9(s) & 9(t)

APPLICANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF SOUTH CAROLINA LAW AND OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE STATE ELICITED TESTIMONY DURING DIRECT EXAMINATION OF A WITNESS THAT THE SOLICITOR EITHER KNEW OR SHOULD HAVE KNOWN TO BE FALSE.

VOLUME THREE 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

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A. Introduction and Factual Background.

During the guilt phase of Applicant's trial, co-defendant Henry Daniel Owens testified pursuant to a plea agreement about Applicant's involvement in the crime. On direct examination, the State elicited evidence about the terms of the plea agreement: in exchange for his testimony against Applicant, the State would permit Mr. Owens would plead guilty to misprision of a felony and would drop all other charges against Mr. Owens. Trial Tr. 824. When Solicitor Bailey asked Mr. Owens about the time he faced on the misprision charge, Mr. Owens replied that he faced "up to fifteen" years. Trial Tr. 824. As even Solicitor Bailey conceded, Mr. Owens' statement was inaccurate; he faced a maximum of ten years.[44] PCR Tr. 621. Yet, at trial, Solicitor Bailey allowed the false evidence by Mr. Owens to go uncorrected (as evidence). See Trial Tr. 824. Moreover, Applicant's counsel did not object to the introduction of this false evidence.

B. Argument.

"Prosecutors are ministers of justice and not merely advocates." State v. Quattlebaum, Op. No. 25051, at 7 (S.C. Sup. Ct. Jan. 24, 2000). Indeed, they are representatives of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." United States v. Berger, 295 U.S. 78, 88 (1935). Thus, a prosecutor's primary obligation is neither to win cases nor to secure certain sentences, but to seek justice. Id. at 88. Accordingly, although

[44]Of course, Mr. Owens ultimately did not serve a single day's time.

prosecutors "may strike hard blows" in pursuit of justice, they are "not at liberty to strike foul ones." Id.; see also Quattlebaum, supra, at 7 ("A prosecutor has special responsibilities to do justice . . . . We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice").

Among the foulest blows a prosecutor can strike is the elicitation of false or misleading testimony. The United States Supreme Court recognized as early as 1935 that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 154 (1972)(citing Mooney v. Holohan, 294 U.S. 103 (1935)). Therefore, a defendant's due process rights are violated when the prosecution elicits false evidence or allows unelicited false evidence to go uncorrected. Id.; see also Napue v. Illinois, 360 U.S. 264, 269 (1959)(finding due process violation when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears"). Even the deliberate elicitation of evidence which merely creates a false impression falls within the ambit of Mooney and its progeny. See, e.g., Alcorta v. Texas, 355 U.S. 28 (1957)(finding due process violation where prosecution deliberately elicited testimony creating a false impression); see also 5 Wayne R. LaFave *et al.*, CRIMINAL PROCEDURE § 24.3(d), at 496 (2d ed. 1999)("Taken together, Mooney and its progeny establish a constitutional obligation of the prosecution as an entity *not to deceive the fact finder* . . . .")(emphasis added).

The failure to correct false testimony or false impressions violates due process when there exists a reasonable likelihood the false or misleading testimony could have affected the judgment of the jury. United States v. Bagley, 473 U.S. 667 (1985). This standard for prejudice constitutes a lower threshold than that required to prove a Brady violation; in fact, the plurality opinion in

Bagley concluded this standard was "equivalent" to the harmless error standard enunciated in Chapman v. California.[45] Bagley, 473 U.S. at 679 n.9.

When Solicitor Bailey's behavior during the questioning of Henry Daniel Owens is viewed through the lenses of Napue and its progeny, it is obvious that his misconduct violated Mr. Von Dohlen's Fourteenth Amendment right to due process. Solicitor Bailey asked a question, received an answer he knew was false, and took no action to correct the false evidence. These facts are squarely on point with the due process jurisprudence discussed above.[46]

Moreover, there can be no question that there was a reasonable likelihood this prosecutorial misconduct influenced the jury's sentencing decision. One of the central questions facing the jury was the credibility of Henry Daniel Owens. Given Mr. Owens' already dubious credibility, knowledge of a difference of five years in the amount of prison time Mr. Owens faced could have swayed the jurors to determine he was not credible. Perhaps more pertinent, if Solicitor Bailey had corrected Owens' false testimony, the jury would have recognized Mr. Owens as what he was–a liar trying to save himself. This would have cast substantial doubt on Mr. Owens' statements about Applicant's involvement in the crime, and the jury would almost certainly been left with residual doubt regarding whether Applicant was, in fact, the sole trigger person in the Blue Diamond.[47]

---

[45]386 U.S. 18 (1967).

[46]In the alternative, trial counsel was ineffective in failing to object to the presentation of this false testimony. Counsel had no strategic reason for his failure to object.

[47]This claim illustrates the synergistic effect of Applicant's claims herein. The prejudice resulting from Solicitor Bailey's failure to correct this false testimony becomes stronger when considered in conjunction with the prejudice resulting from trial counsel's failure to present witnesses who would have implicated Kelsey Pearce and from his failure to fully impeach Kelly Hoffman with her prior inconsistent statements.

Under those circumstances, there is a reasonable probability the jury would either have acquitted Applicant of Ken Presley's murder or, at the least, chosen to impose a life sentence. Accordingly, Applicant is entitled to a new trial.

CONCLUSION

In summary, Applicant's trial was marred by numerous defects. Each of these defects individually resulted in a trial unworthy of confidence. When the combined effect of all the errors and omissions that occurred is considered, there can be no question that Applicant did not receive his fair day in court. Accordingly, his convictions and death sentence should be vacated and remanded for further proceedings.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

May 17, 2000.

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 the Applicant's Post-Hearing Memorandum in Support of Post-Conviction Relief Application 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
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This the 17th day of May, 2000, 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,

v.

MICHAEL MOORE,
Commissioner,
South Carolina Department of
CHARLES M. CONDON,
Attorney General,
State of South Carolina,

Respondents.

98-CP-09-101

RESPONDENTS' POST-HEARING MEMORANDUM OF LAW IN OPPOSITION TO THE APPLICATION FOR POST-CONVICTION RELIEF

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
Herman Lee Hughes, Jr.,	)	**98-CP-09-101**
Applicant,	)	
v.	)	**RESPONDENTS POST-HEARING MEMORANDUM OF LAW IN OPPOSITION TO THE APPLICATION FOR POST-CONVICTION RELIEF**
MICHAEL MOORE, Commissioner, South Carolina Department of **CHARLES M. CONDON,** Attorney General, State of South Carolina,	)	
Respondents.	)	

The Respondents, above-named, hereby make a response to the Applicant's Post-Hearing Memorandum of Law to the Third Application for Post-Conviction Relief received on May 18, 2000. The Applicant is currently represented by court-appointed counsel, John H. Blume, Cornell Law School, Myron Taylor Hall, Ithaca, New York 14853-4901 (607-255-9653) and Pamela A. Wilkins of the Center for Capital Litigation, P.O. Box 11311, Columbia, South Carolina 29211 (803-765-0650).The Respondents are 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.

This matter was assigned, pursuant to a May 8, 1998 Order of the South Carolina Supreme Court to Judge Paula H. Thomas. A status hearing was held on May 26, 1998. On June 22, 1998, the Applicant filed an initial application for state post-conviction relief. 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. This Memorandum Of Law In Opposition to the application for post-conviction relief follows. 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 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 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.

(b) Summary of the Prosecution Penalty Phase Evidence

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 (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. 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.

(c). The Defense Case In Mitigation

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 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. 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.

(d). 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 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.

(e). 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, 523 U.S. 1097, 118 S.Ct. 1674, 140 L.Ed.2d 798 (U.S. April 27, 1998).

II.

ALLEGATIONS IN THE APPLICATION FOR POST-CONVICTION RELIEF

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.

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(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 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).

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).

III.

DISCUSSION OF ISSUES AND ARGUMENT

Ineffective Assistance of Counsel - General Standards

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).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598

(4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the 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).

As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to a burden of showing "deficient" performance, counsel must also prove "prejudice" under the Sixth Amendment. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice", an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Recently in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor."). Respondents submit that Herman Lee Hughes is unable to satisfy this burden.

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.[2]

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 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.[3]

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

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[2] 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.

[3] 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.

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.[4]

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 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

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[4] 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.

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.[5] 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

[5] 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.

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 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.[6] 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.

[6] 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).

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 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., ___ S.C. ___, ___ S.E.2d. ___, 2000 Westlaw 254026 (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. 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).

(c.) 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 <u>not</u> 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.[7] 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

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[7] 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.

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 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 <u>several</u> 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.) <u>Law/Analysis</u>.

9(a). <u>Due Process</u>.

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 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, suupra, is, therefore, barred from consideration in this state post-conviction relief action.[8] Respondents note 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.

The focus of the Applicant's Sixth Amendment argument is based upon the alleged failure of defense counsel 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.

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[8] 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, ___ S.C. ___, ___ S.E.2d ___, 2000 West Law 156547 (S.C. S. Ct., Feb. 14, 2000).

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 "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.[9] 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 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

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[9] 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.

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 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 that Hughes' version of the crime to Dr. Venn was different than the versions expressed by Hughes to his trial counsel (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 testimony, Hughes presented a version to Dr. Venn that attempted to remove blame from him for the shootings and place it 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, Respondents submit that "prejudice under Strickland has not been proven by this alleged deficiency.[10] Therefore, even if 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

[10] Respondents submit that Dr. Venn's post-death sentence recommendation that Hughes should be retained in Family Court is an irrebutable 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.

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.

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, 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 Applicant has ignored the Kent factors in the argument. 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.

(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.*

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.

Issue Related to Competency to Stand Trial and IAC - Ground 9(c) - Applicant's Brief, pp. 20-28.

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.

In allegation 9(c), Hughes contends that his counsel erred in conceding that Hughes was competent to stand trial rather than having the court-appointed mental health experts, Dr. Richard Frierson of the Department of Mental Health and Dr. Lester Finuf of the Department of Special Needs and Disabilities, present to testify. Hughes essentially contends that this was error because trial counsel Newsom had doubts of his competency. Respondents respectfully submit that the Applicant has failed in his burden of proof to show counsel alleged deficiencies in the presentation at trial concerning Hughes' competency to stand trial was a Sixth Amendment violation under Strickland v. Washington, 466 U.S. 668 (1984).

a.) Law on Competency to Stand Trial and Ineffective Assistance.

The test for determining whether a criminal defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). The

defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349(1996). The test is not whether the defendant is actually cooperating with his lawyer, but rather if he has the mental capacity to do so. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). The trial court's determination of competency will be upheld if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, supra. State v Reed, 332 S.C.35, 39, 503 S.E.2d 747, 749 (1998). State v . Kelly, 331 S.C. 132, 502 S.E. 2d 99(1998).

For a petitioner to be granted Post Conviction Relief as a result of ineffective assistance of counsel, he must show both (I) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). In Wolfe v. State, 326 S.C.158,163, 485 S.E.2d. 367,369 (1997), the Court found that to show prejudice stemming from the late continuance motion for a competency evaluation, Wolfe would have to demonstrate that (1) the trial court would have abused its discretion in refusing to grant a continuance motion so that Wolfe could get a private competency evaluation, and (2) *such a competency evaluation likely would have affected the ultimate result of the competency hearing.* Wolfe presented no medical evidence at the PCR hearing suggesting he had been incompetent to stand trial or to participate in his defense. Given the absence of such evidence, the Court found that Wolfe had failed to demonstrate he was prejudiced by the trial court's failure to grant a continuance.

In Jeter v State, 308 S.C.330, 417 S.E.2d 594 (1992), the Court initially found that counsel was not deficient under the facts in failing to request a competency evaluation. Under this second

prong of Strickland, the petitioner need only demonstrate a "reasonable probability" that he was incompetent at the time of the plea or trial. Further, as to the petitioner's competency to stand trial, although under an ineffective assistance of counsel claim the petitioner does not bear the burden of the preponderance of the evidence standard of Dusky, *he must still show there is a reasonable probability he would have been determined to be incompetent.* Strickland, supra. (*Emphasis added*). In Jeter as here, he failed also to meet that burden.

Ineffectiveness claims for failure to show the defendant's incompetency to stand trial have been found deficient for failure to show the defendant's inability to consult or understand. Alexander v . Dugger, 841 F.2d 371, 375 (11th Cir. 1988). The federal court's have also rejected claims where there was no showing that the defendant was incompetent in fact. Theriot v. Whitley, 18 F.3d 311,313 (5th Cir 1994); Hatch v. Oklahoma, 58 F3d 1447, 1458 (10th Cir . 1995).

Recently, in Holliday v. Haley, 2000 Westlaw 40047 (11th Cir. 2000), trial counsel in capital murder case were not ineffective in failing to provide family history records to the psychiatrists and psychologist constituting the "lunacy commission" which evaluated defendant for competency to stand trial, where counsel did not have the records in question at that time, and defendant was unable to prove that the provision of these records would have changed the evaluation, in that the commission would likely have discounted earlier mental tests because the test it administered would be considered more accurate, and defendant spent more than a month in residence at medical facility, giving the mental health experts ample opportunity to complete a thorough evaluation. In Hull v. Kyler, 190 F.3d 88 (3rd Cir 1999), a murder defendant was prejudiced by counsel's failure to express doubt regarding his competency by cross-examining the government's single witness at competency hearing or presenting any of the large body of evidence in support of defendant's incompetence, and

thus was denied effective assistance, in case in which not only had defendant previously been found incompetent to stand trial, but numerous evaluations of his mental condition indicated that he remained incompetent, opinion of government expert witness was not based on defendant's condition on the date of the hearing, but on witness' evaluation more than three months earlier, and defendant was found incompetent on three different occasions near the time of the hearing, including twice after government witness' evaluation and before the competency hearing.

b.) Fact - Analysis.

The record reveals that a hearing was held on competency to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981). R. pp. 140-43. It was revealed to the trial judge that the examiners' reports finding Hughes competent to stand trial by Dr. Frierson and Dr. Finuf were entered into evidence consistent with State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995) (report of competency evaluation is admissible).

In the report of Dr. Frierson, he concluded that Hughes was competent to stand trial although suffering from a conduct disorder and borderline intellectual functioning. In his report, he described various factors supporting this determination, including the ability to read the Miranda warnings, restate them in his own words, describe the offenses he was charged with, "appreciate the seriousness of the charges and understands that he could go to prison for life or receive a death sentence." The report further revealed his ability to understand the roles of the solicitor, his defense counsel, the style of execution, that he trusts his attorney and will tell him everything he knows about the charges, his awareness of the role of the judge and jury, his ability to state the evidence that he might be able to present in the penalty phase, his awareness of pleas, his ability to solve a hypothetical about the courtroom and state a desired outcome in his case. Dr. Frierson concluded

his report that Hughes had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and that he had a rational as well as a factual understanding of the proceedings.

Dr. Lester Finuf, of DDSN, was involved because of the testing but revealed a borderline intellectual level. Dr. Finuf opined in his report of August 30, 1995, that Hughes was "able to communicate sufficiently with his attorney to assist in his own defense." In support of this opinion, Dr. Finuf noted Hughes' ability to state the charges against him, his articulation of the function of key judicial officers and their roles, his knowledge of basic legal terms, an appreciation of the seriousness of the charges, and his ability to differentiate between time units and distinguish between the severity of the acts. He further found that Hughes did not present any evidence of "thought disorder."

During the Blair hearing, counsel Newsom waived his right to cross-examine the examiners. R. pp. 140-41. The trial court then made an oral finding of competency to stand trial, including that the defendant is capable of understanding the nature of the charges and capable of assisting counsel in his own defense. R. pp. 142-43. Subsequently, Judge Cottingham entered a written Order on September 7, 1995. R. pp. 1918-19. At the hearing, counsel Newsom stated that the evaluation was completed over his objection. R. pp. 142-43.[11]

During the state PCR proceeding, counsel Newsom testified about his reasons for not challenging Hughes' trial competency. Newsom stated that there was a question about whether he

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[11] The Applicant was initially sent for evaluation on January 31, 1995, until February 13, 1995. The evaluation was not completed at that time because Hughes did not participate in the formal forensic interview without his counsel's permission. Pursuant to court order, he was re-evaluated in August 1995, resulting in the finding of competency.

was competent and that was why he retained Dr. Morgan and Dr. DeWitt. PCR Tr. pp. 326-27. Newsom stated that "none of our experts told me he was incompetent to stand trial." PCR Tr. p. 327, ll. 14-19. He stated that under their theory Hughes was competent, but he had his own doubts in his day-to-day dealing with him. PCR Tr. 327. Newsom further stated that Hughes was not capable of being a good witness. PCR Tr. 330, ll. 18-20. Counsel further stated on cross-examination that Dr. DeWitt and Dr. Morgan had advised him that their conclusions would be one of competency to stand trial, rather than incompetency. R. p. 414. Counsel conceded that he had no evidence then to contradict the competency findings and conclusions. "Nobody was able to suggest to me that we had a chance in getting him ruled incompetent, so I didn't pursue it." PCR Tr. 415. Newsom stated, though, that he thought Hughes was impaired by his limitations. PCR Tr. pp. 458-59.

Further, counsel's testimony reveals that, although counsel's assessment was that Hughes would be a poor witness, it revealed that Hughes had the capacity to communicate and assist in his defense. The record revealed Hughes made initial admissions to him that he shot Hoffman, asserted Pearce was a triggerman and described Pearce's fear that Hoffman would identify him. PCR Tr. pp. 314-18. Subsequently, although under truth serum according to Newsom, Hughes revealed his further involvement in the incident by revealing shooting more times in the incident. PCR Tr. p. 316, ll.16-20. Counsel Newsom further described his initial meetings with his client and his description of the planned robbery but denied knowing Hoffman at that time. PCR Tr. pp. 421-22. He described in details the day of the incident, the plan to rob, the change in plans when Pearce recognized Hoffman, and Hughes' decision after entering the store to withdraw until Pearce made comments to him. PCR Tr. p. 422. Further, that Hughes went back into the store (but Pearce did

not tell him to shoot anyone). PCR Tr. p. 423. Counsel Newsom described the inquiry he had with his client and Dr. Harold Morgan while Hughes was under truth serum and admitted shooting three times. PCR Tr. pp. 423-24. Counsel further stated that Hughes discussed with him where he got the gun from Mr. Owens. PCR Tr. pp. 425-26. He stated that Hughes told him that he was going to pay for the gun from the proceeds of the robbery. PCR Tr. p. 426. Counsel Newsom further described Hughes' version to him about Pearce going into the store and firing two more shots (after Hughes' three shots), taking the keys to the car and later dividing up the money, going to a club and staying out all night. PCR Tr. p. 428. Further, at some point of time, Hughes also told him he was afraid Hoffman could recognize him because he had seen her at a friend's house. PCR Tr. p. 438.

The Applicant relies upon the testimony of Dr. Marty Beyer and Dr. George Woods to support his claim. Dr. Beyer testified that she had "questions" about his competency to stand trial, but that she was unable to give an opinion on whether he was competent to stand trial. PCR Tr. pp. 10-11, 35-37. Unlike the versions given to trial counsel contemporaneous to the trial that she was not aware of, she claimed that Hughes suggested to her in 1999 that the crime was an "accident" because he was drunk, that he was a "simple thinker" and that his difficulty in planning may have made it difficult to plan for court hearings. PCR Tr. pp. 35-37.

On cross-examination, however, Dr. Beyer conceded that she had no evidence that Hughes did not have an understanding of the proceedings in 1994, and was able to express to her a factual understanding of the circumstances of the crime. PCR Tr. pp. 53-54. Further, Hughes described to her the various circumstances surrounding the crime, including his version of intoxication. PCR Tr. pp. 65-66.

Dr. George Woods, a psychiatrist, evaluated Hughes for the PCR proceedings in 1999, similarly was unable to give an opinion that Hughes had been incompetent at the time of his 1995 trial, but thought there were suggestions that he was unable to rationally assist in the preparation of his defense and would understand matters on a very simplistic level given his neurological impairments and found that it would be hard to believe he could "follow ballistics information or be able to provide information on the psychological testimony." PCR Tr. p. 118. Dr. Woods, however, revealed the breadth of information about the family history, crime and trial that Hughes revealed to him in 1999. PCR Tr. p. 153 (friends he grew up with), p. 157 (relationship with his father); pp. 159-63 (description of facts of the crime); p. 167 (whether Hoffman could identify him); pp. 170-71 (comments about lack of knowledge about what happened to co-defendants).

Respondents submit that this record conclusively shows that Hughes has failed in his burden of proof under Strickland. He was able in 1994-95 and remains today able to rationally discuss the circumstances of the crime and the roles of the various parties. The record further reveals that at no time has he been psychotic nor have thought disorders that impaired his abilities. Counsel was not deficient because he took appropriate steps to resolve the issue of trial competence by consulting with his independent experts, Dr. Morgan and Dr. DeWitt, who never indicated to him, after their mental evaluations, concerns about his competency to stand trial, areas in which both possessed prior expertise. The ability of Hughes to reveal to counsel in 1995 with "a reasonable degree of rational understanding" is evident. Trial counsel performed reasonably, not deficiently, in choosing not to challenge the reports of the examiners.

The Applicant's comparison of counsel's conduct in this case is strikingly different than the deficient conduct found in Hull v. Kyles, supra. In Hull, there were multiple evaluations that

suggested he remained incompetent and had previously been found to be incompetent to stand trial. In Hughes' case, however, there were only conclusions of competence presented to the Applicant's counsel and his own experts did not contradict those conclusions. Further, there was no indication that Hughes suffered from an active mental illness that had decompensated since the evaluations to suggest any need for re-evaluation.

Instead, counsel was presented with a client who, due to his level of intellectual functioning, would not make a good witness, but was able to rationally recount his versions of the crime to his counsel in preparation for the trial. Hughes was rationally aware of the charges and the potential punishment. Hughes was rationally aware of the role of his counsel (as revealed by the reversal to complete the initial evaluation without his counsel's consent) and the other participants in the judicial process. Under Jeter v. State, supra, deficient performance has not been shown. Similarly, Hughes has failed to show a "reasonable probability" that he was incompetent at the time of trial. Allegation 9(c) must be dismissed.

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 veniremán).

Applicant's argument reflects a lack of appreciation for the innumerable factors involved in the jury selection process. Using hindsight, it is easy identify a juror 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 Respondents do not intend to suggest that an applicant could never have a valid ineffective assistance of counsel claim for the failure to use peremptory strikes, Petitioner here failed to come close to 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 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. (R. pp. 229-36), juror Atkins asking twelve question inquiry involving three (3) questions on the death penalty (R. pp. 258-64); juror Edwards asking five questions related to the death penalty (R. pp. 288-94); juror Hudson asking three (3) questions on the death penalty in terms of youth and an explanation of mitigators (R. pp. 356-66); juror Pound on which counsel asked no questions (R. pp.

366-72); juror Mary Gunter asking question on her church's stand on the death penalty (R. pp. 421-30); juror Cheeseboro asking five questions and two (2) specifically on the death penalty (R. pp. 434-49); juror Williams asking five questions but none specifically related to the death penalty (R. 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 (R. pp. 499-507); and juror Nu Vicker asking seven questions, including one on her church's position on the death penalty (R. 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.[12]

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,

[12] 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 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.

The record reflects 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.

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. Respondents submit 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.[13] 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 know the murder victim's family and do not know this sister well either, but she was a friend of my son's

[13] 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.

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.

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.[14]

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 he could have made a motion

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[14] 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.

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.

Respondents submit that Hughes has failed to show deficient performance in the selection of jurors Brenda Wise and William Baron. 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 questionings 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 (R. p. 205), that she would have to be 100% sure (R. p. 197), and believed that she could be fair (R. 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:
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> 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.
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> 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, 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.

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 what they had 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.[15] 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

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[15] 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).

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

Respondents respectfully submit 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.) Conclusion.

As stated above, Respondents submit that counsel performed within the standards demanded under Strickland, supra. In any event, Hughes' present speculation does not show "prejudice" under Strickland for either the guilt phase verdict or the penalty phase verdict.

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.[16] 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.

[16] 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.

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 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 (R. p. 861); that Herman was quiet (but not around Kelsey) (R. p. 862); that Kelsey was more outgoing, bigger and taller (R. p. 862); and that they were

older than Hughes (R. 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.[17] § 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

[17] 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.

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, 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 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, Respondents submit 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.

Respondents submit 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 this Court finds he was required to take these additional steps, 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 Guiford, 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.

Issues Concerning Penalty Phase Ineffective Assistance - Ground 9(f) - Applicant's Memorandum, pp. 52-85.

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.

A.) Introduction.

At his trial in 1995, counsel Newsom presented a thorough history concerning the defendant's cooperation after his arrest, the defendant's family and social background through school officials and his grandmother, evidence of his mental background from two expert forensic psychiatrists, and concluded with evidence from a social worker concerning a psycho-social assessment that summarized Herman Hughes' character and the influences that led him to the tragedy he was involved in.[18] In Jones v. State, supra, the South Carolina Supreme Court was faced with similar arguments that evidence about mental impairments was not adequately present in the penalty phase. The Court found that even if counsel failed to present additional evidence at the resentencing hearing, he was not prejudiced under Strickland. The Court found that extensive evidence had been presented about his family and social background and bizarre behavior through his teacher, mother, aunts and uncle, that he suffered under mental retardation and had brain damage, that the jury was presented with several mitigating factors through which to consider his mental condition, and they were also presented with overwhelming evidence of his guilt and the callous manner he committed the crime. Applying the prejudice prong of Strickland, the Jones court concluded that he had failed in his burden of proof of showing that "there is a reasonable probability that absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death." See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (counsel in capital cases did not render ineffective assistance by alleged failure to present evidence of mild retardation and other witnesses concerning his character where, under Strickland, the evidence would not have affected the outcome).

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[18] The Respondents have previously summarized the evidence in mitigation in this Memorandum at pages 10-14. That portion is incorporated herein by reference.

For the reasons set forth in each subsection, Respondents similarly submit that Hughes has failed in his burden of showing a Sixth Amendment violation under the Strickland test.

B.) Expert Testimony Concerning Hughes' Developmental, Mental, and Social Impairments.

The Applicant contends that counsel Newsom was deficient because he failed to retain experts with expertise who could explain child development and mental retardation, failed to retain psychology experts who could retest and assess the adequacy of the prior testing. He claims that had this been done, the results of the proceeding would have been different. We disagree.

The 1995 jury, based upon defense counsel's presentation, knew many things about Herman Hughes. From his guidance counselor, it was learned that he had a low IQ, attended remedial classes, was held back, then became disrespectful and hostile towards staff with poor performance leading up to expulsion after a history of infractions. R. pp. 1431-40. His sixth grade teacher found that he had difficulty in subjects and was not surprised that he was a slow learner. R. p. 1444.

His grandmother, who raised him, described his learning problems. R. p. 1451. She further testified that she often went to school for counseling and described the fact that there were more problems when he was retained in the sixth grade R. p. 1458.

Dr. Harold Morgan, a forensic psychiatrist, described that his review of medical, school records and Ms. Boette's social history revealed that Hughes was "right on the borderline of retardation." R. p 1472. He further opined that there were observations of "attention deficit and hyperactivity disorder" (ADHD), noting class problems and behavior. Dr. Morgan described the downward drift after his grandfathers death and low mentality lead to a depression of his "not fitting in" and a need for acceptance led him to fall into the wrong crowd and more behavioral problems.

R. pp. 1477-78. He also opined that Hughes was most likely passive, but as a risk could become passive-aggressive. R. p. 1478.

Dr. John DeWitt, another forensic psychiatrist, testified similarly that he found "intellectual limitations" and indications of Attention Deficit Disorder with traits of passivity and dependence. R. p. 1511. He stated that these traits would lead to a person, in stressful situations, being influenced by a person with a more powerful personality to do things that they otherwise would not do. R. p. 1512. Further, he noted that alcohol made him more impulsive. R. p. 1513. He found that Hughes was a person who does not think through plans and was not very sophisticated. R. p. 1514. Dr. DeWitt opined that Hughes "has the ability to conform his behavior" and did not have an irresistible impulse to do something wrong." R. p. 1515. But, he opined that in certain circumstances he may act impulsively and act without thinking clearly about the consequences. R. p. 1515. Dr. DeWitt found that Hughes was slow, but did not meet the minimal criteria for mental retardation, but has limitations. R. p. 1521.

The jury also learned numerous things about Hughes from the psycho-social assessment of forensic social worker Annette Boette. R. pp. 1525-26. 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. pp. 1544-45. Ms. Boette presented factual support for each of her conclusions within her testimony. R. pp. 1537-49.

With the defense presentation, Judge Cottingham charged the jury to consider the following statutory 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.

1.) **Child Development Specialist (pp. 55-61).**

Hughes initially claims that he should have retained an expert, like Dr. Marty Beyer, to testify about "child development." (Her testimony is summarized earlier in this Memorandum, pp. 49-52, which is incorporated herein by reference.) Essentially, she testified that sixteen year-olds are not able to function as adults due to less developed cognitive skills and that Hughes, due to his intellectual limitations, trauma, and alcohol abuse, was even less mature than a normal sixteen year-old. PCR Tr. pp. 9-19. She testified that he had simplistic ways of thinking, lacked planning, and took risks without considering the consequences. PCR Tr. pp. 18-19. She further noted that due to his lack of cognitive abilities, these features were exacerbated by his use of alcohol at the time. PCR Tr. pp. 21-22.

At the PCR hearing, defense counsel Newsom testified that he did not consider retaining an expert on "child development" to testify in mitigation. PCR Tr. p. 381. He testified that he assumed that the psychiatrist would be capable of handling the issue. Further, counsel stated that "I'm not even aware a person like that existed. . . ." PCR Tr. p. 381. Newsom testified that he had consulted with the Center for Capital Litigation for advice and that a psychologist was not suggested either. PCR Tr. p. 382.

The Applicant contends that counsel should have retained such an expert or at least questioned his own psychiatric experts on "the effect of Hughes' youth." It cannot be challenged, with any credibility, that Hughes' youth was a central focus of the 1995 mitigation presentation and the argument of defense counsel. Counsel Newsom stated that one of the principal reasons in his strategy for a life sentence was his youth. PCR Tr. pp. 375, 380.

Counsel did present similar testimony through his expert in social work. Ms. Boette testified about the impact his youth had on his intellectual impairments. R. pp. 1548-49. She stated that "his mental age has not developed to the stage where he is a functioning adult, where he can make adult decisions without relying upon family." R. p. 1549, ll. 5-8. Further, she testified, "because of his many intellectual impairments, Herman was easily influenced by others and fell prey to those who did not have his best interest at heart. Herman was a child who went along with others for approval and sense of belonging and he was unable to judge who was safe and who was not." R. p. 1545. His grandmother and teachers spoke of his youth. The psychiatrists spoke of his impulsivity and inability to project for consequences of his acts. The trial court instructed the jury to consider the fact of his age and mentality, as well as his age below eighteen, as mitigating factors in assessing punishment.

Respondents submit that the evidence presented by Dr. Beyer was a common-sense understanding of the process of development reasonably known and understood by reasonable jurors already. The special influences that Hughes possessed with his limited intelligence and behavioral disorders were presented to the jury. Like the situation in Jones, the alleged failure of counsel Newsom to locate this type of specialist does not undermine confidence in the outcome of the

verdict. The jury was aware of Hughes' youthfulness and his impulsivity from their experts. He has failed to show "prejudice" under Strickland, assuming deficient performance.[19]

Respondents concede that counsel have an obligation to conduct an investigation to allow a determination of what experts to consult. Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1991). We submit that counsel conducted a reasonable investigation. Nevertheless, we submit that the essence of the testimony of Dr. Beyer merely reiterates what Dr. Morgan and Dr. DeWitt testified about Hughes' mental development specifically and corroborated their opinions and the opinion of the social worker generally, as well as the impressions of Lucille Hughes. The omission of this testimony specifically at the penalty phase did not amount to ineffective assistance of counsel. See Devier v. Zant, 3 F.3d 1445, 1453 n. 18 (11th Cir. 1993).

2.) Psychological Testing and Mental Retardation. (pp. 61-65).

The Applicant contends that counsel was ineffective because he should have retained an expert in "mental retardation" and failed to have his own experts explain the consequences of Hughes' intellectual functioning. Respondents submit that on the basis of this record, he has failed to show either deficient performance or prejudice under Strickland, supra.

To support his claims, the Applicant relies upon the testimony of Dr. Denis Keyes, an expert in mental retardation who candidly conceded his own moral opposition to the death penalty. PCR

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[19] Respondents do not concede counsel was deficient. Newsom stated that he consulted with other counsel to locate witnesses. No one advised him to seek out a "child development" specialist, including his own retained experts in psychiatry and social work. He acted as reasonable counsel. Deficient performance was not proven by not presenting a "child development" expert generally and specifically, Dr. Marty Beyer from Washington, D.C..

Tr. pp. 473-512. See PCR Tr. p. 508, ll. 16-18. In his testimony, he questioned the methods used to determine whether the Applicant did or did not suffer under mental retardation because the state experts appeared to limit themselves to the IQ score of 70 as the cut-off of the existence of mental retardation. PCR Tr. pp. 490-91. He stated that an accurate assessment must include a review of the individual's adaptive skills. PCR Tr. p. 491, 497. However, Dr. Keyes did not render an opinion that Hughes was mentally retarded. PCR Tr. p. 499, 509.

Counsel Newsom testified that he did not retain another expert in mental retardation because it was understanding from his own experts that Hughes would not qualify under most psychologists because his IQ was not at 70. PCR Tr. p. 378. Counsel sought instead to capitalize on lower test data they found, particularly the Schlossen test. However, counsel conceded that he was not aware of a "mental retardation" specialist.

The record reveals the jury was well aware of Hughes' lower level of intellectual function prior to the sentence decision. His guidance counselor testified that he had been held back two years in school, but tried hard in class. R. pp. 1430-31. Further, he stated Hughes was in a "remedial" class in sixth grade and had been in a learning disabled class. R. pp. 1432-33, 1438. His sixth grade teacher, Kathy Link, found Hughes to have a difficult time with most subjects and recommended the Schlosson test to evaluate him. R. pp. 1442-43. It was determined that Hughes was a "slow learner."

Dr. Harold Morgan testified that he reviewed numerous records, as well as evaluated Hughes. R. pp. 1465-70. He assessed Hughes in the borderline range for mental retardation according to test data. R. pp. 1472-73. He found as a conclusion: "mental retardation or borderline mental ability." R. p. 1476, ll. 20-21. He further pointed out his test scores that suggested that 99 out of 100 students

would perform better in class. R. p. 1481. On cross-examination, Dr. Morgan testified about his review of the test data on intellectual functioning and that the test data fell generally around the borderline area. R. p. 1495. Dr. Morgan further stated that his opinion that Hughes suffered mental retardation was not based upon his IQ scores, but his performance was a pretty good indication of retardation, despite the test scores. R. p. 1504. He found that he could only plan "simple things" and thought "simply and concretely." R. p. 1504, ll. 14-24.

Dr. DeWitt testified that "he definitely has intellectual limitations." R. p. 1511, ll. 17-18. Dr. DeWitt testified that the testing data showed Hughes was above 70, but in the low 70's. R. pp. 1519-20. He found that he was "slow," did not meet the numerical IQ, but has limitations." R. p. 1521, ll. 12-16.

In reply to Dr. Morgan's testimony, Dr. Richard Frierson testified that in his opinion Hughes did not suffer from mental retardation. R. pp. 1569-70. He based his opinion not only on test data, but upon his history and the clinical interview. R. p. 1570. Dr. Lester Finuf, an expert in mental retardation, testified that to be mentally retarded, "they have to have an IQ of 70 or less, both in . . . all phases of intelligence, as well as adaptive behavior." R. p. 1583. Dr. Finuf testified that he was right at the borderline. R. p. 1592, ll. 12-14.

It is significant to note that the Petitioner has the burden of proof of showing both deficient performance and prejudice under Strickland. The testimony presented at trial by the defense sufficiently suggested the existence of mental retardation, although disputed by the prosecution witnesses, to allow a statutory mitigating circumstance that correctly defined mental retardation to be given as well as instructions on mentality, "mental or emotional disturbances," and "capacity to appreciate the criminality of his conduct."

Although Hughes' current mental retardation expert questioned the method used to reach the opinions, he has wholly failed to show that the opinions were wrong! This glaring deficiency speaks volumes about the inadequacy of the showing made in this hearing.

During the trial, it is evident that the performance prong of the mental retardation definition was the focus of Dr. Morgan's opinion, as well as the focus of counsel Newsom's cross-examination of Dr. Frierson and Dr. Finuf. Simply put, he has failed to show that counsel was deficient in his approach at trial.

Further, the failure to prove Strickland prejudice is evident for the reasons set forth above concerning the juror's knowledge of Hughes' low intellectual function. When the experts revealed that Hughes had greater impulsivity and thought in simple, concrete terms, this addressed the same issue as a more general statement about hypothetical people with mental retardation. Hughes' lower intellectual functioning as impacting on his actual conduct was presented in the conclusions of the social worker, as well as the comments of his psychiatric experts. Although the manner it was presented could have been different, this does not rise to the level of a Sixth Amendment violation. Confidence in the verdict has not been undermined under the Strickland test.

3.) **Brain Damage (pp. 65-68).**

The Applicant contends that counsel was ineffective in locating an expert who would testify that Hughes suffered from brain damage. Respondents submit that he failed in his burden of proof of showing a Sixth Amendment violation.

The Applicant in this portion relies upon the testimony of Dr. George Woods, an expert in neuropsychiatry, who testified that he had evaluated Hughes and found the existence of a form of brain damage. Particularly, he opined that significant neurological impairments, along with an

extremely low IQ, are consistent with someone with developmental disabilities. PCR Tr. p. 81. He opined that Hughes suffered from a "mental disorder not otherwise specified," under the DSM IV. PCR Tr. p. 82. He considered that his full diagnosis would be on Axis I "mental disorder not otherwise specified - brain impairment; on Axis 2 developmental disability; on Axis 3, significant neurlogical impairments, neurosyphillis; Axis 4 - "family issues - disruption and chaos, school problems, substance abuse; and on Axis 5 having significant control and adaption problems. PCR Tr. pp. 86-87.

Dr. Woods opined that neurosyphillis (congenital) was a likely cause of the brain damage. PCR Tr. pp. 86-87, 108-11. Relying upon some test data performed by a psychologist, Dr. James Evans, he found that there may be damage to the frontal parietal, and temporal lobes of the brain. PCR Tr. p. 92. He testified that because frontal lobes are generally thought to be an inhibitor, it could cause a person to have trouble stopping behavior and have difficulty making plans. PCR Tr. pp. 102-03. Dr. Woods opined that this could impact even more on an adolescent since the brain would not be fully developed at that point. PCR Tr. pp. 90-91, 125-26. Additionally, he opined that alcohol, which disinhibits and impairs judgment, could also have an added effect. PCR Tr. pp. 125-26. Dr. Woods, however, conceded that this would not have caused Hughes to act "under an irresistible impulse." PCR Tr. pp. 149-51.[20] See State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992) (South Carolina Supreme Court equates "irresistible impulse" test with statutory definition of "guilty but mentally ill").

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[20] Dr. Woods stated at one point in his testimony that without the neurological impairments that Mr. Hughes would be able to control their behavior more effectively. PCR Tr. pp. 129, 151.

On cross-examination, however, Dr. Woods acknowledged that the prior neurological testing did not reveal the same impairment information that Dr. Woods suggests exists. He testified that the neurological testing at Hall Institute did not find the clonus or hyperreflexivity. PCR Tr. pp. 134-35. He admitted that they did not show the same results as Dr. Kraugh's recent report. PCR Tr. pp. 133-36. He noted the report from hall stated "no abnormal neurological signs." PCR Tr. p. 138.

Further, he admitted that Dr. Kraugh's recent report stated "we would need to be able to demonstrate records precedent to 1995 revealing positive testing for syphillis before entertaining a firm diagnosis of congenital syphillis." PCR Tr. p. 139. Dr. Woods acknowledged that he had no information that prior to Hughes' Job Corps testing that he was ever found to have syphillis and was not aware of any records that supported the conclusion. PCR Tr. pp. 140-43. Further, he admitted that the later test (RPR) done at the Hall Institute was of a consistent level. PCR Tr. p. 142.

In Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), the Court found counsel was not ineffective in failing to develop expert testimony about frontal lobe damage. Similarly, in Williams v. Calderon, 41 F. Supp. 1043 (D. C. Cal. 1998), the District Court rejected a showing, based upon similar testimony by Dr. Woods, that trial counsel's performance was neither deficient nor prejudicial under Strickland. See also Johnson v. Moore, 164 F.3d 624, 1998 Westlaw 708691 (4th Cir. 1998) (unpublished) (no IAC in failing to investigate or present brain damage evidence).

Here, as Dr. Woods admits, the evidence from Hall Institute did not reveal any neurological impairments. Similarly, neither of his own experts advised counsel of any need for further neurological testing. Simply put, counsel cannot be deemed ineffective for failing to pursue experts that his investigation and consultation did not suggest any need. The only suggestion of a potential

concern was the syphillis diagnosis. However, Dr. Frierson testified at trial that the exposure "did not cause any mental impairment." R. p. 1568. Dr. Frierson further testified that there was no evidence of neurological illnesses. R. pp. 1567-68. Counsel stated that he was aware of the syphillis finding and those records were provided to his experts, but he has no knowledge that his mother had syphillis. To the contrary, the information that they developed was that it was a normal pregnancy and birth. PCR Tr. pp. 384-85. Counsel was not ineffective in failing to present this information based on his reasonable investigation.

Further, "prejudice" has not been shown. Although the "source" of his problems was never asserted as "brain damage" at trial, plainly the jury was advised of Hughes' lack of judgment, simple thinking, inability to plan, tendency to act impulsively, and the additional effect of alcohol on his actions. With this information and the instructions by the Court, the additional information suggested by Dr. Woods (but disputed by the State's evidence at trial), would not have undermined the result under the Strickland test. His allegation must be dismissed.

C.) School's Failure to Provide Special Education and Remediation (pp. 68-69).

The Applicant contends that counsel should have presented further evidence how the school system failed to provide appropriate educational support for the needs of Hughes. His claim fails to show either deficient performance or prejudice.

Hughes contends that testimony should have been presented that the system failed to comply with federal law and evaluated and placed Hughes in special education. PCR Tr. p. 510. He further asserts that testimony that there was a complete misunderstanding of the federally funded special

education programs and that Hughes' testing indicated a reading and learning disability that should have been treated. PCR Tr. p. 27.

The record at trial included a plethora of information about Hughes' inability to succeed in school, various testing, as well as concerns by teachers of Hughes' special needs. It goes with saying that the school system did not succeed with Herman Hughes and vice versa. During the mitigation testimony of social worker Boette, she opined that there was a failure on the part of the education system to intervene and meet his needs. R. p. 1545, ll. 3-4. This general information was presented to the jury.

Although specific testimony that suggests that some federal law had not been complied with at one time was not presented, the jury had to be aware of his educational deficiencies. Respondents submit that counsel was not deficient in investigating the school system federal law compliance and instead relying upon the teachers who actually assessed Hughes to testify in the matter. The presentation met the requirements of the Sixth Amendment.

D.) Examination of State Witnesses and Failure to Object to the Admission of School Disciplinary Records (pp. 69-74).

In this issue, the Applicant contends that trial counsel should have objected to the State's penalty phase introduction of Hughes' school disciplinary records. He contends that he had not been provided with adequate written notice under § 16-3-20(B). [This same issue is set forth in 9(r).] Respondents submit that the materials were properly admitted under state law.

§ 16-3-30(B) provides that "only such evidence in aggravation as the state has informed the defendant in writing before the trial is admissible." On October 31, 1994, Solicitor Bailey provided written notice, including the following:

> The State will present 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 the 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.

R. p. 1904 (emphasis added). Counsel Newsom testified that at the time of the trial he was aware of Solicitor Bailey's intent and was not surprised by its introduction. PCR Tr. pp. 449-50. Further, counsel Newsom acknowledged that he also, even if the State had not put in the evidence, that he had to put in "some of that same stuff to show here was a child who had been passed by the system." PCR Tr. p. 452.

The record reveals that the school disciplinary records were presented by the prosecution, without objection. R. pp. 1325-26. In the defense presentation in mitigation, counsel Newsom relied upon Exhibit 44 (R. p. 1436), and the prosecution examined the defense school witnesses concerning the infractions concerning their own character testimony. R. pp. 1439-41. Similarly, his experts each relied upon the school records in completing their assessments of Hughes. R. p. 1470, 1511, 1535. Dr. Morgan specifically pointed to the records to support his assessment on ADHD. R. p. 1496, ll. 9-11. Social worker Annette Boette, however, specifically described the fact that she had reviewed the "infractions" from the school records and reported on the "significant number of" infractions and described those infractions. R. pp. 1544-45. Further, on cross-examination, Ms.

Boette described her review of the school records using some blow-ups of the records. R. pp. 1553-58.

In State v. Riddle, 291 S.C. 232, 237, 353 S.E.2d 138, 141 (1987), the Court found that evidence in aggravation was not admissible unless the defense had a fair and complete opportunity to respond to the records and evidence. Respondents submit that the statutory mandate was satisfied.

First, the notice adequately provided notice of evidence of a violation of "rules" and "disregard for peace and good order." R. p. 1904. Second, counsel Newsom was not surprised by the introduction; in fact, he expected it. Correctly, in the penalty phase he saw no valid objection to make. His reaction was reasonable because there was no objection he could make.

Further, the record reveals that similar information about the school infraction was going to be part of their mitigation. Social worker Boette described the infractions. Necessarily, these maters, independent of the earlier admission, were proper for cross-examination and later comment by the prosecutor in his argument.

Counsel was not deficient in failing to object. Further, "prejudice," even if an objection was valid, cannot be shown where the defense intended to and presented evidence of the infractions. He has failed in his burden under Strickland, supra.

E.) Victim Impact Evidence (pp.74-78).

The Applicant contends that the defense erred in failing to seek to object or limit the presentation of victim impact evidence at the penalty phase of his trial. Respondents submit the evidence was admissible and counsel did not perform in violation of the Sixth Amendment in the manner he allowed the admission.

Recently, in State v Hughey, ___ S.C.___, ___ S.E.2d ___, 2000 Westlaw 313308 (S.C. S. Ct., March 27, 2000), the South Carolina Supreme Court rejected a similar challenge to the

introduction victim impact evidence. The Court held that victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 257, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See also State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991).

In Hughey, the State called four members of Harris's family to describe their personal relationship with Harris and the unique impact her death had on their lives. The solicitor asked each family member one open-ended question that elicited a long, narrative response describing their relationship with the victim. Although given in narrative form, the testimony was routine victim impact testimony that did not evoke any prejudicial comments. The Court found that the witnesses' testimony was relevant and proper because it portrayed Harris as an unique individual and it demonstrated the specific harm caused by Hughey's actions. The Court specifically stated that The family members' testimony in this case is similar to other victim impact testimony permitted by the Court. See State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations).

Here, Respondents submit that the following testimony was consistent and not objectionable under the same test.

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. pp. 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. 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 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 (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. 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.

At the PCR proceeding, counsel Newsom testified that he was aware of the intent of Solicitor Bailey to put in this evidence and was unaware of anything that he could do to stop it. PCR Tr. pp. 447-448. Particularly, he did not see anything during their testimony that caused him to feel a need to object. PCR Tr. p. 447. He stated that it was admissible in his opinion, although he did not like hearing the evidence. PCR Tr. p. 447.

Respondents submit under Payne, Johnson, Rocheville and Hughey, that this testimony was admissible and not excessive. Counsel was not deficient in failing to object. Similarly, the Applicant has failed to prove prejudice under Jones and Strickland. This matter must be dismissed as a ground for relief.

F.) Closing Argument (pp. 78-84).

The Applicant contends that Solicitor Bailey's penalty phase argument should have been objected to when he described the fact that if sentenced to prison he is cared for by the State and provided clothing and medical attention. R. p. 1651. Counsel testified that he did not identify this portion of the closing argument as something that he should have objected to. PCR Tr. pp. 452-53. See also PCR Tr. pp. 389-90. Solicitor Bailey testified that this portion of the argument was developed from counsel Newsom's cross-examination of the Orangeburg Correctional Officer in the penalty phase. PCR Tr. p. 625, ll. 5-12.[21]

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[21] The record reveals that Detention Officer Anthony Brown testified that Hughes would either be watching TV or in his room. R. p. 1355. Detention Officer McCord would testify that the facility

The record reveals that during his lengthy closing argument (R. pp. 1625-59) he made the following comment:

> Let's look at life imprisonment for a minute as an alternative sentence to the death penalty. Is life imprisonment the appropriate, just punishment for the horror story that y'all have heard over the last few days? Herman Hughes gets life imprisonment, goes to prison. *He's cared for by the State of South Carolina. He's fed, he's clothed, he's given medical attention.* . . . Is that justice, a life sentence for what he's done?

Trial Tr. p. 1651 (emphasis added). Trial counsel did not object to this argument concerning the conditions of life imprisonment.

The Applicant relies upon the testimony of appellate counsel Savitz that if there had been an objection that he would have raised it on appeal because it suggests that the life sentence was a "light sentence." PCR Tr. p. 287. As the Applicant has conceded, however, the solicitor's comment was factually accurate. PCR Tr. p. 299. Applicant's Memorandum, p. 80.

Respondents submit that there was no viable objection that could be made to this common sense comment by the prosecutor. See, Rodriguez v. Zavaras, 42 F. Supp. 1059, 1129 (D. Colo. 1999) (prosecutor's comments did not impermissibly suggest that the death penalty was cheaper than a life sentence). This was not a comment that depreciated a life sentence such as State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987) ("those bad life sentences"). Nor was it a comment that injected the "costs" of imprisonment versus a death sentence, such as Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995). Instead, it was merely a comment that in a life sentence the inmate is cared for by the State, a common sense fact known to all. The failure to object was not deficient. Further, the failure to

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was minimum custody and that Hughes acted in a nice manner. R. pp. 1359-61.

object does not undermine confidence in the outcome of the sentencing proceeding. Strickland. Prejudice has not been shown. See, Clermont v. State, 704 A.2d 880 (Md. 1998) (state was allowed to attempt to persuade jury that death was appropriate sentence contrasted with a life sentence, by referring to food, shelter, clothing and health care aspects of prison life); People v. Emerson, 727 N.E.2d 302 (Ill. 2000) (same) (privileges in prison); Pace v. State, 524 S.E.2d 490 (Ga. 1999) (no error in free room and board comment).

G. Cumulative Prejudice.

Respondents submit, for the reasons stated above, there is no Sixth Amendment violation in any of the particulars. Similarly, absent any prejudice, relief is not warranted under Strickland.

Issues Concerning International Law and the Death Penalty - Grounds 9(g) and 9(h). Applicant's Memorandum, pp. 85-98

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.

The Applicant first alleges that his death sentence violates international law. This allegation does not state a claim for which post-conviction relief can be granted. This Court could only grant post-conviction relief where "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code Ann. § 17-27-20 (1985). The allegation of a violation of international law is not cognizable in a post-conviction relief action. Furthermore, as shown below, the Applicant could or should have sought relief on this ground at trial or on direct appeal, not in a collateral attack on his conviction.

Furthermore, the Applicant cannot challenge his death sentence on the ground that it violates the state constitution's prohibition against cruel and unusual punishment. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). *See also* Drayton v. Evatt, Id. [Applying Simmons to death penalty case previously reviewed on direct appeal *in favorem vitae*]. Any issues that could have been raised at trial or on appeal cannot be asserted in a post-conviction relief application. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Drayton v. Evatt, Id. Since the Applicant could have raised this issue and the international law question on direct appeal, his failure to do so has waived these allegations as grounds for relief as related to ground 9(h). **Ground 9(h) for relief must be denied and dismissed with prejudice.**

The ineffective assistance issue set forth in Ground 9(g) is cognizable in a state PCR action. Foye, supra. However, Respondents submit that reasonably competent counsel would not have asserted the international law issue for the reasons set forth below. Similarly, we submit that Strickland prejudice has not been shown by counsel's failure to assert this issue at trial.

a.) The International Covenant on Civil and Political Rights Does Not Bar the Applicant's Death Sentence.

Hughes contends that his counsel should have asserted that his death sentence violates the Supremacy Clause of the United States Constitution because the International Covenant on Civil and Political Rights (ICCPR) prohibits the imposition of the death penalty on persons under the age of eighteen. This novel argument has gained recent popularity throughout the country among defendants sentenced to death, and has only recently reached the state courts of last resort. At least two state supreme courts have flatly rejected this argument, see Ex Parte Pressley, 2000 WL 356347 (Ala. Apr. 7, 2000); Domingues v. Nevada, 961 P.2d 1279 (Nev. 1998), cert. denied, 120 S. Ct. 396 (1999), and no court, in a published opinion, has accepted it. The United States Supreme Court has declined an invitation to address the issue.[22] One circuit court in this state, in a post-conviction relief action, has already rejected this argument. See Conyers v. Moore, No. 97-CP-14-506, Am. Order at 73 (S.C. Cir. Ct. May 2, 2000) (King, J.).

In short, although the argument is novel, it fails. This court should join the unanimous judicial authority in rejecting it.

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[22]One state supreme court judge has written:

> I am aware that an order of the [United States] Supreme Court denying a petition for certiorari review is not to be taken as an expression of an opinion on the merits of the case. [H]owever, I am also aware that when a petition raises a substantial question, the Court sometimes "points out those concerns which, although unrelated to the merits, justify the decision not to grant review." How much more substantial can a question be than whether a person can be executed for a crime committed in his youth, when the ICCPR, a treaty to which the United States is a signatory, makes such an execution facially illegal? However, the Court did not point out concerns justifying the decision not to grant review that were unrelated to the merits. Therefore, I do not believe it is a quantum leap for me to assume that certiorari review was denied based on the merits of the case.

Pressley, 2000 WL 356347 at *7 (Houston, J., concurring in result) (citations omitted).

1.) **Historical Background**.

In 1966, the United Nations General Assembly adopted the International ICCPR on Civil and Political Rights. 999 United Nations Treaty Series ("U.N.T.S.") 171. The ICCPR did not enter into force until it received the requisite number of ratifications in 1976. See id.

In 1977, the Carter Administration signed the ICCPR and forwarded it to the United States Senate with several proposed conditions. See Int'l Covenant on Civil and Political Rights: Hearing before the Comm. on For. Relations, United States Senate, 102nd Cong. at 14 (1992), reprinted in 31 International Legal Materials ("I.L.M.") 645, 649 (1992). In 1991, President Bush urged the Senate to consent to the ICCPR and a series of qualifying statements. 31 I.L.M. at 660. President Bush labeled five of the qualifying statements as "reservations," five as "understandings," and four as "declarations."

President Bush presented the following explanation for the reservation concerning the death penalty for persons under the age of eighteen:

> Article 6 limits the circumstances in which capital punishment may be imposed. Article 6 specifically prohibits the imposition of the death sentence for crimes committed by persons below 18 years of age and on pregnant women. The Administration accepted the obligation with respect to pregnant women. However, it proposed a reservation clarifying that the United States does not accept the prohibition on executing people for crimes committed while they were 16 or 17 years of age. The execution of people for crimes committed while they were under the age of 16 has been ruled unconstitutional by the Supreme Court. The reservation

> proposed by the Bush Administration is significantly narrower than that proposed by the Carter Administration.

31 I.L.M. at 651.

The Senate Foreign Relations Committee favorably recommended the ICCPR, the reservations, understandings and declarations to the Senate. See 31 I.L.M. at 649. On April 2, 1992, the Senate considered the ICCPR along with the conditions. By a two-thirds vote, the Senate consented to the ICCPR–conditioned upon the qualifying statements. See 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992).

On June 1, 1992, President Bush signed the instrument of ratification. President Bush stated that he "ratif[ied] and confirm[ed] the said Convention, subject to the said reservations, understandings, and declarations." White House Statement on Signing the International Covenant on Civil and Political Rights, 28 Weekly Comp. Pres. Doc. 1008 (June 5, 1992). The United States submitted the following reservation with the ICCPR:

> That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

999 U.N.T.S. 171 (United States Reservations).

On June 8, 1992, the United States Ambassador to the United Nations deposited the ICCPR, the qualifying statements, and the instrument of ratification with the United Nations Secretary General. 3 U.S. Dep't of State Dispatch (no. 45), Nov. 9, 1992. The ICCPR came into force for the

United States on September 8, 1992. See id. Since 1992, only eleven of the 114 party-states to the ICCPR have objected to the United States' reservations. 999 U.N.T.S. 171 (Objections to the United States Reservations).

2.) Hughes Lacks Standing to Invoke the ICCPR to Challenge His Death Sentence.

The first attached declaration deposited with the Secretary General said "the United States declares that the provisions of articles 1 through 27 of the ICCPR are not self-executing." 999 U.N.T.S. 177 (United States declaration No. 1). The political branches of the federal government clearly indicated that the United States' consent to the ICCPR did not create private rights of action: "The intent is to clarify that the Covenant will not create a private cause of action in U.S. Courts." 31 I.L.M. at 657 (reprinting Bush Administration's explanations of its proposed declaration).

"[N]o private cause of action can ever be implied from a non-self-executing treaty." In re Estate of Ferdinand E. Marcos, 978 F.2d 493, 503 (9th Cir. 1992). The United States' declaration specifically states that the ICCPR is not self-executing, and the courts have agreed with that interpretation. See, e.g., Igartua de la Rosa v. United States, 32 F.3d 8, n. 1 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995); Domingues v. State, 114 Nev. 783, 961 P.2d 1279 (Nev. 1998), cert. denied, ___ U.S. ___, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999). Accordingly, the ICCPR provides no private cause of action, and Hughes lacks standing to raise its provisions to challenge his death sentence.

Furthermore, "[w]hile it is true that international treaties become the supreme law of the land, it is equally true that ' . . . it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties.'" State

v. Dansinger, 521 A.2d 685, 689 (Me. 1987) (quoting Skiriotes v. Florida, 313 U.S. 69, 73 (1940)) (emphasis added). Because the treaty obligations concern the United States' relations with other countries, not with its own citizens, the Applicant lacks standing to invoke the ICCPR to challenge his death sentence. See Skiriotes, 313 U.S. at 73 ("[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . . With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government").

The ICCPR does not confer any rights upon Herman Hughes. This Court should reject this ground for relief.

3.) The United States' Ratification of the ICCPR Does Not Invalidate the Execution of Persons Sixteen Years or Older Under S.C. Code Ann. § 16-3-20(A) (Supp. 1999).

Even if Hughes had standing to invoke the ICCPR to challenge his death sentence, United States' treaty obligations do not bar South Carolina from seeking the death penalty for his crime.

The United States conditioned its participation in the ICCPR on the reservations, conditions and declarations submitted by the Bush Administration. Article 6 of the ICCPR proscribes the execution of offenders under the age of sixteen. Hughes argues that the United States' reservation to Article 6 of the ICCPR is invalid, apparently contending that the United States and South Carolina are bound by the ICCPR as if no reservation had been made. This contention has no merit.

a.) The Reservation to the Treaty is Valid.

Hughes contends that the Senate did not have the power to place conditions upon the United States' ratification of the ICCPR. He argues that such a power allows the Senate to "consent" to

only those treaty provisions of which it approves, and thus to "'ratify' a treaty that is materially different from the one negotiated with, and accepted by, multiple treaty partners."

This argument rests upon the assumption that the Senate enacted the reservations to the ICCPR. This assumption is wrong. The president (President Carter, and then President Bush) proposed the reservations, both to the international community and to the Senate. 31 I.L.M. at 649. The Senate did not enact the reservations; it consented the treaty with the president's reservations.

Reservations to treaties serve an important function in international law:

> Reserving disagreement not only informs the international community directly and unequivocally as to the position of the reserving country, it protects the reserving state from further international objections and demands for implementing legislation. Reservation, in the words of one commentator, "far from impairing the integrity of treaties, provides a satisfactory means of eliminating avoidable difficulties that might stand in the way of international co-operation." For instance, in a large multilateral treaty, there are certain to be articles with which some countries do not agree. These same countries may be important to the success of the treaty, but without the use of reservations would be unable to participate. Reservations provide the flexibility needed to reach consensus in large multilateral agreements.

Cele Hancock, The Incompatibility of the Juvenile Death Penalty and the United Nations' Convention on the Rights of the Child: Domestic and International Concerns, 12 Ariz. J. Int'l & Comp. L. 699,715 (1995) (quoting T.O. Elias, The Modern Law of Treaties 27-28 (1974)) (footnotes omitted).

The Restatement (3d) of Foreign Relations Law of the United States (1987) (hereinafter "Restatement") expressly contemplates reservations to treaties:

> (1) A state may enter a reservation to a multilateral international agreement unless
> (a) reservations are prohibited by the agreement,
> (b) the agreement provides that only specified reservations not including the reservation in question may be made, or
> (c) the reservation is incompatible with the object and purpose of the agreement.

(2) A reservation to a multilateral agreement entered in accordance with Subsection (1) is subject to acceptance by the other contracting states as follows:

(a) a reservation expressly authorized by the agreement does not require subsequent acceptance by the other contracting states;

(b) where application of the agreement in its entirety among the parties is an essential condition to their consent, a reservation requires acceptance by all the parties;

(c) where a reservation is neither authorized nor prohibited, expressly or by implication,

(i) acceptance of a reservation by another contracting state constitutes the reserving state a party to the agreement in relation to the accepting state as soon as the agreement is in force for those states;

(ii) objection to a reservation by another contracting state does not preclude entry into force of the agreement between the reserving and accepting states unless a contrary intention is expressed by the objecting state.

(3) A reservation established with regard to another party in accordance with Subsection (2)(c) modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions for the other parties to the agreement inter se.

Id. § 313.

Hughes cites no authority for his position that the United States' reservations to the ICCPR are invalid. The Court should reject the argument.

b.) The Reservation to Article 6 of the ICCPR is Not Precluded by Article 4's Nonderogation Provision.

The United States Supreme Court has stated that "[i]n interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations,' to which 'general rules of construction apply.'" Sosiete Nationale Industrielle Areospatiale v. United States District Court, 482 U.S. 522, 533 (1987). Accordingly, a proposed treaty is like an offer to accept a tentative agreement. The contracting states may (1) accept the tentative agreement without changes pursuant to their own domestic law; (2) reject it outright (i.e., the president refuses to send it to the Senate or the Senate

refuses to ratify it); or (3) consent to the treaty on conditional terms. Under the third scenario, the potential party-state rejects the offered treaty, and proposes the conditions as a counteroffer. The counteroffer would become valid only if the other party states accept the condition. See Restatement § 313 cmt f (1987) ("If a reservation is attached at ratification, it constitutes in effect a rejection of the original tentative agreement and a counter offer of a new agreement").

Thus, in this case, the text of the original ICCPR was a tentative agreement. President Bush and the Senate modified the text of the ICCPR by adding reservations, understandings and declarations, effectively rewriting the ICCPR. When the United States deposited the ICCPR with the Secretary General of the United Nations, it constituted a counteroffer to the ICCPR's original text. The United States' counteroffer changed the text of article 6 because it deleted the proscription against the execution of persons under the age of eighteen. Therefore, as consented to by the United States, Article 6, ¶ 5 does not read "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." 999 U.N.T.S. 171. Instead, as modified by the reservation, the ICCPR as applicable to the United States now states that "imposition of the death penalty in the United States is subject to Constitutional constraints, but in no case may a pregnant woman be executed."

Article 4 of the ICCPR includes the following language:

> (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Under the modification to the ICCPR filed by the United States, Article 4 prohibits it only from derogating the version of Article 6 ratified by the Senate. The United States may not under any circumstances derogate or suspend the prohibition against executing pregnant women or sentencing someone to death in violation of the Constitution. This provision is the counteroffer made by the President and the Senate to the ICCPR's 143 party states, and it is this provision that the United States agreed not to derogate. Of those 143 states, only eleven filed an objection to the United States' reservation to Article 6. All eleven of those states, except Germany, explicitly declared that their objections were not an obstacle to the entry into force of the ICCPR. See 999 U.N.T.S. 171. Even Germany did not state that it would not consider the United States a party state to the ICCPR because of its reservations to Article 6. See id.

The United States' reservation to Article 6 is not invalid under Article 4's nonderogation provision. The ICCPR did not prohibit reservations, nor did it contain any specific language permitting only certain reservations. See Restatement § 313(1)(a),(b). Therefore, Hughes's argument is meritless and this Court should reject it.

c.) The United States' Reservation to Article 6 is Not Incompatible With the Object and Purpose of the ICCPR.

Hughes argues that the reservation to Article 6 is invalid because it violates the ICCPR's object and purpose. This argument fails.

In determining whether a particular reservation is compatible with the object and purpose of a treaty, this Court should consider the historic permissibility of reservations. "[I]t was once widely

considered that the unanimous consent of the other parties to a treaty was required to admit a reservation . . . ." Belinda Clark, The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women, 85 Am. J. Int'l L. 281 (1991) (hereinafter "Clark"). In the 1920s and under the League of Nations, the Western European states accepted the unanimity rule. Some East European states "adhered to the view that every state had the sovereign right to make reservations unilaterally and at will, and to become party to treaties subject to such reservation even if they were objected to by other contracting nations." Id. at 289-90.

During this period, the United States developed a system for reservations through the Pan-American Union. See id.

> The basis for the Pan-American system was that as between parties ratifying without reservations, the treaty was in force in the terms in which it was originally drafted; and where reservations were accepted, the treaty was in force between the reserving party and accepting states as modified by the reservation. The reservation was not in force between the reserving party and parties that had already ratified but did not accept the reservation. Pan-American practice differed from League of Nations practice in that the objection of one state did not preclude the reserving state from becoming a party to the treaty, provided that at least one other state had accepted the reservation.

Id.

At the time, the United States recognized both practices for making reservations. The United States was a founding member of the Pan-American Union and a party to certain treaties ratified under its auspices. At the same time, the United States was a party to multiple pre-World War I European conventions. See id.; see also Malkin, Reservations to Multilateral Conventions, 7 Brit. Y.B. Int'l L. 141 (1926).

The United Nations Secretariat followed the League of Nations' practice until 1951, when the International Court of Justice rendered its Genocide Convention opinion. Clark at 291. In that

opinion, the International Court of Justice ruled that the traditional laws of contracts requiring acceptance to a reservation from all parties to the agreement could not easily be applied to multinational treaties. The court held that, absent a provision to the contrary, reservations to multinational treaties are permitted, provided the reservations are not inconsistent with the object and purpose of the treaty. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 International Court of Justice ("I.C.J.") 15 (May 28).

> The Court concluded that no absolute answer could be given to the question whether a reserving state could still be regarded as a party if its reservation was objected to by some of the other parties; the answer depended on the circumstances of each case.
>
> The Court said that if [a party state] finds the reservation to be incompatible with the object and purpose of the treaty, the objecting state may consider that the reserving state is not a party. Each state party is entitled individually to appraise the validity of a reservation, and since no state can be bound by a reservation to which it has not consented, each objecting state will consider (within the limits of the criterion of the object and purpose of the treat) either that a reserving state is a party to the treaty or that it is not. The decision will only affect the relationship between the objecting and reserving states . . .
>
> * * *
>
> The General Assembly [, in 1952,] adopted a resolution requesting that the Secretary-General conform with the Court's opinion with respect to the multilateral conventions for which he was a depository to all state concern, "leaving it to each state to draw legal consequences from such communications."
>
> In its practice regarding conventions adopted after 1952, the UN Secretariat adopted this flexible system. In 1959 reservations to multilateral conventions were again considered by the General Assembly. It not only reaffirmed the directive to the Secretary-General in its 1952 resolution, but also extended it to cover all conventions concluded under the auspices of the United Nations prior to 1952 that did not contain contrary provisions.

Clark at 294-96 (footnotes omitted).

When the Vienna Convention was negotiated, 110 delegations were present; not one favored the old rule of unanimity to govern the admission of reservations. Instead, the delegations decided to follow the flexible system advanced by the International Court of Justice in the Genocide Convention case. Report of the International Law Commission on the Work of its Eighteenth Session, 21 UN GAOR Supp. (No. 9) at 10, UN Doc. A/6309/Rev. 1 (1966), reprinted in 2 Y.B. Int'l L. Comm'n 169, 177, UN Doc. A/CN.4/SER.A/1966/Add.1., cited in Clark at 289.

Articles 19 through 23 of the Vienna Convention on the Law of Treaties codify the flexible system. Although the United States is not a party to the Vienna Convention, Restatement § 313 adopts articles 19-21 of the Vienna Convention, and summarizes the results of this flexible system:

> [I]t tends to fragment those multilateral agreements into a number of smaller multilateral or bilateral agreements. The original arrangements continues among those states that adhere without reservation. The original arrangement pertains also between a reserving state and a state that rejects the reservation if the reserving state decides to accept the agreement without reservation vis-a-vis the objecting state. A different arrangement prevails between a reserving state and a state that accepts a particular reservation.

Restatement § 313 cmt b.

Furthermore, "[w]hen a State objecting to a reservation has not opposed entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation." Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331, 337 (entered into force Jan. 27, 1980). This was the state of international law when the United States ratified the ICCPR.

In 1994, however, another view was espoused that "treaty bodies" are competent to address the legality of reservations during their consideration of the states parties' periodic reports. See William A. Schabas, Reservations to the Convention on the Elimination of all Forms of

Discrimination Against Women and the Convention on the Rights of the Child, 3 Wm. & Mary J. Women & L. 79, 92 (1997), (citing General Comment No. 24, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., at ¶ 17, U.N. Doc. CCPR/C/2 I/Rev. 1/Add.6 (1994)). When the United States submitted its first report of compliance to the Human Rights Committee, the Committee concluded that the reservations dealing with the death penalty were invalid because they were incompatible to the object and purpose of the ICCPR. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53d Sess., 1413th mtg. ¶ 14, at 4, U.N. Doc. CCPR/C/79/add.50 (1995). Under the Human Rights Committee's view, if a treaty body determines that a reservation is inconsistent with the object and purpose of the agreement, it must determine whether the reservation is severable. See Loizidou v. Turkey, 310 Eur. Ct. H.R. (Ser. A) ¶¶ 89-97 (1995).

> The Committee has determined that the U.S. reservations to articles 6, paragraph 5 and 7 of the Covenant are contrary to the object and purpose of the treaty and consequently invalid. If the reservations are illegal, the question becomes whether the United States remains bound by the Covenant, including articles 6 and 7. Examining the matter narrowly, it would appear that the United States has never consented to be bound by article 6 and 7 of the Covenant as far as the death penalty is concerned. Accession to an international treaty is a form of international contract and a state cannot be bound to obligations against its will. However, if the matter is examined from another angle, it is also clear that the United States intends to be generally bound by the Covenant. The issue is one of severability or separability, that is, whether the reservations to articles 6, paragraph 5 and 7 can be dissociated from the accession to the Covenant. If the answer is no, then the United States is not a party to the Covenant. If the answer is yes then the United States is bound by the Covenant, including articles 6 and 7.

William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 Brook. J. Int'l L. 277, 317 (1995) (footnote omitted).

The Human Rights Committee has adopted the view that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party." General Comment No. 24. U.N. GAOR, Hum. Rts. Comm., 53d Sess., ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). The Human Rights Committee concluded that reservations that are inconsistent with the object and purpose of the agreement "will generally be severable, in the sense that the Covenant will be operative for the reserving party-without the benefit of reservation." Id.

The United States has strenuously objected to the Human Rights Committee's opinion:

> The United States has stated, "Since this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some help clarification could be made." Observations by the United States of America on General Comment No. 24 (52), 16 Hum. Rts. L.J. 422, 423 (1995) (observations transmitted by letter dated March 28, 1995). See also, U.N. Doc. A/C.6/50/SR.13, at 52 (1995) (stating the comments of Legal Advisor, Conrad Harper, to the sixth Committee). The United States also stated that it reservations are "integral parts of its consent to be bound by the Covenant and are not severable." Observations by the United States, at 423. It has further indicated that "[i]f it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified." Id. The United States argues that "[t]he general view of the academic literature" is that reservations are an essential part of a State's consent and "cannot simply be erased." Id., at 424. It stated that a State that expressly withholds its consent from a provision "cannot be presumed, on the basis of some legal fiction, to be bound by it."

Schabas, 3 Wm. & Mary J. Women & L., at 109-10.

France and Great Britain also oppose the Human Rights Committee's position. See Report of the Human Rights Committee (Observations of States Parties under article 40), U.N. GAOR, 51st Sess., Annex VI, U.N. Doc. A/51/40 (1996) (stating the observations of France under article 40, ¶ 5 of the ICCPR); see also Report of Human Rights Committee (Submission of Reports and Additional Information by States Parties Under Article 40 of the ICCPR During the Period of Review), U.N. GAOR, 50th Sess., Annex. III, U.N. Doc. A/50/40 (1995) (stating the observations

of the United Kingdom of Great Britain and Northern Ireland under Article 40, ¶ 5 of the ICCPR). The United States does not adhere to the Human Rights Committee's view. Rather, it adheres to the flexible view set forth in the Vienna Convention and the Restatement.

The ICCPR contains no provision concerning possible reservations to the ICCPR. Conversely, the ICCPR does not provide that only certain reservations can be made. Not one of the party states has specifically stated that it considers the U.S. reservations as an obstacle to entry into force of the ICCPR. Accordingly, the reservation to article 6 does not render it incompatible with the object and purpose of the ICCPR.

The United States' reservation to Article 6 does not violate the Vienna Convention or Restatement § 313. Thus, the United States' reservation to Article 6 is not invalid, and U.S. treaty obligations do not preclude South Carolina from imposing the death penalty for Hughes's crime.

b.) Neither Customary International Law Nor Jus Cogens Prohibits South Carolina From Executing Herman Hughes for Crimes Committed While He Was Under the Age of Eighteen.

The United States Supreme Court has sanctioned the death penalty for persons over sixteen years of age. In that decision, the Court looked to national practice, not international practice. Stanford v. Kentucky, 492 U.S. 367 (1989). Additionally, Section 16-3-20 of the South Carolina Code sanctions capital punishment for persons sixteen or older. Therefore, it is unnecessary to resort to international law to determine the legality of the application of the death penalty in South Carolina to a sixteen-year-old.

1.) Any prohibition on the execution of a sixteen-year-old is not customary international law and, even if it were, such law does not bind South Carolina.

Hughes argues that customary international law is part of the law of the United States and that both federal and state courts must apply it. He quotes The Paquete Habana, 175 U.S. 677 (1900) for the proposition that "'[i]nternational law is part of our law, and must be ascertained and administrated by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'" Id. at 700.

Conveniently, however, Hughes quotes the case out of context. The entire passage reads:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

Id. (emphasis added).

Thus, the courts look to customary international law only when "no treaty and no controlling executive or legislative act or judicial decision" exists. Id.; accord Gisbert v. Attorney General, 988 F.2d 1437, 1447, n. 21 (5th Cir. 1993) ("Public international law controls, however, only 'where there is no treaty and no controlling executive or legislative act or judicial decision" (quoting The Paquete Habana)); Bradvica v. Immigration and Naturalization Service, 128 F.3d 1009, 1014, n. 5 (7th Cir. 1997) ("Moreover, customary international law is not applicable in domestic courts where there is a controlling legislative act . . . ").[23] The Senate's ratification of the ICCPR, with the reservation to Article 6, constitutes a "controlling decision" that precludes the application of customary international law in this case.

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[23]The qualification to The Paquete Habana is not dicta. See Gisbert, 988 F.2d at 1447, n. 21.

Alternatively, assuming arguendo that Hughes's sentence violates customary international law,[24] the alleged violation does not warrant relief. The courts "are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law." Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991); accord United States v. Aguilar, 883 F.2d 662, 679 (9th Cir. 1989) ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law"); see also Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988) ("no enactment of Congress can be challenged on the ground that it violates customary international law").

Both state statutory and federal constitutional law authorize the death penalty for sixteen-year-old offenders. Accordingly, this Court's inquiry is at an end. Even if Hughes properly preserved his allegation of a violation of customary international law, it provides no basis for vacating his death sentence.

Furthermore, not every nation is bound by customary international law. Under the majority view, acts of nations become customary international law when the international community as a whole accepts the norm, although not every state must agree. The Restatement provides that "[a] rule of international law is one that has been accepted as such by the international community of states." Restatement § 102(1). Opinio juris requires that the states feel that they are legally required or obligated to observe the principle. See id.

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[24]Hughes has not shown even that customary international law prohibits the execution of sixteen-year-olds. Rgardless of international practice, over 100 states' laws authorize the death penalty for offenders under the age of eighteen. See infra subsection 2.

Because some customary international law is deemed binding on all states, a corollary doctrine developed to respect the sovereignty of the nonconsenting states and to determine whether they were obligated to follow the norm. If a state persistently objects to an emerging norm, it is not bound by that norm once it gains the status of customary international law. The rationale behind this doctrine is that "[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states." Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). Therefore "[a] state that persistently objects to a norm of customary international law that other states accept is not bound by that norm. . . ." Id. (citing Restatement § 102 cmt d.).

Assuming arguendo that customary international law proscribes the execution of sixteen- and seventeen- year-old offenders, the United States is not bound because it has persistently objected to that alleged norm. The respondents do not argue that there is not a global trend to abolish the death penalty. See generally Kristi Tumminello Prinzo, The United States - "Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend Is Toward Its Abolition, XXIV Brook. J. Int'l L. 855 (1999). Rather, because the United States has persistently objected to both the abolitionist movement and to the prohibition against executing sixteen- and seventeen- year-old offenders, it is not bound by any such customary international law.

"The United States has legally permitted juvenile offender to receive a sentence of death throughout most of its history. . . ." See Lynn Loschin, The Persistent Objector and Customary International Law: A Proposed Analytical Framework, 2 U.C. Davis J. Int'l L. & Pol'y 147, 157 (1996). "From 1900 to 1930 seventy-seven persons under age eighteen were executed for crimes committed under the age of eighteen." Cele Hancock, The Incompatibility of the Juvenile Death

Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns, 12 Ariz. J. Int'l & Comp. L. 699, 725 (1995). By 1995, that number had grown to 192 offenders executed for crimes committed while they were under eighteen years of age. See id.

The United States has consistently conditioned its accession to human rights treaties on its exception to the death penalty; its reservations to the ICCPR did not represent a change in that practice. In 1969, at the final drafting conference of the American Convention on Human Rights, the United States urged the deletion of the prohibitions against executions for offenders under the age of eighteen. The United States has not ratified that treaty because the drafting conference would not remove those provisions. United States: Report of the Delegation to the Inter-American Specialized Conference on Human Rights (Apr. 22, 1970), reprinted in 9 I.L.M. 710 (1970). Similarly, the United States has not ratified the Convention on the Rights of the Child, which not only proscribes the death penalty for persons under eighteen years of age, but also life imprisonment without parole. Convention on Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. a/44/736 (1989, reprinted in 28 I.L.M. 1448 (1989).

The only treaty containing a prohibition against the execution of persons under eighteen to which the United States has not objected is the Fourth Geneva Convention. "'In any case, the death penalty may not be pronounced against a protected person, [one held by a party to the conflict or an occupying force of which he/she is not a national] who was under eighteen years of age at the time of the offense.'" Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International ICCPR on Civil and Political Rights, 42 DePaul L. Rev. 1311, 1330 (1993) (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 286).

Thus, the United States has only agreed not to execute the juveniles of another country and only during war. This narrow exception does not vitiate the United States' status as a persistent objector.

Therefore, if this Court determines both that customary international law prohibits the execution of persons under eighteen and that customary international law is applicable, South Carolina is not precluded from imposing the death penalty because the United States has persistently objected to the proscription against the execution of persons under eighteen. Furthermore, the United States Supreme Court reviewed this issue in Stanford v. Kentucky and "discern[ed] neither a historical nor modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." Stanford v. Kentucky, 492 U.S. at 380. Therefore, this Court should deny relief.

2.) Any Prohibition Against the Execution of Sixteen- and Seventeen-year-old Offenders Has Not Attained Jus Cogens Status.

Hughes argues that the alleged customary international legal prohibition against the execution of sixteen- and seventeen-year-olds has attained the status of jus cogens and therefore binds South Carolina. This argument is meritless.

"The term 'jus cogens' means 'compelling law' and, as such, a jus cogens norm holds the highest hierarchical position among all other norms and principles. As a consequence of that standing, jus cogens norms are deemed to be 'peremptory' and nonderogable." M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 Law & Contemp. Probs. 63, 67 (1996). Considerable disagreement, however, exists concerning the meaning of a "peremptory norm." For a norm to be jus cogens, the international community must accept not only the norm but

also its peremptory character. See Restatement. § 331 cmt e ("A domestic court should on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm"). For that reason, the United States "insisted that claims of jus cogens be subject to adjudication by the International Court of Justice or to arbitration . . . ." Id., n. 4.

According to the Restatement, not all human rights are jus cogens, but any violation of Restatement §§ 702 (2)(a-f) is a violation of jus cogens.[25] Hughes implies that the nonderogation provision of Article 4, paragraph 2 of the ICCPR, which precludes derogation of Article 6 in time of emergency, renders the proscription against executing sixteen- and seventeen-year-old offenders jus cogens. This assertion fails: "Nonderogability on emergency and jus cogens are different principles, responding to different concerns, and they are not necessarily congruent." Restatement § 702 n. 11. Accordingly, the nonderogation provision is not "compelling law" rising to the level of jus cogens.

Additionally, the prohibition against capital punishment for sixteen-year-old offenders is not as widely accepted as Hughes would have the Court believe. Kha Q. Nguyen, In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States, 28 Geo. Wash. J. Int'l L. & Econ. 401, 424 (1996) (hereinafter "Nguyen"). In 1989, the United States was among one hundred nations that authorized capital punishment for minors. See id. Furthermore, although Amnesty International would like to consider the United States one distinct state as opposed to fifty individual states, an argument could be made under Stanford that each state is a

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[25]The Restatement declares that the prohibition against (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment (e) prolonged arbitrary detention, and (f) systematic racial discrimination are peremptory norms.

separate entity in determining whether a peremptory norm is generally accepted. 492 U.S. at 371-72. If that is done, the following information is added to the equation:

> Currently, fourteen states and the District of Columbia forbid the imposition of the death penalty. Of the states that have a death penalty, some specify no minimum age, some allow the death penalty for juveniles under eighteen, and some expressly set their minimum age at eighteen. Seventeen states have legislation authorizing capital punishment without specifying any minimum age for the imposition of the death penalty. Of these seventeen states, eight states, as of 1991, still had not established a minimum age for capital punishment. Nine states do not mandate a minimum age in their death penalty statutes, but have set that age by reference to their statutory provisions governing the age at which juveniles may be transferred to criminal court for trial as an adult. Furthermore, eight states have explicitly authorized the capital punishment of juveniles in their death penalty statutes by setting a minimum age below eighteen. Finally, eleven states have established the age of eighteen years as the minimum age for the imposition of the death sentence.
>
> Collectively, seventeen states permit the execution of minors either by the express terms of their death penalty statutes or by indirect reference to their juvenile transfer legislation. While twenty-five states and the District of Columbia prohibit the execution of minors, an additional eight states have not directly addressed the issue of a minimum age for capital punishment.

Nguyen at 405 (footnotes omitted.)

Stanford v. Kentucky supports this view. In that case, Justice Scalia stated that the Court would consider the American conceptions of decency when ruling on the death penalty. 492 U.S. at 369, n.1.

Moreover, when the United States Supreme Court decided Stanford, the Inter-American Commission on Human Rights had already given its annual report finding, in their opinion, that the United States violated jus cogens by permitting the execution of children. Pinkerton and Roach v. United States, Resolution No. 3/87, Case 9647, Inter-Am. Cm. H.R., Annual Report of the Inter-American Commission on Human Rights 1986-1987 at 147, OES/Ser.L/V/II/71, doc. 9, rev. 1 (1987). The Supreme Court did not even mention this determination in its decision. In Pinkerton,

"[t]he Commission found that in the member states of the OAS a universal norm of jus cogens is recognized which prohibits the state execution of children. The norm, it stated, is accepted by all the states of the inter-American system, including the United States." Cerna, Universality of Human Rights: The Case of the Death Penalty, 3 ILSA J. Int'l. & Comp. L. 465, 473 (1997). The Commission rested its decision upon what it deemed the United States' recognition of this alleged norm in its response to the petition of Pinkerton and Roach. See id. In that response, the United States said, "All states, moreover, have juvenile justice systems; none permits its juvenile court to impose the death penalty." Id. (emphasis added). The Commission found that United States recognized the norm of not executing children, but that there was no consensus as to what constituted majority. See id. at ¶ 57. Thus,, even if this Court finds that jus cogens prohibits the execution of children, Hughes's death sentence does not violate this peremptory norm because he was certified as an adult before trial.

The United States Supreme Court had the opportunity to find that the execution of sixteen- and seventeen-year-old offenders was proscribed by jus cogens, but elected to rest its decision in Stanford on domestic law. Even so, there is no clear consensus on whether international law finds the execution of sixteen- and seventeen-year-old offenders violates jus cogens. This Court should deny relief. Counsel was not ineffective under Strickland v Washington, supra., in failing to raise this claim.

Issue Concerning Ineffective Appellate Counsel and Proportionality Argument - Ground 9(i)
Applicant's Memorandum, pp. 98-101

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).

In Ground 9(i), he contends that appellate counsel Savitz erred in making a specific argument to the South Carolina Supreme Court in the appeal that the death sentence on Hughes was not proportionate because he was a sixteen (16) year-old offender with borderline intelligence. He asserts that under § 16-3-25(B), the Court did not properly complete its duty and appellate counsel should have specifically argued and briefed this issue.

During the state PCR hearing, appellate counsel Joseph Savitz testified that he did not normally raise "proportionality" arguments in the capital appeals to the South Carolina Supreme Court and did not do so in this case. PCR Tr. p. 282. He stated that the Supreme Court does its own review, but he did not know if the Court would have done a better job if he had specifically raised it. PCR Tr. pp. 282-83. Savitz acknowledged that in a number of his appeals capital defendants had committed more aggravated crimes. PCR Tr. p. 285. Savitz acknowledged that his brief included facts that he was transferred from Family Court, had been determined to have a borderline intelligence, presented the fact that defense counsel reminded the jury that Pearce was an aggressor and the crime would not have happened without him; the mitigating factors of his age, below eighteen, and had mental retardation. PCR Tr. pp. 293-94. He admitted that this information was in the initial portion of his brief. PCR Tr. pp. 294-95. Counsel Savitz stated that in the 161 opinions of the South Carolina Supreme Court, proportionality was rarely briefed or argued. PCR Tr. p. 295.

In the opinion of the South Carolina Supreme Court, it concluded as follows in determining proportionality:

> Finally, we find the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), cert. denied, 502 U.S. 1038, 112 S. Ct. 888, 116 L. Ed. 2d 791 (1992) (murder and armed robbery of school principal in Anderson); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103, 112 S. Ct. 1193, 117 L. Ed. 2d 434 (1992) (robbery and murder of Domino's Pizza employee); 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) (robbery and murder of woman outside a mall in Charleston).

Hughes, 493 S.E.2d 825.

Hughes maintains that the Supreme Court failed to do an appropriate proportionality review under § 16-3-25(C), speculating that it failed to consider the characteristics of the defendant.

Respondents submit that he has failed in his burden of showing ineffective assistance. Although he did not specifically argue proportionality, the Supreme Court complied with its statutory duty in resolving that the sentence was proportionate. Counsel reviewed to the age, mentality, and role of the Applicant in its brief before the Supreme Court. His speculation that their tasks were not completed flies in the face of the compelling conclusion made in the opinion. He has failed to show either deficient performance or prejudice under Strickland, supra.

Issue Concerning IAC and the Mitigating Instruction Charge - Issue 9(j) - Abandoned at Hearing and Not Briefed by Applicant.

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).

In this allegation, Hughes claimed that he received ineffective assistance of counsel because counsel failed to object to the mitigating circumstance instruction. This issue was abandoned at the hearing and not briefed. Respondents submit it must be dismissed with prejudice for lack of prosecution under the Rules of Civil Procedure.

Issues Concerning Federal And State Constitution Death Penalty on a 16 year old and Ineffective assistance - Grounds 9(k) and 9(l) - Applicant's Brief, pp. 101-112.

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.

In 9(k) and 9(l), Hughes contends that appellate counsel was ineffective in failing to assert under the federal and state Constitutions that the death sentence for a sixteen year-old offender was improper. The record reveals that trial counsel Newsom made a Motion to Bar Imposition of the Death Sentence under both the South Carolina and federal Constitution. After hearing argument, the trial judge denied the motion, concluding: "the appropriate case law, including that of South Carolina, does not suggest that one . . . who was sixteen at the time of the alleged offense cannot suffer the supreme penalty. . . ." R. pp. 1886-88. Appellate counsel Savitz reviewed the motion hearing, R. pp. 1881-88, but counsel did not specifically state why he abandoned this issue in the appeal. PCR Tr. pp. 291-301.

Respondents respectfully submit that the Applicant has failed to show Sixth Amendment prejudice by failing to argue either the federal or state constitutional issues. In State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997), the South Carolina Supreme Court expressly concluded that the Eighth Amendment to the United States Constitution was not violated by the application of the death penalty to a sixteen year-old murder defendant

Respondents submit that the Applicant has failed to prove either deficient performance or resulting prejudice by appellate counsel Savitz under Strickland because -- for the reasons set forth herein -- he cannot show a reasonable probability that the result of the proceeding (appeal) would have been different.[26]

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[26] Respondents submit that counsel was not deficient in failing to raise these claims. Rather, it is unnecessary for the Court to address the first prong under Strickland because there is absolutely no conceivable way Applicant was prejudiced by counsel's performance.

Applicant claims that Article I, Section 15, of the South Carolina Constitution, which bars cruel and unusual punishment, prohibits execution of individuals age seventeen and under at the time of the offense. In support of his claim, he offers the purported rejection by society of the death penalty for juveniles as allegedly reflected in state and federal legislation, court decisions, internal law, popular opinion, and positions assumed by religious organizations. Applicant also asks this Court to consider as evidence of the constitutional violation the lack of deterrence or retribution resulting from the death sentence for a young offender. Respondents submit, however, that Applicant's argument is not persuasive, having been rejected in Conyers..

The Eighth Amendment of the United States Constitution provides:

> Excessive bails shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Similarly, Article I, Section 15, of the South Carolina Constitution, provides in pertinent part,

> Excessive bail shall not be required; nor shall fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted . . .

The analysis utilized by the United States Supreme Court for determining Eighth Amendment error is applied to review claims made pursuant to Article I, Section 15, of the South Carolina Constitution. State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992).

In Stanford v. Kentucky, 492 U.S. 361 (1989), the United States Supreme Court held that the application of the death penalty to an individual who commits a murder at sixteen or seventeen years of age does not constitute cruel and unusual punishment pursuant to the Eighth Amendment of the United States Constitution. The Court determined that the punishment was not shown to violate evolving standards of decency. The information Applicant offers to show that application to him of capital punishment violates evolving standards of decency -- generalized state and federal legisla-

tion, judicial decisions, international law, popular opinion, positions of religious organizations and lack of deterrent or retributive effect -- was rejected in Stanford as indicia of evolving standards of decency to establish a violation of the prohibition against cruel and unusual punishment. Accord Graham v. Collins, 950 F.2d 1009, 1030 (5th Cir. 1992); Prejean v. Smith, 889 F.2d 1391, 1402 (5th Cir. 1989).

The recent increase in violent juvenile crime and the reaction to it is contrary to the lenient attitude Applicant claims is reflected in legislation, public opinion, and jury decisions. The issue Applicant raises has been decided adversely to him by the United States Supreme Court. Stanford v. Kentucky, supra. See also Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985).

In her concurring opinion in Thompson v. Oklahoma, supra, Justice O'Connor agreed with the majority that the death sentence of a fifteen year old defendant should be reversed but reached that conclusion on narrower grounds than the majority. O'Connor considered the fact that the Oklahoma death penalty statute did not establish a minimum age for imposition of the death penalty; that juvenile waiver provisions would allow a fifteen year old juvenile offender to be treated as an adult offender; and that the Oklahoma legislature may not have realized that application of the waiver provision would allow juvenile offenders to be sentenced to death. She also considered that there was significant national consensus forbidding the execution of offenders below the age of sixteen. Thompson, 487 U.S. at 848-849, 108 S.Ct. at 2706 (O'Connor, J., concurring in judgment).

Justice O'Connor determined that in the discrete circumstances presented by the Oklahoma statute, the defendant could not be executed under a statute which did not specify a minimum age at which the death penalty would apply. Because the defendant was waived from juvenile court to stand trial as an adult, because there was no explicit indication from the Oklahoma legislature that

it was aware of and intended that the death penalty apply to fifteen year old offenders, and because there was established a national consensus against application of the death penalty to fifteen year old offenders, O'Connor determined that the sentence should be set aside. O'Connor made clear, however, that establishing a statutory minimum age would not be necessary if it was clear that national consensus did not forbid capital punishment for crimes committed at the defendant's age. Id. at 849-859, 108 S.Ct. at 2706-2711. This is essentially Applicant's claim.

However, this Court finds that Applicant ignores that the United States Supreme Court subsequently held that there was no national consensus forbidding imposition of death for sixteen and seventeen year old capital murderers in Stanford v. Kentucky, supra. The facts involved in this case are also distinguishable from those considered by Justice O'Connor in Thompson, and are consistent with her concurring opinion in Stanford, 492 U.S. at 380-383, 2981-2982 (O'Connor, J., concurring in part and concurring in judgment). In the concurring opinion in Stanford, Justice O'Connor opined that there would be no requirement that a state legislature specify that the death penalty would be applicable to sixteen and seventeen year old offenders. Id.

This Court finds that the record in this case reflects that Applicant was sixteen years old at the time of the offense. As discussed, the United States Supreme Court in Stanford found no national consensus forbidding the application of the death penalty to offenders sixteen years of age and older. In three cases, Conyers, Ted Powers [State v Powers , 331 S.C. 37, 501 S.E.2d 116 (1998)] and Hughes, the South Carolina Supreme Court has conducted a proportionality review under state law and found that the sentences were proportionate where the offender was a sixteen year old at the time of the offense. There is no reasonable probability the South Carolina Supreme Court would have vacated the sentences if the issue would have been presented as a matter of federal law,

Conyers, or under the South Carolina Constitution, Conyers, Wilson. His allegation must be dismissed for failing to prove Sixth Amendment prejudice as to appellate counsel.

Issues Related To The Failure To Appoint 2 Lawyers - Grounds 9(m) and 9(n) - Applicant's Brief, pp. 112-118

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).

Applicant contends in this argument that he was denied his statutory right to two lawyers because retained trial counsel failed to secure the assistance of two (2) attorneys pursuant to S.C. Code Ann. § 16-3-26. Next, he contends that retained counsel was ineffective for failing to preserve appellate review of this issue. Respondents submit that Applicant was not entitled to additional appointed counsel and that Applicant failed to demonstrate that obtaining an additional attorney would have changed the outcome of his trial.

Counsel Newsom testified that he was retained by the Applicant, through his grandmother, to represent Hughes. At the time of his retention, there was a discussion with the solicitor that this case might be a capital case. PCR Tr. pp. 306-307. Newsom testified that he approached Judge

Cottingham, who determined that the appointed counsel on the case would be relieved by Newsom since he had been retained. PCR Tr. p. 311. Subsequently, Newsom stated that he sought to have an additional lawyer appointed to assist but the judge refused his request. PCR Tr. p. 311. Judge Cottingham did allow, however, for indigent funds to be used for investigators and expert witnesses. PCR Tr. p. 311. Newsom said that he was aware of the statute that provided for appointment of two counsel in a capital case. Additionally, he said that he discussed with Judge Cottingham the fact that another judge in the Susan Smith case had appointed a lawyer when David Bruck had been retained. He stated that the judge still denied his request. PCR Tr. pp. 312-313. Counsel Newsom stated that some of his discussion occurred with the trial court in chambers. PCR Tr. p. 312.

The records of hearing do not reveal that this request was done in open court. However, on July 27, 1995, a motion hearing was held where Newsom was substituted as counsel for appointed counsel Hutto and Dean. Judge Cottingham, at the hearing, released the appointed lawyers. Judge Cottingham expressly stated that "with the full understanding that this court, pursuant to their understanding and agreement, will not appoint any counsel for him, but I will make available some investigative funds." State Exhibit One , July 27, 1995, Transcript, pp. 10-11.

To prevail on an ineffective assistance of counsel claim, Applicant bears the burden of demonstrating that his attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing counsel's performance, the Court must bear in mind that its review is "highly deferential." Id. at 689. Indeed, the Court must afford a strong presumption that counsel's performance was within the extremely wide range of professionally

competent assistance. See id. And, to eliminate the deceptive effects of hindsight on its consideration, the Court must look to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See id. at 691-92. Therefore, deficiencies in Applicant's attorney's conduct would warrant the grant of collateral relief only if Applicant convinces the court that in the absence of unprofessional errors by his attorney there is a reasonable probability -- i.e., one adequate to undermine confidence in the result -- that "the result of the proceeding would have been different." See id. at 694.

Initially, it is clear that there is no constitutional right to have two attorneys appointed, even in a capital case. See Comm. v. Griffin, 511 Pa. 553, 570-71, 515 A.2d 864, 873-74 (1986) (trial counsel not ineffective for failing to obtain another attorney to handle the penalty phase). Therefore, Applicant was not entitled to a second attorney based on any constitutional claim.

Contrary to the representations of the Applicant, with regard to whether Applicant was entitled to additional counsel under state law, it is clear that S.C. Code Ann. § 16-3-26 does not require that two attorneys be appointed to a capital case when an attorney or attorneys have been privately retained. Section 16-3-26(b), in pertinent part, provides: "Whenever any person is charged with murder and the death penalty is sought, the court, *upon determining that such person is financially unable to retain adequate legal counsel*, shall appoint two attorneys to defend such person in the trial of the action." (emphasis added). A plain reading of the statute requires the appointment of two attorneys only when a defendant is "financially unable to retain adequate legal

counsel." In Applicant's case, he was able, through his grandmother, to retain the services of Mr. Newsom. Because he was able to retain Mr. Newsom, the statute providing for appointment of two attorneys when a defendant is unable to retain counsel does not apply to this case.[27] At no time did the trial court ever find that Hughes in retaining Newsom was unable financially to retain adequate legal counsel. As the record of the July 27, 1995, hearing reveals, Judge Cottingham found that Hughes was able to retain such counsel!

The Supreme Court of South Carolina, under in favorem vitae review, has affirmed numerous capital cases in which a retained attorney or attorneys did not request and were not provided with additional appointed attorneys. These cases support the conclusion that Applicant was not entitled to two additional attorneys as a matter of state law. See e.g., State v. Gilbert and Gleaton, 273 S.C. 690, 258 S.E.2d 890 (1979) (co-defendants represented by same attorney in joint trial); State v. Gilbert and Gleaton, 277 S.C. 53, 283 S.E.2d 179 (1981);[28] State v. Butler, 277 S.C. 452, 290 S.E.2d

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[27] In pertinent part , the statute states: "(B)(1) Whenever any person is charged with murder and the death penalty is sought, the court, *upon determining that such person is unable financially to retain adequate legal counsel*, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense."

[28] In Gilbert, one retained attorney represented two defendants. The Fourth Circuit recently found that counsel's representation of both the defendants was not unconstitutional or ineffective. See Gilbert v. Moore, Gleaton v Moore, 134 F.3d 642, 647 (4th Cir.), cert. denied, 525 U.S. 840, 119 S.Ct. 103, 142 L.Ed.2d 82 (1998). Hughes current counsel raised this same ground on behalf of petitioner Gleaton on the eve of execution that was denied in collateral proceedings.

1 (1982); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992).[29] See also State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32, cert. denied, 508 U.S. 978, 113 S.Ct. 2978, 125 L.Ed.2d 675 (1993); Rocheville v Moore, 175 F.3d 1015, 1999 Westlaw 140668 (4th Cir. 1999) (unpublished).[30] Because of the state law determination by the trial court that Applicant was not entitled to additional appointed counsel under state law, retained trial counsel could not be deficient for failing to the matter set forth more fully on the record. At the July 27, 1995, hearing, Applicant waived the right to two appointed counsel and the court stated after retention that it was not going to appoint counsel.

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[29] Respondents concede this same issue was not presented in the appeals of those cases. However, it represents supportive actions by state trial judges consistent with the state PCR court's decision.

[30] In Rocheville, he raised this same claim in a state PCR proceeding that was denied , on certiorari and in the federal habeas actions. In an unpublished decision, the Fourth Circuit addressed the issue in the following manner:

> Rocheville explains that the state trial court found him to be indigent but never appointed counsel for him or made him aware that he was entitled to have attorneys appointed. *Rather, Rocheville was represented by one retained attorney whom his parents hired for him.* Thus, Rocheville asserts, he was denied due process in violation of the Fourteenth Amendment because the state court failed to obtain his waiver of the statutory right to appointed counsel. Furthermore, Rocheville claims his trial counsel was ineffective for failing to secure appointed counsel.
>
> Rocheville raised these claims in his state PCR proceeding, and that court ruled that the claims lacked merit. It interpreted the statute as not requiring the appointment of counsel when a defendant already has had retained counsel. This ruling is one of state law with which we have no authority to disagree. See Estelle, 502 U.S. at 67-68. *Because under state law Rocheville was not entitled to appointed counsel, the state trial court did not err in failing to obtain a waiver from Rocheville, and his retained attorney was not ineffective for failing to secure appointed counsel.* Thus, Rocheville's claims that the trial court erred in failing to obtain a waiver of his right to appointed counsel and that his attorney was ineffective in failing to secure additional appointed counsel lack merit. Id.

Counsel asserts that as a matter of public policy, the statute should be read to allow the appointment when counsel is retained by a third party. However, the statutes speaks for itself : an indigent is allowed to have two counsel appointed if he is financially unable to retain adequate legal counsel. Since *adequate* legal counsel was retained the statute was complied with. The mere fact the a judge in another case determined that the defendant did not retain adequate legal counsel under the discrete circumstances in that case did not bind any and all judges to provide two appointed counsel whenever counsel is also retained by an indigent.

Since he was not entitled to the second counsel, there could be no prejudice shown by the failure to place his specific request "on the record."

Similarly, Respondents submit that there was no requirement to have a waiver hearing by Hughes as suggested in footnote 42 of the Applicant's memorandum, as a matter of state procedure, because Hughes was not entitled to the alleged right he now asserts because he had retained counsel of choice. Further, a reading of the July 1995 motion hearing reveals a waiver of the right to the two appointed counsel in lieu of his retained counsel. Since § 16-3-26 was not applicable to his situation, retained counsel cannot be deemed ineffective in failing to advise his client of a state law right that Hughes did not have and the trial court, similarly did not err in failing to hold an on-the-record waiver hearing. As the Court in Strickland, supra, a reviewing court must presume that a trial judge acts within the correct interpretation of state law, not that the Applicant has the luck of a lawless decisionmaker. His assertions must be rejected.

Issue Involving Accomplice Liability Instruction and IAC - Grounds 9(o), 9(p) - Abandoned at Hearing and Not Briefed.

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.

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.

The Applicant abandoned grounds 9(o) and 9(p) at the hearing and did not brief the issues. Respondents submit that they must be dismissed with prejudice for lack of prosecution.

Issue Relating to the Failure to Object to The Introduction of School Disciplinary Records - Ground 9(q) - Incorporated in Ground 9(f) Applicant's Brief, pp. 69-74

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.

Respondents submit that this issue is addressed above in section 9(f). Respondents, however, submit that the school disciplinary evidence was admissible pursuant to the notice of evidence in aggravation. R. 1904. Nevertheless, the evidence was used and presented by the Applicant's social worker who declared that she reviewed school records from St. Matthews and John Ford Middle School. R. p. 1535. She specifically referred to his education plan in elementary school through the significant number of infractions that he had in the Middle School. R. pp. 1542-1545. Since the records were generally included in the notice of evidence of aggravation as violation of "rules" and "disregard for peace and good order" as a juvenile, counsel was not deficient in failing to object. State v Riddle, 291 S.C. 232, 237, 353 S.E.2d 138, 141 (1987). Section 16-3-20 (B). ("In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible.") Further, even if counsel was deficient, prejudice

has not been proven where the same evidence is presented by his own social work expert to support her opinions about his "rapidly deteriorating" situation. Under Jones v State, supra, Sixth Amendment prejudice has not been shown. Respondents incorporate its argument set forth in ground 9(f) above.

Issue Relating to Concession of Guilt and IAC - Ground 9(r) - Applicant's Brief, pp. 118-121

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.

In this allegation , Hughes asserts the counsel's concession of guilt at the outset of the case violated his rights under the state and federal constitution. 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 charges and that the reason he was doing so was to allow the jury to make the decision in the penalty phase rather than the judge. He stated that if the law was different that they would have pled guilty a long time ago. Contrary to the assertion of the Applicant, counsel stated that they would assert that the defendant was guilty, but not state it specifically to assure that it was not a guilty plea. R. pp. 762-63. Counsel then declared that he had discussed this strategy with the Applicant and his family and he declared that he had and that he believed that they concurred in the strategy. R. pp. 763-64. The trial judge then inquired of Hughes concerning his understanding of understanding of the burden of proof and 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 p. 765.

Consistent with the expressed strategy, 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 p. 809.

The Applicant makes the bare conclusion that these comments and strategy revealed that the waiver was secured upon an erroneous premise. This is not supported by the evidence. Newsom testified that his actions were consistent with the agreed strategy. PCR Tr. pp. 370-371, 443-444. Newsom was convinced that his client was informed of the position and that he also informed his grandmother. PCR Tr. pp. 443-44. Hughes responded affirmatively to the trial judge's question as to whether Applicant agreed to admit his involvement. Particularly, he was advised that his counsel was going to admit his involvement in the grand larceny of a vehicle, armed robbery, assault and battery and murder and that he was "in, around, upon and a part of it." R. p. 765. Contrary to the assertions of current counsel, there is no evidence that he did not understand the court's questions.

In Young v Catoe, 205 F.3d 750, 761 (4th Cir 2000), the Court recently rejected a challenge to a concession of guilt strategy in a South Carolina case. In its pertinent part, the Court addressed the issue as follows:

> Our precedents plainly illustrate that counsel's concession of a client's guilt does not automatically constitute deficient performance. Rather, we must heed Strickland 's admonition to consider the totality of the circumstances confronting the lawyer in order to accurately evaluate the reasonableness of the conduct at issue. In Clozza v. Murray, 913 F.2d 1092 (4th Cir.1990), a capital habeas proceeding, we addressed the petitioner's claim that defense counsel had rendered ineffective assistance at trial

by making a number of remarks intended to put distance between counsel and the petitioner, with the result that the jury may have perceived counsel to have effectively conceded the petitioner's guilt. We acknowledged that, under Strickland, a trial strategy designed to maintain counsel's credibility with the jury could be reasonable, notwithstanding the possibility of short-term harm to the defendant. The lawyer in Clozza, faced with "overpowering" proof against his client, id. at 1101, was left with the sole hope of convincing the jury to accept his characterization of the evidence and ignore those portions of the defendant's trial testimony inconsistent with an intoxication defense. We observed that the remarks at issue indicated to the jury that defense counsel understood the gravity of the crimes as well as their horrible nature. Had counsel attempted to pass the crimes off as anything other than the atrocities that they were, his credibility with the jury would most certainly become suspect. Thus, we conclude that counsel's remarks were consistent with his trial strategy.
Id. at 1099.
Our subsequent decision in Bell v. Evatt, 72 F.3d 421 (4th Cir.1995), makes the point more precisely. In that case, the petitioner's lawyer, attempting to secure a guilty-but-mentally-ill verdict for his client on charges of murder and kidnaping, explicitly told the jury during his closing argument*760 that his client was guilty of the latter. We rejected the petitioner's claim that counsel had represented him ineffectively, noting that the evidence supporting the kidnaping charge was "overwhelming," id. at 429, and that [i]t was important for the defense to retain some credibility so that the jury would be sympathetic to the defense witnesses testifying that Bell deserved mercy....[T]he decision to pursue a GBMI verdict was a strategic one that Bell and his trial counsel agreed to.... All indications lead us to conclude that the decision to concede his guilt was a rational one.... Id. at 428 (internal quotation marks omitted). [FN6]

FN6. See also United States v. Leifried, 732 F.2d 388, 390 (4th Cir.1984) (counsel not ineffective for admitting defendant's guilt of individual drug offenses where evidence was overwhelming and concession's purpose was to persuade the jury that defendant was innocent of operating a continuing criminal enterprise).

Clozza and Bell stand for the proposition that, on occasion, it is best to risk losing the battle in the hope of winning the war. "There is a distinction which can and must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender." Clozza, 913 F.2d at 1099. As we there-after recognized, "[s]ome remarks of complete concession may constitute ineffective assistance of counsel, but tactical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming evidence of the defendant's guilt." Bell, 72 F.3d at 429.
In Clozza, it was necessary for counsel to retreat from being identified too closely with the cause of his client, if the latter were to stand any chance of benefiting from

the former's credibility. In Bell, it was necessary for counsel to retreat from pursuing acquittal on the charge of kidnaping, in order to increase the likelihood that the jury would return a verdict of something less than unequivocal guilt of murder. And, in the case now before us, it was necessary for counsel to retreat from an unlikely acquittal of a patently guilty client, so that he might attain the more realistic goal of saving the client's life.

That was, at least, the reasoning of the PCR Court, which found that, in the face of "an overwhelmingly strong case" against Young, [FN7]

FN7. In addition to Young's confession, detailed supra at 756, witnesses placed Young in the vicinity of the school near the time of the shooting, the murder weapon had been hidden just outside the front door of Young's residence, and Young had told his mother that investigators were accusing him of a "shooting at the school," when the officers had not yet revealed the purpose of their visit to the family's home.

counsel felt that the best way to save [Young's] life was if he gave the jury the appearance that he was willing for the truth to come out concerning the murder and was remorseful for his role in it.... Obviously, counsel's concession is consistent with the overall strategy of conceding that [Young] was technically guilty of murder but did not deserve the death penalty.

J.A. 1738-39. The court concluded that "counsel's strategic decision--made only after investigation and with [Young's] express approval [FN8]--was reasonable." J.A. 1726.

FN8. At the PCR hearing, Young denied having discussed with Mann any trial strategy. As we observed supra in note 3, however, we are bound to accept the PCR Court's contrary finding. Nonetheless, Young points out that Mann's own testimony acknowledged that they discussed the decision to "concede guilt" only to the extent that Mann promised Young that his arguments to the jury would be crafted to Young's anticipated testimony. Young's testimony, of course, established that he was guilty of murder. See supra at 758. Hence, the PCR Court's finding of consent has not been rebutted by clear and convincing evidence, and is not unreasonable.

With regard to the Sixth Amendment's requirement that trial counsel render competent *761 assistance, the PCR Court's interpretation of the applicable Supreme Court precedents is largely in accord with our own, as evidenced by the similarities in circumstances, analysis, and result between this case on one hand, and Clozza and Bell on the other. Insofar as one could argue, however, that the PCR Court's decision is an extension of Strickland and its progeny beyond the limits of what we have previously sanctioned, it nevertheless does not represent an unreasonable application of clearly established federal law. Consequently, paying strict heed to the standard of review set forth in § 2254(d)(1), we must uphold the

> PCR Court's conclusion that Mann's concession of Young's guilt did not constitute deficient performance. [FN9]
>
> FN9. It is of little moment that Mann also conceded the presence of malice. As we noted supra at 757, malice is an essential element of the crime of murder in South Carolina. By conceding Young's guilt of murder, Mann necessarily conceded that Young acted with malice aforethought. In the event that the jury might have ascribed unintended meaning to counsel's concession, i.e., viewed Young as a malicious person within the lay definition of the term, Mann effectively negated that possibility by portraying his client in a positive light during the balance of his opening. Further, to the extent that the prosecution's burden of proof was in danger of being ameliorated as the result of Mann's misstatements concerning implied malice, that danger was avoided as the result of the trial judge giving a proper malice instruction prior to the jury commencing its deliberations.

Id. The Respondents submit that the "waiver" to reveal his consent to the concession of guilt strategy was sufficient. There was no showing that counsel actions were either deficient or prejudicial under Strickland. His speculation that Hughes did not concur in the strategy is defeated by his statements in open court which carry a presumption of verity.[31] Further, the fact that Hughes failed to testify in this hearing about any misunderstanding shows that he has failed in his burden of proof. The allegation must be dismissed.

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.

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[31] He speculates that Hughes mental status would preclude him from understanding these concepts. The problem is that he never presented the applicant as a witness to state that he did not agree with the strategy or understand the questions. The record shows that he was informed. He has failed to show otherwise. State v Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988) is distinguishable. Although Newsom stated that he could not be sure that he understood these discussions, there is no evidence that Hughes disagreed with the approach.

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). Respondents disagree that this comment mandates 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.[32] 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

[32] 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.

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**.

Respondents submit 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, 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.

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN **HERMAN LEE HUGHES, JR.,** Applicant, v. **MICHAEL MOORE**, Commissioner, Department of Corrections, and **CHARLES M. CONDON**, Attorney General, State of South Carolina, Respondents.	IN THE COURT OF COMMON PLEAS No. 98-CP-09-101 APPLICANT'S REPLY TO RESPONDENTS' POST-HEARING MEMORANDUM IN OPPOSITION TO POST-CONVICTION RELIEF APPLICATION

Most of the arguments in Respondents' post-hearing memorandum are easily answered by reference to Applicant's post-hearing memorandum or to the PCR and trial records themselves. Therefore, this Reply responds only to a very few discrete issues raised by Respondents.

A. Issues Relating to Adequacy of Family Court Waiver Hearing and Counsel's Representation at Waiver Hearing

Respondents argue that counsel's representation at the family court waiver hearing was effective or, in the alternative, that Applicant suffered no prejudice from counsel's ineffectiveness. In so arguing, Respondents both rely on inapposite authority and misconstrue Applicant's argument.

First, Respondents rely heavily on State v. Corey D., 2000 WL 254026 (S.C. Sup. Ct. March 6, 2000), in arguing that the law would have required transfer in this case. That reliance is misplaced, as Corey D. is wholly distinguishable from the present case. There, the South Carolina Supreme Court held the family court abused its discretion by refusing to transfer Corey D., a

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juvenile, to General Sessions Court. Id. That case involved the beatings, rapes, and murders of two elderly women (both women were over ninety years old). Although, of course, any homicide is serious, the crimes in Corey D. were far more aggravated, gruesome, and shocking than those at issue here; in fact, there the supreme court relied heavily upon the heinous nature of the murders in finding transfer appropriate. See id. at *6 ("While murder will always be considered 'serious,' the heinousness of these particular crimes is beyond dispute"). In contrast, the crimes in which Herman Hughes, Kelsey Pearce, and Henry Daniel Owens were involved were far less heinous: the victims were not beaten, raped, or otherwise molested; only one person was killed; the crimes all arose from one incident, not two separate incidents as in Corey D..

The differences in Corey D. and the present case do not stop with the degree of seriousness of the crimes. Unlike Mr. Hughes, the defendant in Corey D. possessed average intelligence and a level of maturity and sophistication consistent with his chronological age–facts the supreme court specifically noted in its opinion. In fact, of the participants in the crimes at issue there, Corey D. was indisputably the most intelligent. In contrast, Mr. Hughes has, *at best*,[1] borderline intellectual functioning, and is not–even now at age 22–a sophisticated person. See PCR Tr. 263 (testimony of Dr. Jon Venn regarding Applicant's sophistication). These factors alone distinguish this case from Corey D., which involved a far more serious crime and wholly different facts.

Second, Respondents have misconstrued Applicant's actual argument. Specifically, Respondents reduce Applicant's Sixth Amendment claim relating to counsel's representation at the

[1]Mr. Hughes is, in fact, mildly mentally retarded, but for purposes of this argument Applicant assumes (without conceding) that the State's theory of his level of intellectual functioning is accurate. Even Respondents do not dispute that Mr. Hughes' intellectual functioning is seriously sub-normal.

waiver hearing to one point: "The focus of the Applicant's Sixth Amendment argument is based upon the alleged failure of defense counsel Banks to request an evaluation and recommendation from DJJ." Respondents' Post-Hearing Memorandum at 56. This assertion reflects a misunderstanding of Applicant's argument. In fact, Applicant's position is that counsel has a duty to do *something* at a waiver hearing to ensure that the information upon which the family court bases its decision is accurate and to ensure that the family court receives adequate information upon which to base its decision. Here, counsel concedes he did virtually nothing: He called no witnesses who could have shown Applicant's extremely low intellectual functioning, immaturity, and lack of sophistication; he made no attempt to gather or present evidence regarding Applicant's amenability to rehabilitation within the juvenile justice system;[2] he did not even introduce readily available records that would have documented Applicant's serious academic and cognitive difficulties. It does not matter whether counsel's failure to protect his client's interest stemmed from inexperience, lack of time to prepare, or any other factor. Counsel's ineffectiveness remains clear. Additionally, as described in his Post-

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[2]Dr. Venn's testimony indicates Applicant was amenable to rehabilitation in the juvenile justice system. Respondents attempt to discount Dr. Venn's testimony by citing his "important bias" (opposition to the death penalty) and the fact that he himself would not have performed the DJJ evaluation on Mr. Hughes. As to the first point, Dr. Venn's opposition to the death penalty, who really cares? If anything, Dr. Venn's frank acknowledgment of his moral opposition to capital punishment enhances the credibility of his testimony; if he were truly willing to do anything to thwart the execution of a death sentence, why would he openly admit his opposition to the death penalty? Moreover, if he is really so biased, why did he acknowledge the existence of negative factors for Mr. Hughes' rehabilitation? In undersigned counsel's experience, persons who are morally opposed to the death penalty also tend to be morally opposed to perjury. Carried to its logical conclusion, the Attorney General's argument suggests that the testimony of *any* witness in a capital case who is opposed to the death penalty must be "discounted." See Respondents' Post-Hearing Memorandum at 59 n.10. This is silly. By the same token, perhaps the testimony of Solicitor Walter Bailey–or any other pro-death penalty witness--should be "discounted" because of an important bias: not only does Solicitor Bailey believe in the death penalty, but he wants Herman Hughes dead.

Hearing Memorandum, Applicant was prejudiced by counsel's ineffectiveness.

B. Issues Relating to the Denial of Applicant's Right to Appointment of Two Lawyers

In their response to Applicant's arguments regarding his right under S.C. Code Ann. § 16-3-26 to the appointment of two lawyers, Respondents engage in an incredible reading of what should be plain statutory language. As Respondents acknowledge, § 16-3-26(b) provides that "[w]henever any person is charged with murder and the death penalty is sought, the court, *upon determining that such person is financially unable to retain adequate legal counsel*, shall appoint two attorneys to defend such person in the trial of the action." (emphasis added). Although the phrase "such person" is quite obviously singular and even more obviously refers only to the defendant himself, Respondents apparently read "such person" to mean "such person, his grandmother, or any other family member of any means." The only real problem with Respondents' interpretation is its lack of any basis in the statutory language of § 16-3-26(b).

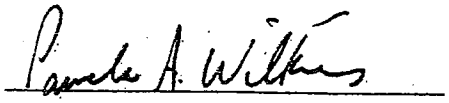
Contrary to Respondents' contention, Herman Hughes was personally "financially unable to retain adequate[3] legal counsel." He was indigent, a point Respondents do not contest. He–not his grandmother–was the capital defendant ("such person" referred to in § 16-3-26(b)) affected by the statute. Under these circumstances, there can be little question Mr. Hughes fell within the ambit of the statute.

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[3]Applicant does not concede that his grandmother was financially able to provide "adequate" legal representation. As is described more fully in Applicant's post-hearing memorandum, the Record is replete with evidence of the prejudice resulting from the use of only one lawyer (who himself testified he was underpaid for the case and lacked time or resources to focus as fully on some issues as he would have liked).

For the foregoing reasons, the Application for Post-Conviction Relief should be granted, and Applicant's convictions and death sentence should be vacated.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

June 8, 2000.

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 the Applicant's Reply to Respondents' Post-Hearing Memorandum in Opposition to Post-Conviction Relief Application 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 8th day of June, 2000, in Columbia, South Carolina.

Pamela A. Wilkins

State of South Carolina

The Circuit Court of the Fifteenth Judicial Circuit

Paula H. Thomas
Judge Fifteenth Circuit
Post Office Drawer 1270
Georgetown, South Carolina 29442

(843) 546-9618

FAX MEMORANDUM

TO: Pamela Wilkins, Esq. FAX (803)765-0705
Center for Capital Litigation

Donald Zelenka, Esq. FAX (803)734-4035
SC Attorney General's Office

FROM: Judge Paula H. Thomas

DATE: ~~4/28/00~~ 8/1/00

RE: Herman Hughes v. Michael Moore, et al.
C/A No. 98-CP-09-101

MESSAGE:

Mr. Zelenka, please draft a proposed order for the above referenced matter based on the attached order outline.

Please provide a copy to opposing counsel for their review.

14 Pages
YOU SHOULD RECEIVE ~~1 PAGE~~ INCLUDING THIS ONE.
IF YOU DO NOT RECEIVE ALL PAGES PLEASE CALL (843) 546-9618

HERMAN HUGHES
PCR -- OUTLINE OF ORDER

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 U.S. CONST.

9(b) APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE FAMILY COURT HEARING DETERMINING WHETHER HE WOULD BE WAIVED TO GENERAL SESSIONS COURT, IN VIOLATION OF THE S.C. LAW AND THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONST.

RELIEF DENIED. 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.

9(c) APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE HEARING TO DETERMINE HIS COMPETENCY TO STAND TRIAL, IN VIOLATION OF S.C. LAW AND THE 6TH AND 14TH AMEND. TO U.S. CONST.

RELIEF DENIED. 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 Applicant would have been found incompetent to stand trial.

The test of whether or not a defendant has the present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational and factual understanding of the proceedings against him. Dusky v. U.S., 362 U.S. 402 (1960).

Applicant relies on the testimony of Dr. Marty Beyer and Dr. George Woods in support of his claim that he should not have been found competent by the trial court.
This court finds:

1. Applicant has failed to show that trial counsel's performance was deficient.
2. Applicant has failed to show a reasonable probability that absent counsel's performance, he would have been determined incompetent.
3. The testimony of Dr. Marty Beyer and Dr. George Woods may have questioned the competency of Applicant, but neither expert was able to offer a conclusive opinion as to the Applicant's level of competency at the time the crime was committed.
4. The record supports that Applicant displayed a reasonable degree of rational understanding of the crime, the roles of the various parties, the charges, the potential punishment, and the role of his counsel and other judicial participants.

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 U.S. CONST.

RELIEF DENIED. 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.
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 pre-emptory 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.

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 16TH AND 14TH AMEND. TO THE U.S. CONST.

RELIEF DENIED. 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*.. US v. Michaud, 925 F.2d 37 (1st Cir. 1991), Russell v. Collins, 944 F.2d 202 (5th Cir.1996), Gustave v. US, 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).

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 Amend. 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.

9(f) APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF S.C. LAW AND THE 16TH AND 14TH AMEND. TO THE U.S. CONST.

RELIEF DENIED. Applicant's constitutional rights have not been violated. Applicant has failed to satisfy the *Strickland* standard of review for challenging a death sentence. Applicant has failed to show that trial counsel's performance during the sentencing phase was deficient. Even if trial counsel could be found ineffective, the Applicant has failed to show that absent any error on the part of trial counsel, the balance of aggravating and mitigating circumstances would not warrant the death penalty.

Applicant claims that counsel was deficient because he failed:

1. to retain experts who could explain child development and child retardation as well as experts who could address the adequacy of prior evaluations.
2. to retain an expert in mental retardation and have his experts fully explain Applicant's mental limitations.
3. to retain an expert to testify that Applicant suffered from brain damage.
4. to adequately present to the jury that the school system failed Applicant.
5. to object to the State's introduction of Applicant's school disciplinary records at the sentencing phase.
6. to object or to limit the presentation of victim impact information submitted to the jury.
7. to object to Solicitor Bailey's penalty phase closing argument when he described the

State providing clothing and medical attention to Applicant if sentenced to prison.

Trial counsel has an obligation to conduct an investigation to allow a determination of what experts to consult. Caro v. Calderon, 165 F.3d 1223, 112 (9th Cir. 1991).
Counsel's failure to pursue experts that his investigation and consultation deemed unnecessary does not amount to ineffective assistance of counsel. Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), Williams v. Calderon, 41 F.Supp. 1043 (D.C.Cal. 1998), Johnson v. Moore, 164 F.3d 624 (4th Cir. 1998). Victim impact evidence is admissible in the sentencing phase to show the uniqueness of the victim and the specific harm caused by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1992). Victim impact evidence is relevant to assist the jury in determining defendant's moral culpability and blameworthiness and is inadmissible only if it is so unduly prejudicial that it results in a fundamentally unfair trial. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 257, 115 L.Ed.2d 720 (1991).

Applicant's grandmother testified about his learning difficulties.
Dr. Harold Morgan testified that Applicant was "right on the borderline of retardation" based on his review of the medical records, school records, and Ms. Boette's social history.
Dr. John DeWitt testified of Applicant's intellectual limitations, attention deficit disorder, slowness, but that the did not meet the minimal criteria for mental retardation. Dr. DeWitt also testified that he had the ability to conform his behavior and did not have an irresistible impulse to do something wrong.
Dr. Annette Boette testified that:

a. Applicant came from a family of very little formal schooling and few skills and who could not attend to his needs.
b. Applicant suffered trauma as a result of his mother and grandmother fighting over his adoption.
c. Applicant has borderline intellectual ability and the education system failed to ensure his needs were met.
d. Applicant could be easily influenced by others because of his limitations.

Dr. Woods testified that his evaluation of Applicant revealed evidence of brain damage. However, he also stated that alcohol would have an added effect in that it would further disinhibit and impair Applicant's judgment. He said this would not cause Applicant to act under an irresistible impulse. Dr. Woods acknowledged that records prior to 1995 would have to be reviewed to determine if applicant tested positive for syphilis before diagnosing Applicant with congenital syphilis. He conceded that no neurological impairments were revealed by the Hall Institute's evaluations.

Judge Cottingham instructed the jury that:

a. Applicant had no significant prior criminal record.
b. That Applicant was under the influence of mental problems at the time of the murder.

c. Ability of Applicant to conform his conduct to the law was substantially impaired.
d. Applicant was only 16 years old at the time of the crime.
e. Applicant was mentally retarded at the time of the crime and he went on to define mental retardation.
f. Applicant acted under the domination of another person.
g. The jury can consider any other mitigating circumstances.

Court finds:

1. Counsel provided an explanation for his failure to retain a child development expert; he believed that the experts available could handle the issue and the Center for Capital Litigation offered no alternative suggestions when he consulted them for advice.
2. Counsel stated that Applicant's age was the principal reason for his strategy in pursuing a life sentence.
3. The trial court adequately instructed the jury to consider Applicant's age and mentality as mitigating factors.
4. Applicant's limited abilities, impaired intelligence, and impulsivity was adequately presented to the jury.
5. Counsel provided an explanation as to why he chose not to retain an expert in mental retardation. Specifically, he stated that he understood from his own experts that Applicant would not qualify because his IQ was higher than 70.
6. Counsel conducted a reasonable investigation as to what experts were needed at trial.
7. Although Applicant's impairments were never referred to as "brain damage," the jury was still informed of Applicant's limited intellectual functioning, his tendency to act impulsively, and the effect of the alcohol on his judgment.
8. Counsel was not deficient in his investigation of the school system's compliance with federal laws, nor is he deficient in his presentation to the jury sufficient evidence to show that the education system failed the Applicant. The jury heard ample evidence as to Applicant's trouble with school and his limited academic abilities.
9. Counsel provided an explanation for his failure to object to the State's introduction of Applicant's school disciplinary records; he state that he would rely on some of it himself in mitigation to show that Applicant had been failed by the system and that his experts relied upon those records in making their assessments of Applicant.
10. Counsel provided an explanation for his failure to object to the admission of the victim impact testimony presented by the State and in fact stated that it was his opinion that it was admissible; Counsel was not ineffective.
11. Counsel was not ineffective for failing to object to the Solicitor's closing

argument on the State's care of Applicant in prison.

12. Applicant has failed to satisfy his burden of proof in showing that there is a reasonable probability that but for counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death penalty.

9(g) and 9(h) APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER S.C. LAW AND THE 16TH AND 14TH AMEND. TO THE U.S. CONST. BY TRIAL COUNSEL'S FAILURE TO ARGUE THAT INTERNATIONAL TREATIES AND CUSTOMARY INTERNATIONAL NORMS BINDING UPON THE U.S. FORBID THE EXECUTION OF JUVENILE OFFENDERS.

APPLICANT'S DEATH SENTENCE VIOLATES INTERNATIONAL TREATIES AND CUSTOMARY INTERNATIONAL NORMS BINDING UPON THE U.S.

RELIEF DENIED. Applicant's constitutional rights have not been violated. Applicant has failed to satisfy the *Strickland* standard of review for challenging a death sentence. Applicant has failed to show that trial counsel's performance during the sentencing phase was deficient. Even if trial counsel could be found ineffective, the Applicant has failed to show that absent any error on the part of trial counsel, the balance of aggravating and mitigating circumstances would not warrant the death penalty.

PCR relief can only be granted where "the conviction of the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." S.C. Code Ann. § 17-27-20 (1985). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Any issues that could have been raised at trial or on appeal cannot be asserted in a post-conviction relief action. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973), Drayton v. Evatt, Id.

Court finds:

1. Applicant waived his allegation for relief under international law based on his failure to raise this issue on direct appeal.
2. Counsel was not ineffective for failing to argue that international treaties because this Court agrees that reasonably competent counsel would not have asserted the international law issue based on the following:
   a. Applicant presents a novel argument that his death sentence violates the Supremacy Clause of the U.S. Const. based on the International Covenant on Civil and Political Rights' (ICCPR) prohibition of the death penalty on persons under the age of eighteen, however this Court wishes to join the unanimous

judicial authority rejecting it.

b. Applicant lacks standing to sue under the ICCPR.

c. Under S.C. Code § 16-3-20(A), the ICCPR does not invalidate the sentencing of sixteen year old persons who committed murder to the death penalty.

3. Applicant has failed to show that counsel's failure to argue the international law issue undermined confidence in the outcome or prejudiced Applicant in any way.

9(I) APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN VIOLATION OF S.C. LAW AND THE 16TH AND 14TH AMEND. TO THE U.S. CONST.

RELIEF DENIED. 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 appellate counsel, the jury would have found reasonable doubt as to the guilt of Applicant.

Applicant claims that:

1. Appellate counsel Joseph Savitz failed to argue that Applicant's death sentence was disproportionate because he was sixteen (16) years old.
2. Appellate court did not fully comply with S.C. Code § 16-3-25(B).

Court finds:

1. Appellate counsel provided an explanation as to why he did not raise this argument. He stated that he does not normally make proportionality arguments in capital cases because the Supreme Court does its own review.
2. Supreme Court found that the death sentence was proportionate to that in similar cases and is neither excessive nor disproportionate to the crime.
3. Although appellate counsel did not argue dis-proportionality, the Supreme Court complied with its statutory duty in resolving that the sentence was proportionate.
4. Applicant has failed to show a reasonable probability that but for appellate counsel's failure to address this issue on appeal that the result of the proceedings would have been different.

9(k) and 9(l) APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE 16TH AND 14TH AMEND. TO THE U.S. CONST. AND S.C. LAW BY APPELLATE'S COUNSEL FAILURE TO APPEAL THE TRIAL COURT'S RULING THAT THE S.C. CONST. PERMITS THE IMPOSITION OF THE DEATH PENALTY UPON A DEFENDANT WHO WAS A JUVENILE AT THE TIME OF THE ALLEGED CRIME.

ALTERNATIVELY, IN THE EVENT THE COURT FINDS THAT THE ISSUE CONCERNING THE S.C. CONST. WAS NO PRESERVED FOR APPEAL, APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL 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 ALLEGED CRIME VIOLATES THE S.C. CONST.

RELIEF DENIED. Applicant's constitutional rights have not been violated. Applicant has failed to satisfy the *Strickland* standard of review for challenging a death sentence. Applicant has failed to show that trial counsel's performance during the sentencing phase was deficient. Even if trial counsel could be found ineffective, the Applicant has failed to show that absent any error on the part of trial counsel or appellate counsel, the balance of aggravating and mitigating circumstances would not have warranted the death penalty.

The South Carolina Supreme Court expressly concluded that the imposition of the death penalty on a sixteen year old murder-defendant is not a violation of the Eighth Amendment to the U.S. Const. State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997).
Eighth Amendment to the U.S. Const. provides: "Excessive bails shall not be required nor excessive fines imposed, nor cruel and unusual punishment."
Article I, Section 15, of the S.C. Const. provides, "Excessive bail shall not be required; nor shall fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted.."
Death sentence imposed on a person who commits murder and who is age sixteen years old does not constitute cruel and unusual punishment pursuant to the Eighth Amendment to the U.S. Const. Stanford v. Kentucky, 492 U.S. 361 (1989). There is no national consensus forbidding imposition of the death penalty for sixteen year old defendants who commit capital murders. Stanford v. Kentucky, 492 U.S. 361 (1989).

Court finds:

1. Trial counsel made a Motion to Bar Imposition of the Death Penalty under the state and federal constitutions.
2. Applicant has failed to show a reasonable probability that but for appellate counsel's failure to address this issue on appeal that the result of the proceedings would have been different.
3. The South Carolina Supreme Court has conducted proportionality reviews for two other cases involving sixteen year old defendants.
4. Applicant has failed to show a reasonable probability that but for appellate counsel's failure to address this issue on appeal that the result of the proceedings would have been different.

9(m) and 9(n) APPLICANT WAS DENIED HIS STATUTORY RIGHT TO THE

APPOINTMENT OF TWO ATTORNEYS TO REPRESENT HIM AT HIS CAPITAL TRIAL

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED Y THE 16TH AND 14TH AMEND. TO THE U.S. CONST. AND S.C. 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

RELIEF DENIED. 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.

There is no constitutional right to have two attorneys appointed, even in capital case. Comm. v. Griffin, 511 Pa. 553 (1986) (trial counsel not found ineffective for failing to obtain another attorney in capital case). S.C. Code § 16-3-26 does not require 2 attorneys be appointed to a capital case when an attorney or attorneys have been privately retained; plain reading of statute requires appointment of two attorneys ONLY when D is "financially unable to retain adequate legal counsel." State v. Gilbert and Gleaton, 273 SC 690 (1979), State v. Butler, 277 SC 452 (1982), State v. Kornahrens, 290 SC 281 (1986), State v. Bell, 302 SC 18 (1990), State v. Davis, 309 SC 326 (1992), State v. Rocheville, 310 SC 20 (1993), Rocheville v. Moore, 175 F.3d 1015 (1999)
The Court finds:

1. Judge refused Newsome's request for second appointed lawyer, but this request was made in chambers and not in open court
2. Judge did make available indigent funds to be used for investigators and expert witnesses.
3. Based on Applicant's ability to retain counsel Newsome, the Court finds that Applicant was financially able to retain adequate legal counsel.
4. Therefore Applicant was not entitled to 2 attorneys under S.C. Code § 16-3-26.

GROUNDS 9(o)-9(p) are dismissed for failure to prosecute.

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 I & 3 OF THE S.C. CONST. AND BY THE 14TH AMEND. TO THE U.S. CONST.

RELIEF DENIED. 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.

Counsel's concession of guilt does not automatically constitute deficient performance, but must heed Strickland's admonition to consider the totality of the circumstances. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000); Clozza v. Murray 913 F.2d 1092 (4th Cir. 1990).
Court finds:

1. Counsel announced prior to opening that as a matter of strategy, he would admit to Applicant's involvement to allow the jury to make the decision in the penalty phase rather than the judge.
2. Counsel stated that they would assert Hughes was guilty, but not state it specifically to avoid guilty plea.
3. Applicant answered affirmatively to court's specific questions regarding his understanding of the burden of proof and whether or not he had been informed of and agreed with counsel's strategy to admit involvement
4. Newsome was convinced that client and his grandmother were informed of the position.
5. Newsome's trial strategy, which was designed to maintain counsel's credibility with the jury, is reasonable.
6. Applicant has failed to show that Newsome's actions were deficient or prejudicial under *Strickland;* his speculation that Hughes did not concur in the strategy is defeated by his statements in open court which carry a presumption of verity.
7. State v. Arthur is distinguishable. Although Newsome stated he could not be sure that he understood these discussions, there is no evidence that Hughes disagreed with the approach.

9(s) and 9(t) APPLICANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF S.C. LAW AND OF THE 6TH, 8TH, AND 14TH AMEND. TO THE U.S. CONST. IN THAT THE STATE ELICITED TESTIMONY DURING DIRECT EXAMINATION OF A WITNESS THAT THE SOLICITOR EITHER KNEW OR SHOULD HAVE KNOWN TO BE FALSE.

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF S.C. LAW AND OF THE 6TH AND 14TH AMEND. TO THE U.S. CONST. BY COUNSEL'S FAILURE TO OBJECT TO THE SOLICITOR'S ELICITATION OF FALSE TESTIMONY DURING THE DIRECT EXAMINATION OF A WITNESS.

RELIEF DENIED. 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 misprison of a felony.
Court finds:

1. Guilty plea transcript of Owens reveals the court asking "do you understand that for misprison 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 misprison 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 (5 years) 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 Owen's 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.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	No. 98-CP-09-101
	)	
HERMAN LEE HUGHES, JR., Applicant,	)	
	)	
v.	)	APPLICANT'S OBJECTIONS TO RESPONDENTS' PROPOSED ORDER DENYING RELIEF
	)	
MICHAEL MOORE, Commissioner, Department of Corrections, and **CHARLES M. CONDON**, Attorney General, State of South Carolina, Respondents.	)	

APPLICANT'S OBJECTIONS TO RESPONDENT'S PROPOSED ORDER

I. THE ATTORNEY GENERAL'S PROPOSED ORDER – IF SIGNED – WOULD NOT REFLECT AN INDEPENDENT JUDICIAL DECISION BUT WOULD BE THE EQUIVALENT OF ADOPTING IN TOTO THE ADVERSARIAL BRIEF OF ONE OF THE PARTIES.

The Attorney General's proposed order is little more than its post-hearing brief with a different caption. While the Court did provide the Attorney General with at least some minimal guidelines for the order of dismissal,[1] the Proposed Order is, in most respects, a verbatim regurgitation of respondent's post-hearing brief, with the Court's own findings added to each section as an afterthought. Clearly, this is no substitute for independent judicial decisionmaking and this

[1]With all due respect, the Court's bare bones letter reflects little independent judicial analysis. The outline appears to be little more than sentences and citations pulled from Respondents' post-hearing memorandum. Although the Court obviously agrees with Respondents that relief should be denied, it seems impossible that the Court would accept without alteration virtually *every* factual and legal argument advanced by Respondents. While Applicant understands the Court's desire to rule promptly, the need for a thorough, accurate, and independent adjudication of the issues certainly should outweigh a desire for expedience--particularly where, as here, a human life hangs in the balance.

court should write its own order which reflects the court's independent findings and conclusions.

Appellate courts have expressed clear disapproval of lower courts' wholesale adoptions of one party's findings of fact and conclusions of law, concluding that such findings are "not the original product of a disinterested mind." Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977); see also, e.g., Shaw v. Martin, 733 F.2d 304, 309 n.7 (4th Cir. 1984)("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions"). This disapproval stems from the clear implication of such a practice: Wholesale adoption of such findings and conclusions indicates the lower court's abdication of its proper function as adjudicator. See, e.g., Philbrook v. Ansonia Bd. of Educ., 925 F.2d 47, 53 (2d Cir. 1991)(viewing with disfavor court's verbatim adoption of party's proposed order); Kelson v. United States, 503 F.2d 1291 (10th Cir. 1974)(mechanical adoption of one party's proposed findings constitutes an abdication of the trial judge's duty). Certainly, if this Court signs the Proposed Order, the findings in the Order should be entitled to little deference by any subsequent reviewing court.

II. THE ATTORNEY GENERAL'S PROPOSED ORDER CONTAINS FINDINGS WHICH ARE CLEARLY INACCURATE.

The Attorney General's proposed order contains a number of statements regarding trial counsel's investigation, development and presentation of sentencing phase evidence which are factually inaccurate. For example, the order contains statements to the effect that Mr. Newsom met with undersigned counsel John Blume of the South Carolina Death Penalty Resource Center, and that the Resource Center did not advise Mr. Newsom to seek any expert opinions or services beyond what Mr. Newsom had already retained. *See, e.g,* Proposed Order at 128. However, that is simply not

true. As the affidavit of John H. Blume, attached to this memorandum as Exhibit A reveals, Mr. Newsom was advised to:

1) retain the assistance of a neuropsychologist;

2. retain the services of an expert in mental retardation;

3. secure mental experts with expertise in the areas that were evident from the investigation and social history.

In fact, Mr. Newsom was provided with the names and telephone numbers of individuals with this expertise. For example, Mr. Newsom's own notes from his file reveal that he was given the name and telephone numbers of: James Evans, Ph.D., who in fact conducted a neuropsychological evaluation in connection with the post-conviction proceedings in this case and determined that Mr. Hughes has brain damage; Jonathan Venn, Ph.D., a psychologist who worked for the Department of Juvenile Justice and who did the waiver evaluation in connection with the post-conviction proceedings in this case; and Richard Nagle, an expert in mental retardation at the University of South Carolina. *See* Exhibit A. Thus, contrary to testimony cited in the Proposed Order at 110, counsel was not "unaware" of the existence of a mental retardation specialist. In addition, Mr. Newsom was provided with sample examinations of a neuropsychologist and an expert in mental retardation, and was provided several articles about mental retardation issues and the development of mental health evidence in capital cases. These articles discussed not only the need to secure an expert in mental retardation in cases in which that was at issue, but also the need for a neuropsychologist and the need to locate and secure experts in the areas which emerge from the investigation and social history.[2] *Id.*

[2]Exhibit B is an affidavit from Mr. Newsom authenticating the documents.

Thus, this Court can not sign the order with the proposed findings that Mr. Newsom's representation passed constitutional muster because he was not advised to seek additional expert assistance. Signing this order would be improper not only because such a statement is legally inaccurate in that it makes the performance prong a subjective test as opposed to an objective one--the standard is whether counsel's actions were objectively reasonable, not whether they were subjectively reasonable because of a conversation with a third party--but also because the statements are not true, and are refuted by notes and documents contained in Mr. Newsom's trial file which establish that he was advised to seek additional expert assistance and did not.

If the Court intends to incorporate these findings, or is considering adopting this part of the Attorney General's Proposed Order, then it will be necessary to relieve Mr. Blume as counsel in this matter and/or re-open the evidentiary hearing in this case in order that Mr. Blume can testify as to his conversations with Mr. Newsom about the necessity of securing additional expert assistance and the information he provided Mr. Newsom about particular experts.[3] The essence of Mr. Blume's testimony is set forth in his affidavit which is attached as Exhibit A.

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[3]As the affidavit reveals, undersigned counsel were not provided with the attachments to Mr. Blume's affidavit, including the notes of Mr. Newsom's conversation with Mr. Blume, until after Mr. Newsom testified in this case. Counsel received what was purported to be the entire file, but discovered at the evidentiary hearing, after Mr. Newsom's testimony that, in fact, they had not received the entire file. PCR TR. 471-72. Even after reviewing the documents on short notice at the court house, counsel could not possibly anticipate that the alleged failure of Resource Center personnel to suggest additional expert assistance would be a linch-pin of any final order and thus could not appreciate the significance of the documents. In any event, it would be fundamentally unfair to adopt such clearly erroneous findings in an order denying post-conviction relief in a case involving a brain-damaged, sixteen year old, mentally retarded defendant.

III. IN NUMEROUS RESPECTS THE ATTORNEY GENERAL'S PROPOSED ORDER GOES WELL BEYOND THE SCOPE OF THE OUTLINE PROVIDED BY THIS COURT.

In numerous material respects, the Attorney General's Proposed Order exceeds the scope of the outline provided by this Court. Throughout the Proposed Order, the Attorney General has pushed the limits of what this Court has outlined, in every instance creating for itself a more favorable appellate and collateral review posture. This pervasive shading and stretching of this Court's outlined conclusions makes it impossible to enumerate each objectionable instance without creating an enormous document - and without appearing to be whining over small matters. To avoid both cumbersome length and the charge of quibbling, Applicant will first set out the major deviations from and addendums to this Court's outline, and then return to the source and importance of smaller instances of gilding the outline's lily.

A. The Juvenile Transfer Hearing

The proposed Order differs in several material respects from this Court's outline as to this issue.

- The proposed Order finds that procedural default bars any substantive due process claim concerning the juvenile waiver hearing. However, the Court's outline contains no finding of procedural default. Indeed, there is no mention of the default issue at all in relationship to this claim.

- The proposed Order addresses at some length Martin Banks' failure to make a timely request for a waiver evaluation by the Department of Juvenile Justice. In fact, the proposed Order treats this as the central issue pertinent to Mr. Hughes' ineffectiveness claim. Yet this Court's outline relied on wholly different factors, most significantly the Court's conclusion that Mr. Hughes would have been transferred to General Sessions Court regardless of what his counsel had done.

- Similarly, the proposed Order contains findings (or rantings) that Dr. Jon Venn has a so-called "personal moral bias" against the death penalty that renders his every opinion suspect. Although Dr. Venn's views were explored on cross-examination,

this Court's outline contains absolutely no indication that it found that Dr. Venn's expertise was compromised by those views. Again, the Court's outline makes no mention at all of Dr. Venn's credibility or lack thereof, and such disparaging innuendo is by no means necessary to the Court's conclusion.

B. Ineffective Assistance during Jury Selection

In the section of the outline addressing the *voir dire* ineffectiveness claim, this Court based its denial of relief on a few discrete factors: (1) the trial court's explanations to the jurors of the concepts of mitigation and aggravation; (2) trial counsel's specific "strategic" explanations for failing to challenge or strike William Barron or Brenda Wise; and (3) trial counsel's purported tactical reasons for his failures to ask more in-depth questions of jurors and his purported tactical reason for not attempting to rehabilitate jurors who were acquainted with the Hughes family. Instead of providing appropriate record support for these findings, the Attorney General's Proposed Order adds several gratuitous findings of fact and conclusions of law.

- The Proposed Order specifically finds that William Barron and Brenda Wise "convincingly" stated they could put aside their prior knowledge of the case and of the victim's family members and their pain. The Court's outline contains no finding remotely similar to this, nor is this finding necessary to any of the Court's conclusions. Moreover, it is difficult to imagine how the Court - or the Attorney General - could have come to such a conclusion. Presumably one would need to have been present in order to make such a judgment.

- Similarly, the Proposed Order finds that counsel was not ineffective for failing to object to Solicitor Bailey's questions about the jurors' ability to vote for death for a sixteen year-old offender. In fact, the proposed Order contains a rather extensive discussion of this issue. Once again, however, the Court's outline did not address this issue at all.

- The Proposed Order also contains an extensive discussion of the testimony of Jeff Bloom and John Mauldin, Mr. Hughes' attorney experts. Yet the Court's outline focused wholly on Mr. Newsom's so-called tactical explanations for his actions and inactions, as well as on the trial court's explanations to and questioning of the jurors. The Court's outline contained neither mention nor evaluations of the testimony of Mr. Bloom and Mr. Mauldin.

C. Guilt Phase Ineffectiveness

In the guilt phase ineffectiveness section of the Proposed Order, the Attorney General moves significantly beyond the Court's actual findings in the outline in two respects.

- The proposed Order specifically finds that Applicant 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." Proposed Order at 99. However, this Court's outline made no findings at all regarding the nature of Ms. Hoffman's relationship with Kelsey Pearce.[4]

- The Proposed Order finds that trial counsel's failure to recall Officer Danny Kirkland to testify about Hoffman's statements at the crime scene did not constitute ineffective assistance. This is remarkable overreaching in light of the fact that this Court's outline did not even address the failure to recall Officer Kirkland.

D. Penalty Phase Ineffectiveness

In the crucial section concerning penalty phase ineffectiveness, the Attorney General's Proposed Order reflects a one-sided creativity in transforming what this Court found into what the State believes this Court should have found.

- This Court's outline stated only that counsel was not ineffective in failing to object to victim impact evidence because he provided an explanation for his failure to object. In addition to this finding, the Proposed Order introduces a specific finding that all the victim impact evidence was admissible. This Court found a strategic reason for counsel's action, but the Proposed Order added that there was no opportunity or need to make a strategic decision.

- Similarly, this Court's outline states that counsel was not ineffective for failing to object to admission of Applicant's school disciplinary records, because counsel intended to use these records himself. The Proposed Order, however, after dutifully repeating that finding, adds an additional finding that the solicitor's Notice of Evidence in Aggravation was sufficiently broad that trial counsel had no viable objection in the first place. .

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[4]Such a finding would be remarkable given the evidence of the relationship came from a variety of sources (including law enforcement) and the only denial came from Kelly Hoffman, who not only had an incentive to deny it, but who also clearly committed perjury at the PCR hearing.

I reject to denial of ineff. assist.

- In addressing counsel's failure to retain someone with specific expertise in child development, the Court's outline states only that trial counsel believed the experts he had already retained could handle the issue and that no one advised him to secure such an expert. Not limiting itself to this finding, the Attorney General's Proposed Order also has the Court specifically finding that the details of child and adolescent development are a matter of "common sense" such that jurors would need no expert assistance as to these details!

E. International Law As a Bar to Applicant's Death Sentence

Reading this Court's directions would seem to provide clear guidance as to the matters to be addressed. Nevertheless, the Attorney General offers a lengthy discussion and analysis of an issue clearly outside the scope of this Court's outline.

- The Applicant presented two bases for his claim that international law prohibited sentencing him to death for a crime he committed at the age of 16. This Court's outline is very clearly limited to Applicant's assertion that a treaty bars his death sentence. No disposition or even mention is made of the claim that jus cogens also bars his sentence. Nevertheless, the Attorney General analyzes the other claim as well. Given that the Applicant presented expert testimony on this issue, it is particularly inappropriate for the Attorney General to determine the persuasiveness of and weight to be accorded that testimony.

6. Ineffectiveness of Appellate Counsel

The Applicant's claim of ineffectiveness with respect to appellate counsel was extraordinarily simple: He should have argued that the Applicant's sentence was disproportional. Nevertheless, once again the Attorney General was dissatisfied with this Court's findings and felt the need to augment them.

- The Court's outline summarizes appellate counsel's explanation for his omission and determines that the South Carolina Supreme Court complied with its duty in determining proportionality. To that outline the Attorney General has added a discussion of how appellate counsel, through other sections of his brief, informed the Supreme Court of factors relevant to the proportionality analysis. Whether those references were adequate notice, whether they notified the reviewing Court of the appropriate factors, or whether such out-of-context provision of information is even

relevant to assessing prejudice are matters this Court did not address.

G. Statutory Right to Appointment of Two Lawyers

Whether the Applicant was entitled to the appointment of two lawyers might seem to be a simple matter. Yet even with respect to this issue the Attorney General was not content to stay within the bounds of this Court's outline.

- The Proposed Order contains a factual finding that Applicant failed to demonstrate that "obtaining an additional attorney would have changed the outcome of his trial." Proposed Order at 166. However, this Court's outline only addressed the issue of whether Applicant was entitled to appointment of a second attorney, concluding that he was not. This Court made no finding nor suggested that it had any view on the question of what effect appointment of a second attorney might have had.

- The Proposed Order also contains a legal conclusion that "there was no requirement to have a waiver hearing by Hughes . . . because Hughes was not entitled to the alleged right he now asserts . . . ." This Court's outline does not touch the issue of waiver at all.

H. The Elicitation of False Testimony

This Court's findings are extremely unfavorable to the elicitation of false testimony claim, especially given the record evidence. Still, the Attorney General has tried to make them better by inventing an additional reason to deny relief upon it.

- Although this Court four times characterizes Henry Daniel Owens' descriptions of the sentence he faced as "misstatements," and does not at any point address Ownes' motivation, the Proposed Order raises a new "question": Whether the response was "not only inaccurate but false." Proposed Order at 185.

I. Ineradicable Problems with the Proposed Order

This Court may act to correct the errors enumerated above, as it well should. There is no excuse for inventing either factual findings or legal conclusions, and the Attorney General should not have done so. Equally troubling, however, is a problem that cannot so easily be fixed. In

innumerable instances, the Proposed Order is not clearly inconsistent with the outline, but it represents only one of many possibilities. To take one example, it is impossible to know if or in how many ways the Proposed Order departs from what this Court would have found concerning the waiver of the Applicant's right to a defense at the guilt-innocence phase. *Perhaps* this Court would have concluded that, as the Proposed Order states, "[T]here is no evidence that [the Applicant] did not understand the court's questions." Certainly the outline does not say this; certainly the evidence of mental retardation and youth could be construed as "some evidence"that he did not understand. Likewise, the Proposed Order's conclusion that the waiver was adequate "to reveal his consent to the concession of guilt strategy," Proposed Order at 176, is not *inconsistent* with this Court's outline, though the outline makes no inference about what the Applicant actually thought. The Proposed Order also draws a negative inference from the Applicant's failure to testify in post-conviction on this issue, but the outline says nothing that suggests this was part of the Court's reasoning; that the Court would employ this inference seems especially dubious given the compelling reasons against putting any Applicant on the stand in post-conviction proceedings, let alone a retarded Applicant.

Nor is this the only issue upon which there are a variety of factual or legal details that could, consistently with this Court's outline, be supplied. To take another example, while the Court's outline simply concluded that trial counsel was not deficient for failing to point out the "comparative punishments between [Henry Daniel Owens's] charge and the plea bargain," the Proposed Order attempts to provide a rationale for that conclusion--namely, that the jury was aware of the difference between the potential penalties faced by Hughes and by Owens, so the other comparison did not matter. Whether this is the reason that the Court had in mind -- or whether this Court had any specific reason in mind -- can in no way be discerned by a simple comparison between the outline

and the Proposed Order. Or to mention briefly a third example, the proposed Order strongly *suggests* that, as a matter of law, no seated juror was impermissibly biased. The Court's outline contains no such finding, nor is such a finding necessary to the Court's conclusions, although, it could be argued that unlike the additions discussed in greater detail above, it would not be surprising if the Court intended such a finding.

Unless this Court happens to specifically agree with nearly 200 pages of details, the Proposed Order must contain many more deviations from its intent. Nevertheless, unless this Court begins anew, many of those deviations are likely to go unremedied; the Applicant can no more read this Court's mind to object to discrepancies than the Attorney General could read this Court's mind in order to avoid them, assuming, of course, that he desired to do so.

CONCLUSION

At the very least, the Applicant deserves findings of fact and conclusions of law generated by a court of law. The Attorney General's partisan effort, whose obvious purpose is to create *optimal* findings for the state, thereby ensuring denial of relief in subsequent proceedings, is not an adequate substitute. The Applicant also deserves findings that reflect what both parties and this Court now know occurred with respect to his representation at trial. This Court should therefore draft a new order, one that removes those findings that do not comport with known facts, and incorporates the factual and legal findings that represent the applied judgment of this Court, rather than the wish-list of the Attorney General.

Respectfully submitted,

BY: _____

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ATTORNEYS FOR PETITIONER

October 4, 2000.

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 the Applicant's Objections to Respondent's Proposed Order Denying Relief in the above-captioned case 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 4th day of October, 2000, in Columbia, South Carolina.

John H. Blume

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	CA No. 98-CP-09-101
	)	
HERMAN HUGHES, JR.,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	AFFIDAVIT
MICHAEL MOORE, Commissioner of Department of Corrections,	)	
	)	
Respondent.	)	
	)	

I, John H. Blume, being duly sworn, do hereby depose and say:

1. I am an attorney licensed to practice law in South Carolina.

2. From1988 to 1996, I was the director of the South Carolina Death Penalty Resource Center, which then became the Post-Conviction Defender Organization of South Carolina, and is now called the Center for Capital Litigation.

3. In my capacity as director of the Resource Center, I met with Phillip Newsom, counsel for Herman Hughes on several occasions prior to Herman's trial.

4. I discussed areas of the mitigation/mental health investigation with Mr. Newsom. I have reviewed notes taken by Mr. Newsom at our meeting. The notes make clear that I specifically advised Mr. Newsom to retain the services of a neuropsychologist. I gave him the names and phone numbers of at least two neuropsychologists, Jon

outline of an expert in the field of mental retardation,[3] and also gave him several articles discussing mental retardation and its significance in criminal cases. [4]

6. I also provided Mr. Newsom with an article I wrote discussing the elements of a competent mental health examination in order to help him formulate his case. The article discusses (1) the need for an accurate, complete social history, including gathering all relevant records;(2) the need for neuropsychological testing and an assessment of whether the client has any organic brain damage; and (3) the need to select experts based on the themes in the case that arise from the history and psychological testing, i.e., to select experts that have "expertise in the themes that have developed in the social history."[5]

7. The notes I retrieved from Mr. Newsom's file on September 21, 200 (exhibit 1) and other documents attached to this affidavit secured from Mr. Newsom's file were not in the file we originally obtained from Mr. Newsom, which was believed by us to be the entire file. The first time I ever saw these notes was after Mr. Newsom testified at the post-conviction relief hearing in Horry County, South Carolina. Mr. Newsom brought his file to court that day, and informed us that he had located additional materials relevant to Mr. Hughes' case.

---

[3]The sample direct examination which I provided to Mr. Newsom and which was retrieved from his file by me on September 21, 2000, is attached to this affidavit as exhibit 3.

[4]One of the articles which I provided to Mr. Newsom and which was retrieved from his file by me on September 21, 2000, is attached to this affidavit as exhibit 4.

[5]A copy of the article I provided to Mr. Newsom and which I retrieved from Mr. Newsom's file on September 21, 2000, is attached to this affidavit as exhibit 5.

FURTHER AFFIANT SAYETH NAUGHT.

John H.Blume

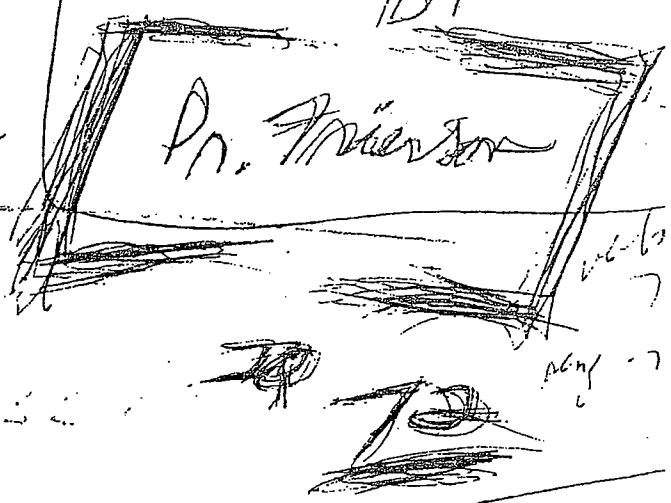
Sworn to and subscribed before me
this 3d day of ~~September~~ October, 2000.

R. Lee
Notary Public

My Commission Expires: 7/31/2004

EXHIBIT 1

- private investigator -



- Marital Relations -

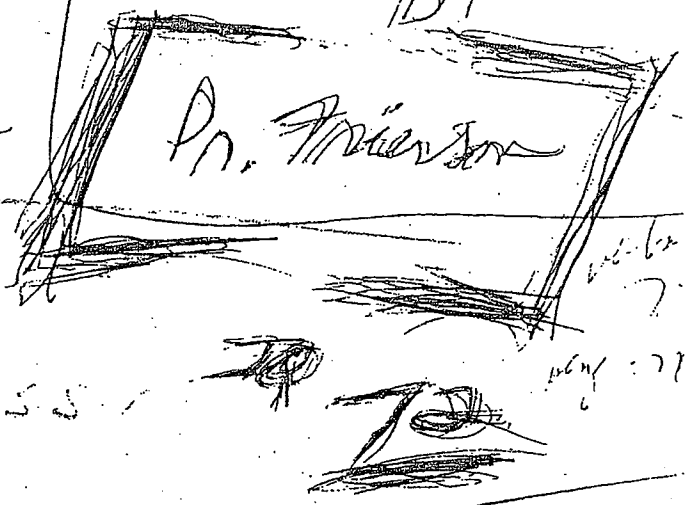
Joan Vin QJ. 765-4630

friend + bully

Jim Evans

777-4721

Sent Richard Nesbit - 774137



738-0805

256-0508

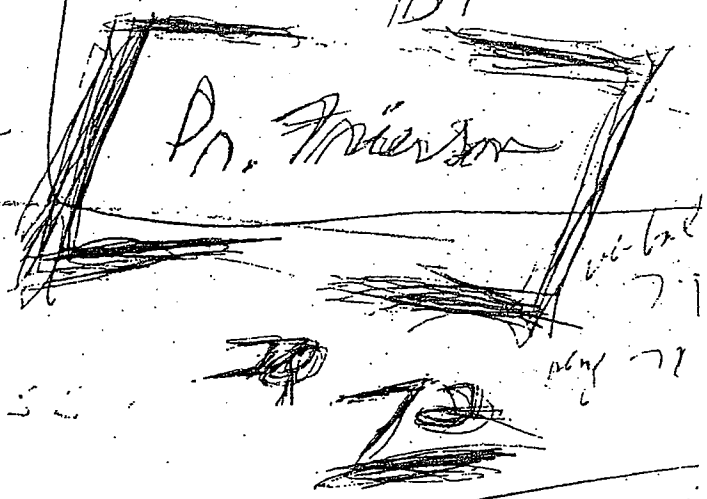
John Arnlaff

Dorothy Schumacher

734/1256

- private investigator -

Dr. Thierson



Lloyd Hill - dentist

Syphilis

Bacteriologic Laboratories

John Vin · R.N.T. 76

Hannah Hughes

EXHIBIT 2

THE COURT: Any redirect?

MR. GIBBS: Just a few.

REDIRECT EXAMINATION BY MR. GIBBS:

Q Mr. Drayton, are you addicted to heroin?

A I used heroin, I never did went -- had to go to no methadone or nothing. I participate through ANA for it inside the department of corrections.

MR. GIBBS: I have nothing further.

THE COURT: All right, come down, please, sir.

MR. GIBBS: We would call James Evans.

THE COURT: Come right up here, please, sir.

WHEREUPON JAMES R. EVANS WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

THE COURT: State your full name, please, sir.

MR. EVANS: James R. Evans.

DIRECT EXAMINATION BY MR. BLUME:

Q Dr. Evans, could you please state your profession and your employment?

A I am a psychologist and I work at the University of South Carolina in the psychology department.

Q And, how are you employed at the University?

A As an associate professor in the department of psychology.

Q Could you, briefly, describe your education for the court?

BY MR. BLUME:

Q Dr. Evans, what is a learning disability?

A A learning disability is usually defined as an academic learning problem that consists of under achieving or you are achieving lower than what would be expected on the basis of your I.Q. and furthermore that it is -- has some basis in a brain difference of a brain disfunction.

Q Okay, and what causes learning disabilities?

A There are a great many causes, inherited abnormalities of the brain is one basic cause, a very common cause. Also, different types of insult to the brain can cause this learning disability as I defined it.

Q Okay, and Dr. Evans, how do you determine whether an individual has a learning disability?

A Administer a battery of tests. First going by that definition, you would need to have an intelligence test and you would do some achievement tests and see if the academic achievement was significantly lower than what would be expected given his I.Q., and then if it is you can look further to see if there is any evidence for process disfunctions which might reflect brain damage or brain disorder.

Q Okay, I believe you answered this but just in case there is any other -- what are these tests designed to determine?

Q So, based upon that did you or did you not draw any conclusions as to whether he has a learning disability, and if so, what were those conclusions?

A I did and the conclusions were that he does, in fact, have a severe reading problem, a severe spelling problem which go beyond the levels which we would expect from his I.Q.

Q Dr. Evans, you were provided with, I believe, Dr. McKee's psychological testing in this case?

A Yes.

Q And, what, if anything, did that testing indicate about Mr. Drayton's I.Q.?

A That it was at about the 12th percentile, the 10th to 12th percentile, for the normal population.

Q And, numerically what was it?

A I believe that it was 82.

Q Okay, and could you briefly explain to the court what an I.Q. is?

A It is an abbreviation for intelligence quotient and some people have said that it is supposed to reflect one's mental horsepower but most people agree that it is a very good reflection of one's learning ability especially for school type learning ability. General school related.

Q And, what is an average I.Q.?

A 90 to 110.

Q And, if he had studied harder in school, would he still have a learning disability?

A He would and even if that effect happened that I just mentioned, it would make it an even more significant learning disability because studying harder might, in fact, improve the I.Q. score a little bit but it wouldn't -- it is not likely to improve the reading without any special help, therefore the discrepancy between the reading and the I.Q. would have been even greater.

Q Now, what kind of help, for example, does Ricky Drayton need for this type of learning disability that he has?

A Well, he -- it should have been caught early and he should have been placed in a -- probably in his case, it seems that it was severe enough that it needed to be a self contained classroom where he stayed with a special teacher all day every day of the school year for a while until it could have been some compensatory techniques taught to him.

Q Now, were those types of programs available in this State when Ricky Drayton was in school?

A Not in public schools, no.

Q And, how do you know that?

A Well, I came here in 1971 and there were no classes in Richland County for them, there was not even a State

Q Okay, now, following up on some things that you said earlier, Dr. Evans, what effect, if any, does having a learning disability have on a person apart from achievement in school?

A The indirect effects?

Q Yes, the indirect effects.

A Well, first of all it tends to -- in almost all cases the person because they are failing in school and school is so important when you are young begin to question their own self worth and as they question their own self worth and their own self concept goes down, they begin to act around peers as if they are inferior and then many times peers in turn rejects them and the whole thing snowballs into a social rejection, self rejection sort of situation.

Q These individuals, I assume -- do they or do they not, I don't really know, do they generally have less knowledge about the world?

A I think you could say that in the sense that a lot of our knowledge about the world for most people comes from reading and he, reading below third grade level, -- would impair his knowledge about the world, yes.

Q And, does the learning disability have any effect on their perceptual skills?

A Well, I don't know that it goes that direction but many children with learning disabilities have perceptual

correct judgements in a stressful situation?

A The brain disfunction, I would anticipate that it would do that, yes. The -- most persons who have brain disfunction find it extremely difficult if not impossible to process two different streams of information simultaneously so that if -- it would become very rigid in a cognitive sense and are liable to just sort of move in one direction without any stopping to evaluate whether they are going the right way or not.

Q And, would these brain impairments have lowered his inhibitions and his self control?

A They ordinarily do, yes. Persons with brain injury known for their lack of ability to inhibit emotions and respond -- just sort of follow their impulses based upon the emotion at the time.

MR. BLUME: One second, Your Honor.

THE COURT: The court will indulge you.

MR. BLUME: I would going to talk to co-counsel for a minute but it seems that he has left the room and at this point I would ask Dr. Evans to answer any questions of Ms. Elliott.

THE COURT: Cross examine, Ms. Elliott?

MS. ELLIOTT: Yes, Your Honor, thank you.

CROSS EXAMINATION BY SALLEY ELLIOTT:

Q Dr. Evans, so you are saying that someone with a

Q Okay, so dyslexia can take several different forms, is that correct, one is a reading -- difficulty with reading?

A That -- now that is common to all of it, it would not be called dyslexia if it were not reading -- a reading disorder involved in it but then the other symptoms that go along with that can vary.

Q Okay, and one could be that when Mr. Drayton looks at a page of written material, the letters look scrambled, is that a form of learning disability?

A That is one of the fairly common symptoms of dyslexia and specific reading disability. I use the term specific reading disability and dyslexia interchangeably here.

Q It is -- a learning disability is an unexplained discrepancy between what you have tested to be his actual or his projected ability and what he has actually -- what he actually tests out as far as his reading ability, is that what you are saying? That he should be doing better but he is not and we don't know why.

A Basically, that is it.

Q Okay, there are many people who suffer from that, is that correct?

A Yes.

Q There are famous people who suffer from that is that also correct?

or novels just that ---.

A Most newspapers are written about the 5th grade level therefore he would be impaired with newspapers, maybe the simplest of all dime store novels, he could read but ---.

Q Well, would it surprise you to learn that there has been testimony that he does read newspapers and novels?

A It would surprise me if he reads them with comprehension.

Q You gave him, now I may mispronounce this, excuse me if I do, but the Weschler, is that correct---.

A No, I did not administer that. Dr. McKee administered that. I looked over the results of it.

Q Is there now a revised edition of that test available?

A That is the one that he was given, the Wexler Adult Intelligence Scale -- I am not certain that he was given the revised one. There was a revised one that came out in 1980 so I would assume that he would have been given it.

Q Well, let me give you your summary and see if you can flip through that and check on it for me.

A It doesn't say, it just says -- but I have it right here and I can look in here and tell ---.

Q If you would, thank you.

A He had the Wexler Adult Intelligence Scale revised.

Q Revised, all right. In reviewing the records from the Juvenile Placement and Aftercare, the Florence School

on that and I would need to review the records again, I don't recall anybody else saying specifically that he had dyslexia but they were talking about the reading problems and the academic learning problems.

Q A learning disability in and of itself does not effect -- the person who has the disability does not effect his ability to reason, does it, it effects his ability to read -- if it is a reading disability?

A In and of itself, a learning disability -- a reading disability would not be expected to have major impact upon their reasoning, however, the majority of person with specific learning disabilities do have some problems with abstract verbal reasoning and so to a certain extent some of the higher order reasoning might be affected but not common sense type reasoning.

Q Don't kill me, he would understand that?

A Yes, he should.

Q And, a learning disability in and of itself has no effect on the ability to determine what behavior is appropriate? If you are not in an academic setting as far as the work place?

A It should not have any major impact on that.

Q If you grew up and you lived in a community -- did you interview Mr. Drayton?

A Yes.

EXHIBIT 3

PROFESSOR RUTH LUCKASSON -DIRECT (PENALTY PHASE)

1) Qualifications

Employment

Fields of concentration in research and writing

Special experience in mr persons and criminal justice system (MR expert to ABA Committee on Mental Health Standards; Member, President Bush's Committee on MR; Current project on MR person's who are victim's of crimes)

qualified as expert witness in MR before

**Move to qualify her as an expert im mental retardation

2) Have you at my request conducted an evaluation of Ron Orr?

3) What did that evaluation consist of?

*review of testing conducted by W.S. Hall Institute and by Dr. Brad Fisher

*review of relevant records relating to Ron Orr

*interview

*testing

*consultation with a neurologist at Yale Medical School about his findings in this case {to decide}

4) Before we turn to a more detailed explanation of the results of

your evaluation can you breifly summarize your findings?

* moderate mr
* His mr affects virtually every aspect of his life
* While Mr. Orr does have some skills, for example, he can draw and copy quite well for someone with his level of mental retardation, he is severely impaired. As a result of his mr his ability to understand, to express himself, to plan, to think, to reason, to accurately gauge the reactions of others are all substantially impaired.
* He is likely to become easily disoriented if placed in an unfamiliar situation, as he has no ability to abstract or apply even many of the rudimentary principles he has learned to other situations.
* Mr. Orr is ashamed of his mental retardation and tries to hide it. However, he knows he is mentally retarded and this makes him feel different and isolated
*When under stress or afraid, the effects of his impairments are exacerbated
* Mr. Orr is also mentally ill

5) Professor Luckasson, can you tell me what is mental retardation? Give the brief definition

a) What are the causes of mental retardation?

6) Now you said Ron Orr is mentally retarded, what do you base your opinion on?

* IQ tests of state hospital and Brad Fisher
* history (school records - describe failure etc.)
  your testing
* clinical interview and fifteen years of experience working
  people with mr

a) Do we know why Ron Orr is mentally retarded?

* No we can't say for sure. However, the history in this case indicates that the most likely cause is either in utero or birth trauma, early head injury or viral infection. We know this because the Magnetic Resoncance Imaging test performed recently on Mr. Orr reveals brain abnormalities. While, I am not a neurologist, I have spoken with the neurologist that reviewed the Magnetic Resonacne Imaging test in this case and was informed that Mr. Orr has brain lesions, which could be the result of either trauma or viral infection, and that he also has abnormally small frontal brain lobes. Either or both of which could be the etiologoical cause of his mr.

{if crossed on this, Ruth can easily give way, admit she is not a neurologist and say that for her purposes the cause of his mr are really irrelevant, and in fact in

many if not most cases it is difficult to determine with the precision the cause of mr. Regardless of the cause, Ron Orr is mr and has been mr all of his life. Nevertheless based on her converstion with the neurologist it appears that in this case, his mr is linked to his brain abnormalities.

7) Professor Luckasson, I would like you, if you would, to descirbe the effects that mental retardation has on a person.

a) For example, how does it affect a person's cognitive functioning?

First cognitive functioning is ****.

* Ability to abstract and reason is substantially impaired
* Ability to understand cause and effect and the consequences of one's actions is substantially impaired

b) how does mr affect a person's ability to communicate?

* Mr affects gravely affects both a person's ability to understand what is being communicated to them as well as their ability to communicate to others.
* First, mr affects a person's receptive language. Because of an inadequate fund of information and cognitive impairments, people with mr do not know as much as people without mr and this affects their ability to understand. This is not simply a result of a poor

vocabulary, although that is part of it. The ability to undestand is much more complex than that. For example, much of communication is based on accurately interpreting non-verbal cues. However, the literature reveals tht people with mr frequently misinterpret these non-verbal cues, for example, facial expressions. The same is true with tone of voice. Much of what is communicated is through not only the words but also the tone. People with mr frequently misinterpret tone of voice.

*Furthermore, because of their lack of abilty to abstract, language does not have the nuances and meaning that it does for people without mr, and thus, if understood at all, what is said is often undestood only in its most concrete terms.

* Similarly, a person's abilty to express himself is impaired. Again this is not only a result of a poor vocabulary, but rather results from the severe intellectual impairment. Thus it is very difficult for people with mr to express themselves and this often leads to frustration

c) How does mr affect a person's memory?

Give details

d) How does mr affect a person's sense of self?

*most mr people know they are different. This often makes them embarrassed and ashamed. As a result of this many mr people attempt to cover up their disability. This is known in the literature as passing. Give e.g. of pretending to read etc.

*Furthermore, the basic elements that allow us to interact with others are communication skills, i.e., the abilty to express oneself and to understand what is being comminicated by others. Thus many people with mr often find it very difficult to interact with others. This can lead to feelings of isolation and aloneness.

*It is important to know that people with mr do feel the whole range of human emotions: love, anger, sorrow, etc. One of the stereotypes of mr people was that they did not have the emotions that non-retarded people do. This is not true, but due to their impairment, emotions can be more confusing for people with mr than for other persons.

e) How does mr affect a person's ability to function in the world?

*This varies with the mr individual of course, but many of the ways mr affects a person, as I've previously described, affects a person's ability to function in the world. For example the ability to communicate with others, to understand, to reason etc.

*Under the proper circumstances, however, many people with mild mr can function and work in sheltered workshops or in jobs that permit them to perform highly repetitive tasks.

*Still it is difficult for people with mr to apply a set of principles from one task to another. Use e.g. of working on fans, may can learn to do a task on a 7" fan but if put them in a 10" fan line, they would not have the ability to take the skills learned in the other context and apply them to this different situation.

*Furthermore, as a result of their impairments, we know that people with mr often become frightened and confused if placed in a different situation. This is because much of their ability to function is based on familiarity and rudimentary principles learned through repitition. Thus if placed in an unfamiliar situation, they become easily disoriented. They do not have the skills to allow them to recover from the disorientation and literally can totally deteriorate mentally.

8) Professor Luckasson, are people with mr more or less likely to become alcoholics or drug users?

* The research indicates that people with mild and moderate mr are more likely to develop substance abuse problems than other individuals. This is especially true if they are raised in an environment where there is drug

or alcohol abuse.

9) Now, Professor Luckasson, you have been talking about people with mr in general. Let's now talk specifically about Ron Orr. How mentally retarded is Ron Orr?

*moderate mr

*While approx 1 to 2% of people in this Country are mr (below 70 IQ's) Ron is substantially more impaired than most mr people. In fact ****% of people with mr have IQ's between 65 and 70. Ron Orr has an IQ in the fifties and this combined with his other impairments is significant. For example, if you placed Ron in a line of 1000 people, and ranked them according to intelligence, Ron would be the very last person in the line.

10) How did you determine his level of mr?

*review of IQ testing

* my own achievement testing

* record review (school etc)

* clinical interview and experience

11) Can you explain the concept of mental age to the jury?

Give pro's and con's of the concept as in competency hearing

12) And what is Ron Orr's mental age, and how did you determine this?

* Approximately eight years old

*This is determined based on a formula that is tied to IQ scores

*It was also confirmed by my tests, which were to determine not only his academic achiemvement, but also his intellectual abilities. In all of the tests except for one, he achieved at or below the first grade level. Ine one arithmetic test he performed at the second grade level. Thus this is consistent with the IQ scores.

*It is also confirmed by his school records, which reveal that although he was socially promoted on a few occasions, he never passed a single grade. In fact he was at one point thireteen years old and still in the third grade

*Thus based on all this information, we can accurately say that Ron Orr has the mental age of an eight year old child.

13) Now you talked about tests you gave. How do you know MR. Orr was trying on the tests, and that they accurately reveal his abilities?

*Tests have questions designed to reveal malingering

*Consistency of scores in subparts etc.

*Consistency of scores with historical achievement, and IQ testing

*My 15 years of experience and work with over *** people with mr {You may want to talk about how hard he tried etc. during tests}

14) Let's talk about how mr affects Ron Orr's abilities. What can you tell us, based on your evaluation about Mr. Orr's cognitive functioning?

*His ability is substantially impaired. He has no ability to abstract. I gave him a number of simple tests designed to determine his ability to reason and abstract and he failed these tests abysmally. For example, give a few e.g.'s here.....

*His understanding of cause and effect and consequences of actions is substantially impaired. Give a few examples

b) What can you tell us about Mr. Orr's ability to communicate?

*Mr affects significantly affects every aspect of Mr. Orr's ability to communicate and to understand what is being said to others.

* Functionally illeterate. He can in essence read a few

d) What, if anything, can you tell us about Mr. Orr's sense of self?

*Mr. Orr knows he is mentally retarded and is very ashamed of his disability. {Tell what happened when you explained to him that you would have to talk about him being mentally retarded - Very upset and said but I can draw; he also cried and said he didn't want to be retarded} He has been teased about being retarded all of his life, and this combined with his own sense of his inadequacies affects him dramatically.

*Like may mr people, Mr. Orr hides his disability. Are you comfortable explaining maps like this. I think this also explains why he like to drive cars so much. In Mr. Orr's mind, driving a car makes him like nonretarded people, this is something he can do that doesn't make him feel retarded, and he can do. The same has to do with his drawing. This is something he can do that makes him feel non retarded.

* But again, Mr. Orr understansds that he is impaired and this makes him feel isolated and ashamed. These feelings of differentness, in conjunction with the fact that he was raised in a home where substance abuse was a way of life, explain his history of drug and alcohol abuse, which was found by the state hospital as well as the

records I reviewed.

e) What about Mr. Orr's ability to function in the world?

*While Mr. Orr is able to do some simple things like drive and draw, he is not able to function independently, and has never been able to function independently. He is more impaired than 85% of all the people with mr, and again, as I stated previously is in the bottom one tenth of one percent of all people in terms of intelligence {check #'s}

*Mr. Orr's memory, cognitive abilities and communicative abilities are so impaired that it is impossible for him to funcition independnetly because he has very little ability to plan, to reason, to abstract etc. With the level of Mr. Orr's impairment in all these critical areas, he simply cannot function witout the assistance of others for life's basic needs.

*He would also become disoriented and confused if placed in an unfamiliar situation. Under these circumstances, he would not have the resources to adequately cope with new and unusual surroundigs. This would be extremely stressful for him.

15) Now, Professor Luckasson, are you familiar with the statement Mr. Orr supposedly gave to the police in this case?

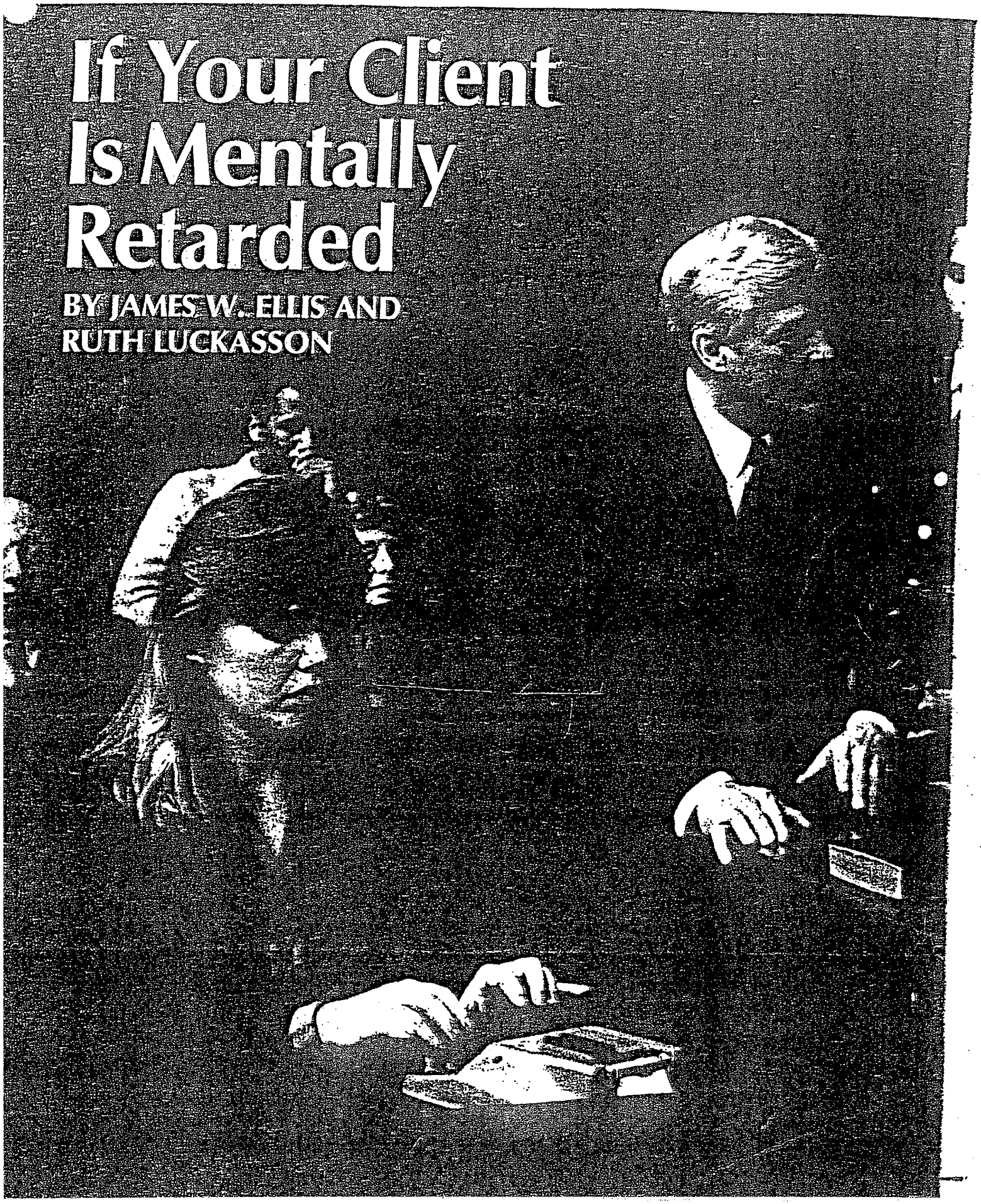
Yes

EXHIBIT 4

1242 / 3440

If Your Client Is Mentally Retarded

BY JAMES W. ELLIS AND RUTH LUCKASSON





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The defendant needs special help in understanding basic rights and responsibilities

A mentally retarded defendant presents a dilemma for the criminal justice practitioner. The disability is difficult to spot and is often confused with other conditions, such as mental illness. The mentally retarded defendant faces problems at every stage of criminal proceedings; attorneys must address issues of competence and criminal responsibility throughout these proceedings or face the spectre of denied due process. The problem can even be viewed as a life or death matter; recently, several convicts who have been identified as mentally retarded have been executed, and the Supreme Court is considering an Eighth Amendment challenge to the execution of minors. While the parallel to minors is not perfect, characteristics found in many individuals with mental retardation mirror the developmental limitations of minors. Thus, the Court's resolution of the case may suggest a line of analysis applicable to mentally retarded criminal defendants. *Thompson v. Oklahoma*, 724 P.2d (Okla. Cr. 1986), *cert. granted*, 107 S. Ct. 1284 (1987). It is, then, crucial for lawyers to be able to recognize the mentally retarded defendant and to understand the condition's impact on a case.

What is mental retardation?

The American Association on Mental Retardation defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." American Association on Mental Deficiency, *Classifi-*

cation in Mental Retardation 1 (H. Grossman ed. 1983). This definition has been universally accepted by courts and legislatures.

As a practical matter, this means that defendants with an IQ of 70 or lower are mentally retarded (although the cutoff can be somewhat higher, depending on the testing instrument used).

The impact of mental retardation on the individual is substantial. Among the characteristics frequently observed in persons who are mentally retarded are limited communication skills, impaired memory, poor impulse control, and difficulties with attention. In addition, the person with mental retardation lacks basic information that the normal operation of the criminal justice system presupposes of all suspects and defendants. Compounding all of these problems is the fact that people with mental retardation typically exert extraordinary efforts to avoid any detection of their disability, even by individuals seeking to assist them and even when the recognition of the person's handicap would be likely to result in more favorable treatment. The combination of these difficulties makes it impossible for the criminal courts to reach a fair and just result if the nature of an individual's disability is not recognized.

The recent case of Limmie Arther in South Carolina illustrates many of these problems. Mr. Arther, whose IQ has been measured as approximately 65, was convicted of murder and sentenced to death. When asked by an interviewer to recite the alphabet, he had to resort to singing the nursery rhyme, and even then could proceed accurately no further than the letter G. He hummed the rest of the tune. When asked why a judge should understand mental retardation, Arther answered, "I don't know that. . . . Most of the words, you know, I had to listen real close, because, you know, I had to catch on one word, and the next word I have to try to catch on that, and I get lost very quick. . . . It's not good though. It's bad. It's bad to be retarded." Marcus, "Retarded Killer's Sentence Fuels Death-Penalty Debate," *The Washington Post*, June 23, 1987, at A1, Col. 1.

Several misconceptions about mental retardation are commonly encountered in the criminal justice system. The first is that anyone with an IQ below average is mentally retarded. Part of this misunderstanding may derive from the fact that in an earlier era, persons with IQ scores between 70 and 85 were referred to by mental health professionals as "borderline retarded." This classification has been abandoned by the field, and individuals who function at this level are no longer considered to be mentally retarded.

As a corrollary, many of those people unfamiliar with the condition believe that an individual who is only "mildly" mentally retarded is not very seriously disabled, and requires no special attention from the criminal justice system. The professional classification system does divide mentally retarded persons into four categories: mild, moderate, severe, and profound, but this terminology does not support the conclusion that a "mildly" retarded individual has only a minimal disability. As we have written elsewhere, "Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability." Ellis and Luckasson, "Mentally Retarded Criminal Defendants," 53 *George Washington Law Review* 414, 423 (1985).

Every person with mental retardation has a substantial disability. As an expert witness testified in a recent capital case in South Carolina, to minimize the effect of "mild" mental retardation is the equivalent of saying that an amputee who has lost only one limb is "mildly amputated."

Finally, many lawyers and judges confuse mental retardation with mental illness. Mental illness is a diverse group of disorders of emotion and thought processes. Mental retardation, by contrast, is primarily a substantial reduction in the disabled individual's ability to learn. The confusion of these two conditions often leads criminal justice personnel to seek evaluation or treatment of an individual who is retarded from a mental health professional, such as a psychiatrist. Most mental health professionals have little or no training or experience with people with mental retardation. Referring a mentally retarded defendant to such an inappropriate professional invites a misleading evaluation and fruitless "treatment."

Getting help

This is not to suggest that mental retardation is extraordinarily difficult for competent experts to identify or address. Qualified mental retardation professionals can determine whether an individual is mentally retarded with less ambiguity than the courts often encounter when mental health experts disagree about a diagnosis of mental illness. And, although mental retardation is a permanent condition that cannot be "cured," some of the specific effects of the disability can often be overcome by special education or other forms of habilitation by qualified professionals. The ABA Criminal Justice Mental Health Standards refer to the professional training of mental retardation professionals as well as to their roles as scientists, evaluators, consultants and habilitators. Standard 7-1.1. The Standards stress the critical nature of professional training in the field of mental retardation, and suggest the wide range of professional disciplines that might prove important in

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individual cases. "Mental retardation professionals are individuals who have undergone extensive, formal post-graduate education and training in identifying specific functional deficits or habilitation needs of persons with mental retardation or a developmental disability. They include special education teachers, speech and language pathologists, audiologists, physical therapists, as well as those psychiatrists, psychologists, clinical social workers, psychiatric nurses, and other mental health professionals who have received the necessary education and training in mental retardation matters. Mental retardation professionals must be licensed or certified to practice if licensure or certification is required." Standard 7-1.1 commentary at 6-7.

Competence

The disabilities of suspects and defendants with mental retardation raise questions about individual competence at several stages of the criminal process. The individual may not understand the situation in which he finds himself and may not be able to give reasonable assistance to counsel.

The most familiar setting in which competence arises is the competence to stand trial. It has long been recognized that some persons with [illegible] do not meet the

[illegible]

Nevertheless, it is [illegible] acknowledged that [illegible] competence to stand [illegible] frequently [illegible] defendants, the [illegible] raised [illegible] persons who may [illegible] The current [illegible] evaluation of competence [illegible] reflects this [illegible] assessment instruments [illegible] designed for mentally [illegible] s, but only one instrument [illegible] y in development, is specifically designed for defendants with mental retardation. The forensic evaluation for a defendant with mental retardation will generally administer different from those found in

the typical mental illness test battery. If a test is included that was not designed for use with people who have mental retardation, great care must be taken to point out its limitations for this defendant.

Far too often, even when the possibility that a mentally retarded defendant is incompetent is raised, he or she is committed for "treatment" at a mental health facility. It should come as no surprise that when a person with mental retardation is given treatment designed to alleviate mental illness, the retarded individual does not magically become competent to stand trial.

Paradoxically, the prognosis for effecting competence in a defendant whose incompetence results from mental retardation may be particularly hopeful if appropriate professionals are employed. Contrary to the expectations of many courts, it may be easier to effect competence to stand trial in a defendant with mental retardation than it is to "restore" a psychotic individual to competence. The key is the willingness of the court system to make use of the expertise of special educators and other qualified mental retardation professionals. It will often be possible for them to teach the retarded individual those things he needs to know in order to understand the proceedings and assist counsel.

Issues of competence may also arise in other contexts. One is the person's ability to waive *Miranda* rights and make a confession or statement that can be used at trial. When law enforcement officers accept such statements without valid waiver, they may jeopardize subsequent prosecution. If the defen-

(Continued on page 45)

The ABA's Mental Health Standards

The ABA House of Delegates, on August 12, 1987, passed new Criminal Justice Mental Health Standards on the subject of competence and capital punishment. As a result, these standards are now official American Bar Association policy.

The new standard [illegible]

punishment [illegible] cient capacity [illegible]

understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court."

Standard 7-5.7 provides [illegible]

tance of responsibility," a prison term would still be presumed for frauds involving more than $10,000. Moreover, "a defendant who enters a guilty plea is not entitled to a sentencing reduction . . . as a matter of right." Thus, the risk or length of a prison term is not likely to decrease with a guilty plea. With this decrease in the perceived value of the guilty plea, more white-collar defendants may opt to take their charges to trial. (Theoretically at least, the "acceptance of responsibility" credit is to be given "without regard to whether [the] conviction is based upon a guilty plea or a finding of guilt.")

The Sentencing Commission interprets Section 235 of the Comprehensive Crime Control Act as permitting a sentencing judge to use the guidelines as of the effective date, regardless of when the crime was committed. Because of possible *ex post facto* problems, however, the Sentencing Commission has submitted proposed legislation to Congress that would permit application of the guidelines only to crimes committed after the effective date.

Even if the effective date of the guidelines has been (as the Commission desired) delayed for nine months, judges will be asked to use the guidelines in the interim and to report any problems or discrepancies to the Sentencing Commission. If the guidelines are implemented, white-collar defendants may face the spectre of lengthy prison terms more than ever before.

* * *

It is important for the practitioner to understand that white-collar investigations are no longer demure, sometimes courtly exchanges between polite adversaries. They rather frequently involve the application of some of the harshest and more intrusive investigative techniques which the criminal justice system makes available to law enforcement and prosecution officials. **CJ**

Mentally Retarded Client

(Continued from page 15)

dant's disability is not detected by the time of the trial itself, the individual may be convicted on the basis of improper evidence.

Another context in which questions about competence arise is the plea bargaining process. Serious injustice may result if an incompetent mentally retarded defendant's guilty plea is accepted. If the handicapped individual succeeds in masking his disability, there may not be anybody in the process with an incentive and opportunity to review whether the defendant really understands the nature and consequences of the bargain.

Criminal responsibility

The defense of insanity (or, in the terms of the ABA Standards for Criminal Justice, "mental nonresponsibility") has always been formulated to include individuals with mental "defects." Yet the defense is raised much less frequently in cases involving mental retardation than in cases of mental illness. There is reason to believe that this is beginning to change.

Lawyers and mental retardation professionals are increasingly recognizing the extent to which a mentally retarded individual's handicap may have reduced his understanding of the world and of the consequences of his actions. This may meet the requirements of the insanity defense's cogitive prong—that the individual did not appreciate the wrongfulness of his conduct.

The defense is available to people with mental retardation regardless of which formulation a particular jurisdiction had adopted. Some mentally retarded defendants, however, may be particularly disadvantaged by the recent abandonment of the defense's volitional prong, in federal law and in some states, shifting from the American Law Institute's test to a modified version of the *M'Naghten* test. Defendants with substantial problems of impulsivity, or poor impulse control, whether resulting from their mental retardation or from the way the individuals have been treated in the past, may present especially persuasive cases concerning their inability to conform their conduct to the law's requirements.

Problems also arise in those jurisdictions that have adopted "guilty but mentally ill" (GBMI) statutes. Typically, these statutes have been drafted to include defendants with mental retardation within their scope, but the provisions regarding evaluation of the defendant's mental condition and for disposition following conviction all focus exclusively on mental illness.

Noncapital sentencing

It has long been recognized that even where a defendant's mental illness or mental retardation is insufficient to warrant an acquittal by reason of insanity, it may nevertheless constitute a valid ground for mitigating the punishment imposed. This principle is reflected in ABA Criminal Justice Standard 7-9.3, which provides that "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender."

Despite this consensus, the United States Sentencing Commission failed to permit consideration of mental disability as a mitigating circumstance in many cases. The commission's new guidelines would allow courts to consider "significantly reduced mental capacity" as a possibly mitigating factor, but only for nonviolent offenses. U.S. Sentencing Commission, *Sentencing Guidelines and Policy Statements* '5K2.13 (April 13, 1987). This unprecedented limitation, which the commission has not attempted to justify in commentary, apparently means that if a defendant's mental retardation or mental illness falls short of constituting a complete de-

fense to the charge of a violent crime, it cannot even be considered by the court in determining an appropriate sentence for the disabled offender. This limitation, which was opposed by testimony from the ABA and from mental retardation professional organizations, is likely to be the subject of extensive debate in the coming months.

The death penalty

Jurisdictions that have adopted capital punishment must face two important issues regarding mentally retarded defendants charged with capital crimes. One is the possibility that the defendant's mental disability renders him incompetent to be executed. *See generally*, Ward, "Competence for Execution: Problems in Law and Psychiatry," 14 *Florida State University Law Review* 35 (1986). The United States Supreme Court recently held that it violates the Eighth Amendment's prohibition on cruel and unusual punishment to execute a currently incompetent individual. *Ford v. Wainwright*, 106 S.Ct. 2595 (1986). Although the *Ford* case dealt with an inmate who was mentally ill (or, as the Court referred to him, "insane"), the ruling clearly applies to any incompetent individual, regardless of the nature of his particular disability. In reformulating their laws to meet the new procedural requirements of *Ford*, states should take care to describe both mentally ill and mentally retarded convicts as within the law's scope, and should mandate the use of qualified mental retardation professionals to evaluate those convicts whose possible incompetence may be a result of mental retardation. Meanwhile, defense counsel can persuasively argue that *Ford* applies in any case of mental incompetence, and that the etiology of the incompetence, whether it is caused by mental illness or mental retardation, is irrelevant to the Eighth Amendment challenge.

The broader question is whether it is *ever* permissible, under the Eighth Amendment and equivalent provisions of state constitutions, to execute a person with mental retardation. Despite the fact that some state statutes fail to list mental disability as a mitigating circumstance, it is unconstitutional to deny a defendant the opportunity to present any relevant information that may be mitigating. *See Skipper v. South Carolina*, 106 S.Ct. 1669 (1986). As in noncapital cases, mental retardation will always be a relevant mitigating factor.

But the system under which the capital sentencing authority considers possible factors in mitigation may be insufficient to address the effect of a defendant's mental retardation on his offense. Since the decision whether a particular individual should be executed must always rest on the defendant's "blameworthiness" and "personal responsibility and moral guilt," *Booth v. Maryland*, 107 S.Ct. 2529, 2533-34 (1987), a strong argument can be made that capital punishment should be categorically precluded when the defendant is mentally retarded. Although the effect of some retarded defendant's disabilities will not be sufficient to entitle them to an acquittal on grounds of mental nonresponsibility, the reduced understanding of all mentally retarded individuals about the consequences of human actions supports the conclusion that they never have the extraordinary "blameworthiness" that would justify selection as the extraordinarily exceptional case that arguably merits the death penalty. These considerations led the Association for Retarded Citizens and the American Association on Mental Retardation to call for a ban on the death sentence or execution of any mentally retarded person.

The criminal justice system's awareness of defendants with mental retardation is gradually improving. Lawyers and judges must become increasingly sophisticated in their understanding of this disability and its effects if they are to do justice in cases involving mentally retarded defendants. Defense counsel must improve their ability to identify mental retardation and obtain assistance from properly qualified professional experts in the field of mental retardation. Counsel also has an obligation to make appropriate legal arguments to require the criminal justice system to take fairly into account the special disabilities and circumstances of defendants with mental retardation. CJ

Report to Members

(Continued from inside front cover)

mer" and a "walk"—one that attempts realistically to protect society from further crimes by a convicted offender.

Even for those that believe in a "tougher" criminal justice system, there surely must be a reasonable limit to the need for harshness. Is a system that is twice as "tough," and more than twice as expensive, now "tough enough?" One would expect that the pressure for longer sentences would have begun to ebb. Instead, the momentum for the expanded use of imprisonment continues unabated. Despite evidence that federal criminal sentences had increased in severity by 32 percent during the previous seven years, last year, Congress enacted sweeping new mandatory minimum sentences for federal drug crimes. And this Spring, the United States Sentencing Commission produced a set of federal sentencing guidelines which, if followed by the federal judiciary, will increase, by the Commission's own estimates, federal prison populations by 71 to 88 percent in five years. The Commission acknowledges that one of its principal objectives was to reduce the number of convicted federal offenders who did not receive a prison sentence.

Policy on criminal sentences is made in this country by officials in all three branches of government: governors and correctional depart-

EXHIBIT 5

TRIAL PRACTICE SERIES

BNA CRIMINAL PRACTICE MANUAL

Vol. 5 No. 9 May 1, 1991

DATA COLLECTION CRITICAL TO FORENSIC MENTAL EXAM

Common faults of mental health examinations conducted in criminal cases include inadequate gathering of data and inadequate testing for neurological dysfunction, according to John C. Blume, executive director of the South Carolina Death Penalty Resource Center. In the second part of a two-part article, Blume details how to avoid these deficiencies and offers advice on how to select an expert to conduct the examination. (Page 207)

CHOOSING EXPERTS, GATHERING DATA FOR FORENSIC EVALUATION

By John. C. Blume

In the second part of a two-part article, John C. Blume, executive director of the South Carolina Death Penalty Resource Center, outlines some of the common deficiencies in mental health examinations conducted in criminal cases and offers advice on information-gathering, choosing an expert, and testing. The first part of the article appeared in the last issue of the Current Reports.

IV. Common Deficiencies in Forensic Evaluations

It can be readily seen that many, if not most, of the mental health evaluations conducted in criminal cases do not satisfy the five-step process set forth in the first part of the article. This is not surprising because, as in many other areas, the indigent defendant receives short shrift in the criminal justice system. However, in this section of the article, I will focus in on the elements of an evaluation which, in my experience, are generally most deficient and result in the most unreliable results.

A. Client's History

Many forensic evaluations are unreliable because the history upon which they are based is inadequate. All too often, the medical and social history relied upon by mental health professions is cursory at best and comes exclusively from the client, or possibly from the client and discussions with one or two family members.

This is inadequate because clients, and even their family members, are in many cases very poor historians and may fail to relate significant events which are critical to a proper determination of an individual's mental state at the time of the offense.

For example, individuals who are physically and/or sexually abused often minimize the severity and extent of the abuse. Similarly, individuals with organic impairments generally are unable to recall significant events regarding their medical history which may be critical to a reliable diagnosis. It also well established that many mental illnesses, *e.g.*, bipolar mood disorder and schizophrenia, run in families and thus it is important to know the family as well as the client's medical and psychiatric history.

It is for this reason that it is essential that a mental health professional obtained as much information as possible regarding a client's social and medical history to reliably determine what genetic, organic, environmental, and other factors may have played a role in the client's mental state at the time of the offense. Thus all available records for both the client and significant members of his family should be obtained. These records include, but are not limited to:

- Client's and sibling's birth records
- Client's medical records and family medical records
- Any social services records relevant to client or his family
- Client's and siblings' school and educational records
- All jail and/or department of corrections records, including medical records
- All records relevant to any prior psychiatric or psychological evaluation for client or any family members including grandpar-

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ents, parents, siblings, etc., including the evaluating professional's raw data and notes (do not be content with obtaining the discharge summary or final report)
- Death records for any immediate family members
- Any military records, including medical records
- All police or law enforcement records regarding the arrest, offense and any prior offenses
- All records relevant to any co-defendants
- Family court records for parents and client
- Attorney files, transcripts, and court files for any prior offenses by the client or his family members

Reviewing these records will often lead to additional records, documents and material which should be obtained. You should do so because it is impossible before an investigation is complete to determine what will be the fruitful sources of information.

However, you cannot prepare the history solely from talking with your client and obtaining records. Other family members, friends and persons with knowledge about your client must be interviewed. These people, especially family members should not be talked to in a group, but individually. It is important to bear in mind, for example, that any family member or caretaker you interview potentially abused your client or other members of the family. This information will rarely come out in a family gathering, and will even more rarely come out the first time you talk with the individual. In addition to family members, your client's friends, prior counsel, teachers, social workers, probation and parole officers, acquaintances, neighbors, employers, spouses (current or former), and any witnesses preceding, during and after the offense should be interviewed. Any or all of these persons may have critical information relevant to your client's mental state.

B. Inadequate Testing for Neurological Dysfunction

While not all of our clients have organic brain damage, many do. Organic brain damage can and does affect behavior. It can impair judgment and rob an individual of the ability to make decisions in crises rationally and responsibly. It can destroy and diminish a person's ability to learn, to carry out a plan of action, to understand long term consequences of actions, to appreciate cause and effect, and to mediate impulse driven behavior. However, and despite its obvious relevance in a capital case, neurological impairment is often not diagnosed.

Another very common deficiency in state forensic evaluations is the inattention to the possibility of organic damage, other neurological dysfunction, or a physiological basis for psychiatric symptoms. Based on my experience, many of our clients are at risk for organic brain damage. They have a history of serious head injuries from chronic childhood physical abuse, car accidents, and falls. Their developmental years are plagued with chronic illnesses and fevers, frequently untreated, and malnutrition or undernourishment. Poor or nonexistent prenatal care and/or birth trauma are routinely found in their histories. Many clients had mothers who drank alcohol or used drugs during their pregnancies, now well recognized as a cause of permanent and devastating mental disabilities in the developing fetus. Most of our clients are chemically dependent, and their early and prolonged use of drugs and alcohol including brain damaging organic solvents, can cause permanent brain damage.

However, partly as a result of inadequate histories, and for other reasons which are often difficult to identify specifically in any particular case, inadequate attention is frequently given to the possibility of neurological impairment. For example, very few of my clients have ever been examined by a neurologist, despite indications in their histories that warrant a neurological consultation. Occasionally, the extent of the neurological evaluation may be an EEG. It is also a rare case in which any neuropsychological testing has been conducted, even though neuropsychological testing is one of the best ways to determine the presence of more subtle brain damage prevalent in our clients. Unfortunately, I have been involved in numerous cases where it was only discovered after the trial that the defendant had a serious organic deficit. For example, in one case we discovered during the federal habeas corpus proceedings that our client had a brain tumor that was present at the time of the offense. While this is a dramatic example, in countless other cases we have discovered that our clients have serious neurological impairments that went undiagnosed in earlier evaluations.

This can have tragic consequences. It can deny your client of a concrete way to reduce his blameworthiness. It is a fact of death penalty life that juries, and judges, are generally less impressed with psychosocial ex-

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planations. Organic deficits frequently have their origin in events and situations over which the defendant had no control, such as Fetal Alcohol Syndrome, measles, encephalitis, or neurotoxins such as those found in lead-based paint. They can be presented in an empathy provoking manner, as part of a constellation of factors that affected your client's behavior. While we may understand, and believe in, psycho-social diagnoses such as post-traumatic stress disorder, in some cases it is not compelling enough unless it is accompanied by a physical explanation. For example, if you can show that part of your client's brain is literally missing, most jurors and judges can understand that it might affect an individual's behavior. The same presentation can be made with less dramatic or "softer" neurological impairment, e.g., diffuse brain damage. The important thing is to insure that the evaluation your client received at trial, or receives in connection with post-conviction litigation, fully considered the possibility of neurological impairment.

This cannot be done without a reliable history and appropriate testing and examination. A competent neurologist, psychiatrist, or neuropsychologist will recommend a complete neurological examination when indicated by physical symptoms such as one sided paralysis or weakness, facial asymmetry, seizures, headaches, dizziness, blurred vision, or imbalance. Laboratory tests, including blood and endocrine work ups, may also be necessary to determine the presence of diseases that affect behavior. Magnetic Resonance Imaging (MRI), Electroencephalogram (EEG), and CT scans can also useful in this regard. However, it is important to note that a negative (or normal) result on a CT scan, EEG, or MRI does not rule out the possibility of neurological impairment. While a positive finding proves organicity, a negative finding does not rule brain damage out. Organicity may still be discerned through neuropsychological testing and/or a neurological evaluation.

V. Choosing Experts

There are a number of different types of experts you may need in any particular case. However, you will not know exactly what type of experts you will need until the social-medical history is completed. As I have stressed throughout this article, this must always be the first step. It is useful, in compiling and understanding the social and medical history, to obtain the assistance of a social worker. Social workers are trained not only in gathering the type of information you need—both from documents and individuals—but also in interpreting the data. While you or someone in your office can collect most documents and interview the witnesses, you may not be attuned to significant facts in the records, or be less able to obtain information form the client, the client's family and friends, and other persons with relevant knowledge about your client. Thus, you should consider obtaining the assistance of an individual with a social work background in the investigation, compilation and assimilation of the social and medical history.

Depending on the results of the social history, it is then time to obtain your own experts. In doing so, you should search for professionals with expertise in the themes that have developed in the social history, e.g., child abuse; alcoholism and/or substance abuse; familial or genetic pre-disposition to certain mental illnesses; head injuries or other indicators of organicity; mental retardation, or all of the above. It is important to note that one mental health professional can very rarely help you with all of these things.

It is frequently necessary to put together a multidisciplinary team of professionals, including a social workers, to determine the client's mental state reliably. For example, if the history indicates a history of chronic child maltreatment and abuse, it may be best to begin with a full psychological battery, including neuropsychological testing. This testing may confirm or deny the presence of post-traumatic stress disorder, organic impairment or other diagnoses resulting from the abuse. Similarly, in many cases involving child abuse, the individual will often have a long history of substance abuse. Thus, it may be necessary to retain a pharmacologist to explain the nature of the substances abused, their effects on an individual's judgment, impulse control, cognitive functioning, etc., and to explain the long-term effects of these drugs on a person's brain. Furthermore, depending on the results of the neuropsychological examination, a neurological consult may be in order.

Other types of experts may also be necessary. We have enlisted the assistance of audiologists, mental retardation experts, special education teachers, and a variety of other types of experts, in addition to social workers, psychologists, neurologists, neuropsychologists, pharmacologists, and psychiatrists.

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The important thing, however, is to assemble the necessary mental health professionals on the basis of the history as you determine it. Furthermore, it is frequently a good idea to have one professional who can "bring it all together." In other words, many of your experts may be testifying as to only one piece of the mental health picture, for example, your client's history of substance abuse. It is useful to have one person who, in consultation with all the other members of the team, is prepared to discuss all the history, testing, and diagnosis and give the sentencer a comprehensive picture of the individual's mental state at the time of the offense, and, if relevant, at trial.

VI. Attacking Anti-Social Personality Disorder

Many of our clients are diagnosed by mental health professionals, employed by either the state or the defense, as having an anti-social personality disorder. This diagnosis is not only very harmful but, unfortunately for many of our clients, it is often arrived at erroneously. In my opinion, anti-social personality disorder is the lazy mental professional's diagnosis. The criteria for the disorder is really only a description of people's behavior. For example, one of the characteristics is that the individual engaged in sexual activity at a young age, or began using substances at an early age.

Besides the fact that many of these characteristics are economically and racially biased, the diagnosis is often erroneously arrived at because of an inadequate history and lack of other adequate testing and evaluations. For example, if there is an organic or other cause such as mental retardation for some of the behaviors, then the diagnosis should not be given. In this regard, it is useful to look at and study the decision trees published in *the American Psychiatric Association's Diagnostic and Statistical Manual-III.* These "trees" indicate a number of other diagnoses that preempt the diagnosis of anti-social personality disorder. However, because all many psychologists do is talk to the client, and look at his or her criminal record and other behaviors, the diagnosis is often arrived at despite other factors which would either prevent the diagnosis or move it sufficiently far down on an axis as to make it irrelevant to the other more significant diagnoses in explaining the individual's behavior.

The point of this discussion is that you should never accept at face value any professional's, including your own, determination that your client has anti-social personality disorder. The consequences of this diagnosis are devastating. While in some case the diagnosis may be unavoidable, in many it is not. If the steps outlined previously in this article are followed, you dramatically increase your chances of avoiding a diagnosis that establishes aggravating factors, and obtaining one that offers a compelling basis for mental health related claims.

VII. Don't Be Fooled by the Client

Many times when I consult with lawyers, I hear them say when we are discussing the possibility that their client is mentally ill or mentally retarded that "Well, I've talked to him and he seems pretty sharp to me." Or they say "Well, he seems normal to me." Sometimes they describe their client as manipulative, evasive, hostile, or street smart. It is crucial to remember that as lawyers we are not trained to recognize signs and symptoms of mental disabilities. It is equally important to keep in mind that many mentally retarded, mentally ill or brain damaged individuals are quite adept at masking their disabilities. For example, the one universal skill that mentally retarded people have mastered is some degree of hiding their disability. One client of mine sat in his cell for hours at a time pretending he could read because he thought if people thought he could read they wouldn't believe he was mentally retarded. Other clients with severe mental illnesses are often good at masking their illness for short periods of time.

Unfortunately the quality of many attorney client conversations does not allow probing into the client's mind to determine delusional or aberrational thought processes. However, this does not mean that they are not there. Many ill people, for example, know that other people don't think like they do, and may need to get to know you before they share their thoughts. Similarly, many people with brain damage may not appear dysfunctional when engaged in casual conversation. The important thing is that neither you nor any mental health professional should pre-judge a client's mental state based upon casual contact. It is only through the assistance of competent mental health professionals who recognize the importance of a documented social history and who are trained in appropriate testing that you can reliably and adequately determine your client's mental state.

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VIII. Essential References

Because of the pivotal role of mental health issues in criminal and capital litigation, counsel must gain a working knowledge of behavioral sciences. Whether an attorney has only one criminal or capital case or several, it is essential to become familiar with the diagnosis and treatment of psychiatric disorders. Two publications need to be on the shelves of attorneys in criminal litigation and studied: *Comprehensive Textbook of Psychiatry, Fifth Edition*, edited by Harold I. Kaplan, M.D., and Benjamin J. Sadock, M.D. (Williams & Wilkins, 1989) and *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, published by the American Psychiatric Association in 1987. These references offer a guide through the labyrinth of mental health information and allow counsel to participate fully in developing appropriate mental health claims.

IX. Conclusion

Defense counsel in criminal, especially capital, litigation can and should insure that their clients receive a competent and reliable mental health evaluation. In order for a mental health evaluation to meet the nationally recognized standard of care in the psychiatric community it must involve a multistep process that requires far more than a clinical interview. A thorough and documented social history, physical examination, and appropriate testing are necessary components of any psychiatric diagnosis. Mental health professionals must consider if there is an organic cause for behavior before reaching any psychiatric diagnosis. Counsel has a responsibility to ensure that psychiatric evaluations reflect this multistep process.

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	CA No. 98-CP-09-101
	)	
HERMAN HUGHES, JR.,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	AFFIDAVIT
MICHAEL MOORE, Commissioner of Department of Corrections,	)	
	)	
	)	
Respondent.	)	
	)	

I, Phillip J. Newsom, being duly sworn, do hereby depose and say:

1. I am an attorney licensed to practice law in South Carolina.

2. I was retained counsel for Herman Hughes at his capital trial in Calhoun County.

3. Attached to this affidavit as exhibit 1 is a copy of notes taken from my file in the Herman Hughes' case. These notes were made during my representation of Mr. Hughes and prior to his trial.

4. Attached to this affidavit as exhibit 2 is a copy of a transcript excerpt of an examination of James R. Evans. This document was in my trial file in Herman Hughes' case.

5. Attached to this affidavit as exhibit 3 is a direct examination outline of Professor Ruth Luckasson. This document was in my trial fine in Herman Hughes' case.

6. Attached to this affidavit as exhibit 4 is a copy of an article called "If your client is mentally retarded." This document was in my trial file in Herman Hughes' case.

7. Attached to this affidavit as exhibit 5 is an article entitled "Data Collection Critical

to Forensic Mental Exam." This document was in my trial fine in Herman Hughes' case.

FURTHER AFFIANT SAYETH NAUGHT.

Phillip Newsom

Sworn to and subscribed before me
this 3rd day of October, 2000.

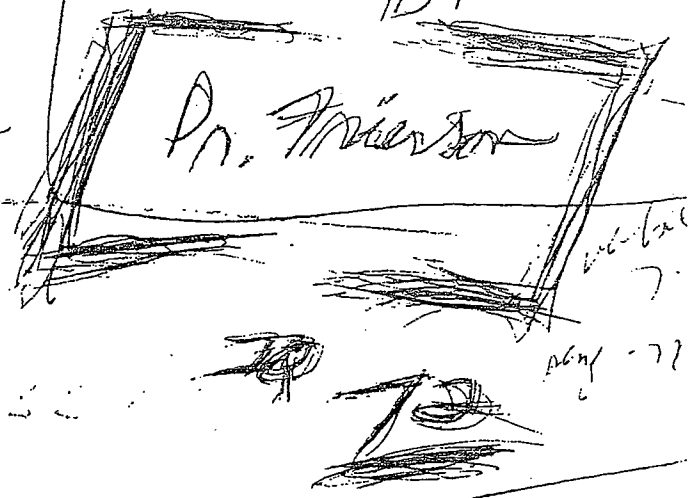
Notary Public

My Commission Expires: Feb 5, 2005

EXHIBIT 1

- private investigator -

Dr. Thierson



- Marshall Botsford -

John Vin DJJ 765-4630

News + Billy

Jim Evans

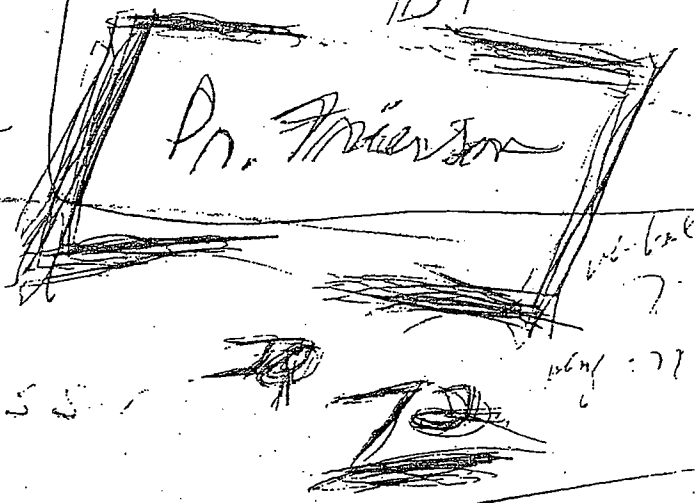
777-4721

Sent Richard Nugent - 774137

Bandridge Title

Herman Hughes Jr.

1260 3458



- private investigator -

Sylmar Hill - dr

- Psychiatrist -

- Endocrinologist -

John Vin · P.I.T. 765

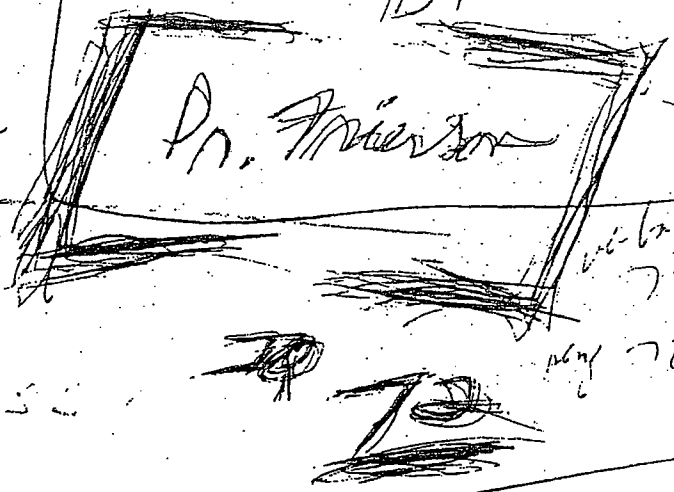
Sent Richard Bagot - 774137

Dorothy Schumacher

734-1258

- private investigator -

Dr. Thiessen



Syphilis

EXHIBIT 2

THE COURT: Any redirect?

MR. GIBBS: Just a few.

REDIRECT EXAMINATION BY MR. GIBBS:

Q Mr. Drayton, are you addicted to heroin?

A I used heroin, I never did went -- had to go to no methadone or nothing. I participate through ANA for it inside the department of corrections.

MR. GIBBS: I have nothing further.

THE COURT: All right, come down, please, sir.

MR. GIBBS: We would call James Evans.

THE COURT: Come right up here, please, sir.

WHEREUPON JAMES R. EVANS WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

THE COURT: State your full name, please, sir.

MR. EVANS: James R. Evans.

DIRECT EXAMINATION BY MR. BLUME:

Q Dr. Evans, could you please state your profession and your employment?

A I am a psychologist and I work at the University of South Carolina in the psychology department.

Q And, how are you employed at the University?

A As an associate professor in the department of psychology.

Q Could you, briefly, describe your education for the court?

BY MR. BLUME:

Q Dr. Evans, what is a learning disability?

A A learning disability is usually defined as an academic learning problem that consists of under achieving or you are achieving lower than what would be expected on the basis of your I.Q. and furthermore that it is -- has some basis in a brain difference of a brain disfunction.

Q Okay, and what causes learning disabilities?

A There are a great many causes, inherited abnormalities of the brain is one basic cause, a very common cause. Also, different types of insult to the brain can cause this learning disability as I defined it.

Q Okay, and Dr. Evans, how do you determine whether an individual has a learning disability?

A Administer a battery of tests. First going by that definition, you would need to have an intelligence test and you would do some achievement tests and see if the academic achievement was significantly lower than what would be expected given his I.Q., and then if it is you can look further to see if there is any evidence for process disfunctions which might reflect brain damage or brain disorder.

Q Okay, I believe you answered this but just in case there is any other -- what are these tests designed to determine?

Q So, based upon that did you or did you not draw any conclusions as to whether he has a learning disability, and if so, what were those conclusions?

A I did and the conclusions were that he does, in fact, have a severe reading problem, a severe spelling problem which go beyond the levels which we would expect from his I.Q.

Q Dr. Evans, you were provided with, I believe, Dr. McKee's psychological testing in this case?

A Yes.

Q And, what, if anything, did that testing indicate about Mr. Drayton's I.Q.?

A That it was at about the 12th percentile, the 10th to 12th percentile, for the normal population.

Q And, numerically what was it?

A I believe that it was 82.

Q Okay, and could you briefly explain to the court what an I.Q. is?

A It is an abbreviation for intelligence quotient and some people have said that it is supposed to reflect one's mental horsepower but most people agree that it is a very good reflection of one's learning ability especially for school type learning ability. General school related.

Q And, what is an average I.Q.?

A 90 to 110.

Q And, if he had studied harder in school, would he still have a learning disability?

A He would and even if that effect happened that I just mentioned, it would make it an even more significant learning disability because studying harder might, in fact, improve the I.Q. score a little bit but it wouldn't -- it is not likely to improve the reading without any special help, therefore the discrepancy between the reading and the I.Q. would have been even greater.

Q Now, what kind of help, for example, does Ricky Drayton need for this type of learning disability that he has?

A Well, he -- it should have been caught early and he should have been placed in a -- probably in his case, it seems that it was severe enough that it needed to be a self contained classroom where he stayed with a special teacher all day every day of the school year for a while until it could have been some compensatory techniques taught to him.

Q Now, were those types of programs available in this State when Ricky Drayton was in school?

A Not in public schools, no.

Q And, how do you know that?

A Well, I came here in 1971 and there were no classes in Richland County for them, there was not even a State

Q Okay, now, following up on some things that you said earlier, Dr. Evans, what effect, if any, does having a learning disability have on a person apart from achievement in school?

A The indirect effects?

Q Yes, the indirect effects.

A Well, first of all it tends to -- in almost all cases the person because they are failing in school and school is so important when you are young begin to question their own self worth and as they question their own self worth and their own self concept goes down, they begin to act around peers as if they are inferior and then many times peers in turn rejects them and the whole thing snowballs into a social rejection, self rejection sort of situation.

Q These individuals, I assume -- do they or do they not, I don't really know, do they generally have less knowledge about the world?

A I think you could say that in the sense that a lot of our knowledge about the world for most people comes from reading and he, reading below third grade level, -- would impair his knowledge about the world, yes.

Q And, does the learning disability have any effect on their perceptual skills?

A Well, I don't know that it goes that direction but many children with learning disabilities have perceptual

correct judgements in a stressful situation?

A The brain disfunction, I would anticipate that it would do that, yes. The -- most persons who have brain disfunction find it extremely difficult if not impossible to process two different streams of information simultaneously so that if -- it would become very rigid in a cognitive sense and are liable to just sort of move in one direction without any stopping to evaluate whether they are going the right way or not.

Q And, would these brain impairments have lowered his inhibitions and his self control?

A They ordinarily do, yes. Persons with brain injury known for their lack of ability to inhibit emotions and respond -- just sort of follow their impulses based upon the emotion at the time.

MR. BLUME: One second, Your Honor.

THE COURT: The court will indulge you.

MR. BLUME: I would going to talk to co-counsel for a minute but it seems that he has left the room and at this point I would ask Dr. Evans to answer any questions of Ms. Elliott.

THE COURT: Cross examine, Ms. Elliott?

MS. ELLIOTT: Yes, Your Honor, thank you.

CROSS EXAMINATION BY SALLEY ELLIOTT:

Q Dr. Evans, so you are saying that someone with a

Q Okay, so dyslexia can take several different forms, is that correct, one is a reading -- difficulty with reading?

A That -- now that is common to all of it, it would not be called dyslexia if it were not reading -- a reading disorder involved in it but then the other symptoms that go along with that can vary.

Q Okay, and one could be that when Mr. Drayton looks at a page of written material, the letters look scrambled, is that a form of learning disability?

A That is one of the fairly common symptoms of dyslexia and specific reading disability. I use the term specific reading disability and dyslexia interchangeably here.

Q It is -- a learning disability is an unexplained discrepancy between what you have tested to be his actual or his projected ability and what he has actually -- what he actually tests out as far as his reading ability, is that what you are saying? That he should be doing better but he is not and we don't know why.

A Basically, that is it.

Q Okay, there are many people who suffer from that, is that correct?

A Yes.

Q There are famous people who suffer from that is that also correct?

or novels just that ---.

A Most newspapers are written about the 5th grade level therefore he would be impaired with newspapers, maybe the simplest of all dime store novels, he could read but ---.

Q Well, would it surprise you to learn that there has been testimony that he does read newspapers and novels?

A It would surprise me if he reads them with comprehension.

Q You gave him, now I may mispronounce this, excuse me if I do, but the Weschler, is that correct---.

A No, I did not administer that. Dr. McKee administered that. I looked over the results of it.

Q Is there now a revised edition of that test available?

A That is the one that he was given, the Wexler Adult Intelligence Scale -- I am not certain that he was given the revised one. There was a revised one that came out in 1980 so I would assume that he would have been given it.

Q Well, let me give you your summary and see if you can flip through that and check on it for me.

A It doesn't say, it just says -- but I have it right here and I can look in here and tell ---.

Q If you would, thank you.

A He had the Wexler Adult Intelligence Scale revised.

Q Revised, all right. In reviewing the records from the Juvenile Placement and Aftercare, the Florence School

on that and I would need to review the records again, I don't recall anybody else saying specifically that he had dyslexia but they were talking about the reading problems and the academic learning problems.

Q A learning disability in and of itself does not effect -- the person who has the disability does not effect his ability to reason, does it, it effects his ability to read -- if it is a reading disability?

A In and of itself, a learning disability -- a reading disability would not be expected to have major impact upon their reasoning, however, the majority of person with specific learning disabilities do have some problems with abstract verbal reasoning and so to a certain extent some of the higher order reasoning might be affected but not common sense type reasoning.

Q Don't kill me, he would understand that?

A Yes, he should.

Q And, a learning disability in and of itself has no effect on the ability to determine what behavior is appropriate? If you are not in an academic setting as far as the work place?

A It should not have any major impact on that.

Q If you grew up and you lived in a community -- did you interview Mr. Drayton?

A Yes.

EXHIBIT 3

PROFESSOR RUTH LUCKASSON -DIRECT (PENALTY PHASE)

1) Qualifications

Employment

Fields of concentration in research and writing

Special experience in mr persons and criminal justice system (MR expert to ABA Committee on Mental Health Standards; Member, President Bush's Committee on MR; Current project on MR person's who are victim's of crimes)

qualified as expert witness in MR before

**Move to qualify her as an expert im mental retardation

2) Have you at my request conducted an evaluation of Ron Orr?

3) What did that evaluation consist of?

*review of testing conducted by W.S. Hall Institute and by Dr. Brad Fisher

*review of relevant records relating to Ron Orr

*interview

*testing

*consultation with a neurologist at Yale Medical School about his findings in this case {to decide}

4) Before we turn to a more detailed explanation of the results of

your evaluation can you breifly summarize your findings?

* moderate mr
* His mr affects virtually every aspect of his life
* While Mr. Orr does have some skills, for example, he can draw and copy quite well for someone with his level of mental retardation, he is severely impaired. As a result of his mr his ability to understand, to express himself, to plan, to think, to reason, to accurately gauge the reactions of others are all substantially impaired.
* He is likely to become easily disoriented if placed in an unfamiliar situation, as he has no ability to abstract or apply even many of the rudimentary principles he has learned to other situations.
* Mr. Orr is ashamed of his mental retardation and tries to hide it. However, he knows he is mentally retarded and this makes him feel different and isolated
*When under stress or afraid, the effects of his impairments are exacerbated
* Mr. Orr is also mentally ill

5) Professor Luckasson, can you tell me what is mental retardation? Give the brief definition

a) What are the causes of mental retardation?

6) Now you said Ron Orr is mentally retarded, what do you base your opinion on?

* IQ tests of state hospital and Brad Fisher
* history (school records - describe failure etc.)
  your testing
* clinical interview and fifteen years of experience working
  people with mr

a) Do we know why Ron Orr is mentally retarded?

* No we can't say for sure. However, the history in this case indicates that the most likely cause is either in utero or birth trauma, early head injury or viral infection. We know this because the Magnetic Resoncance Imaging test performed recently on Mr. Orr reveals brain abnormalities. While, I am not a neurologist, I have spoken with the neurologist that reviewed the Magnetic Resonacne Imaging test in this case and was informed that Mr. Orr has brain lesions, which could be the result of either trauma or viral infection, and that he also has abnormally small frontal brain lobes. Either or both of which could be the etiologoical cause of his mr.

{if crossed on this, Ruth can easily give way, admit she is not a neurologist and say that for her purposes the cause of his mr are really irrelevant, and in fact in

many if not most cases it is difficult to determine with the precision the cause of mr. Regardless of the cause, Ron Orr is mr and has been mr all of his life. Nevertheless based on her converstion with the neurologist it appears that in this case, his mr is linked to his brain abnormalities.

7) Professor Luckasson, I would like you, if you would, to descirbe the effects that mental retardation has on a person.

a) For example, how does it affect a person's cognitive functioning?

First cognitive functioning is ****.

* Ability to abstract and reason is substantially impaired
* Ability to understand cause and effect and the consequences of one's actions is substantially impaired

b) how does mr affect a person's ability to communicate?

* Mr affects gravely affects both a person's ability to understand what is being communicated to them as well as their ability to communicate to others.
* First, mr affects a person's receptive language. Because of an inadequate fund of information and cognitive impairments, people with mr do not know as much as people without mr and this affects their ability to understand. This is not simply a result of a poor

vocabulary, although that is part of it. The ability to undestand is much more complex than that. For example, much of communication is based on accurately interpreting non-verbal cues. However, the literature reveals tht people with mr frequently misinterpret these non-verbal cues, for example, facial expressions. The same is true with tone of voice. Much of what is communicated is through not only the words but also the tone. People with mr frequently misinterpret tone of voice.

*Furthermore, because of their lack of abilty to abstract, language does not have the nuances and meaning that it does for people without mr, and thus, if understood at all, what is said is often undestood only in its most concrete terms.

* Similarly, a person's abilty to express himself is impaired. Again this is not only a result of a poor vocabulary, but rather results from the severe intellectual impairment. Thus it is very difficult for people with mr to express themselves and this often leads to frustration

c) How does mr affect a person's memory?

Give details

d) How does mr affect a person's sense of self?

*most mr people know they are different. This often makes them embarrassed and ashamed. As a result of this many mr people attempt to cover up their disability. This is known in the literature as passing. Give e.g. of pretending to read etc.

*Furthermore, the basic elements that allow us to interact with others are communication skills, i.e., the abilty to express oneself and to understand what is being comminicated by others. Thus many people with mr often find it very difficult to interact with others. This can lead to feelings of isolation and aloneness.

*It is important to know that people with mr do feel the whole range of human emotions: love, anger, sorrow, etc. One of the stereotypes of mr people was that they did not have the emotions that non-retarded people do. This is not true, but due to their impairment, emotions can be more confusing for people with mr than for other persons.

e) How does mr affect a person's ability to function in the world?

*This varies with the mr individual of course, but many of the ways mr affects a person, as I've previously described, affects a person's ability to function in the world. For example the ability to communicate with others, to understand, to reason etc.

*Under the proper circumstances, however, many people with mild mr can function and work in sheltered workshops or in jobs that permit them to perform highly repetitive tasks.

*Still it is difficult for people with mr to apply a set of principles from one task to another. Use e.g. of working on fans, may can learn to do a task on a 7" fan but if put them in a 10" fan line, they would not have the ability to take the skills learned in the other context and apply them to this different situation.

*Furthermore, as a result of their impairments, we know that people with mr often become frightened and confused if placed in a different situation. This is because much of their ability to function is based on familiarity and rudimentary principles learned through repitition. Thus if placed in an unfamiliar situation, they become easily disoriented. They do not have the skills to allow them to recover from the disorientation and literally can totally deteriorate mentally.

8) Professor Luckasson, are people with mr more or less likely to become alcoholics or drug users?

* The research indicates that people with mild and moderate mr are more likely to develop substance abuse problems than other individuals. This is especially true if they are raised in an environment where there is drug

or alcohol abuse.

9) Now, Professor Luckasson, you have been talking about people with mr in general. Let's now talk specifically about Ron Orr. How mentally retarded is Ron Orr?

*moderate mr

*While approx 1 to 2% of people in this Country are mr (below 70 IQ's) Ron is substantially more impaired than most mr people. In fact ****% of people with mr have IQ's between 65 and 70. Ron Orr has an IQ in the fifties and this combined with his other impairments is significant. For example, if you placed Ron in a line of 1000 people, and ranked them according to intelligence, Ron would be the very last person in the line.

10) How did you determine his level of mr?

*review of IQ testing

* my own achievement testing

* record review (school etc)

* clinical interview and experience

11) Can you explain the concept of mental age to the jury?

Give pro's and con's of the concept as in competency hearing

12) And what is Ron Orr's mental age, and how did you determine this?

* Approximately eight years old

*This is determined based on a formula that is tied to IQ scores

*It was also confirmed by my tests, which were to determine not only his academic achiemvement, but also his intellectual abilities. In all of the tests except for one, he achieved at or below the first grade level. Ine one arithmetic test he performed at the second grade level. Thus this is consistent with the IQ scores.

*It is also confirmed by his school records, which reveal that although he was socially promoted on a few occasions, he never passed a single grade. In fact he was at one point thireteen years old and still in the third grade

*Thus based on all this information, we can accurately say that Ron Orr has the mental age of an eight year old child.

13) Now you talked about tests you gave. How do you know MR. Orr was trying on the tests, and that they accurately reveal his abilities?

*Tests have questions designed to reveal malingering

*Consistency of scores in subparts etc.

*Consistency of scores with historical achievement, and IQ testing

*My 15 years of experience and work with over *** people with mr {You may want to talk about how hard he tried etc. during tests}

14) Let's talk about how mr affects Ron Orr's abilities. What can you tell us, based on your evaluation about Mr. Orr's cognitive functioning?

*His ability is substantially impaired. He has no ability to abstract. I gave him a number of simple tests designed to determine his ability to reason and abstract and he failed these tests abysmally. For example, give a few e.g.'s here.....

*His understanding of cause and effect and consequences of actions is substantially impaired. Give a few examples

b) What can you tell us about Mr. Orr's ability to communicate?

*Mr affects significantly affects every aspect of Mr. Orr's ability to communicate and to understand what is being said to others.

* Functionally illeterate. He can in essence read a few

d) What, if anything, can you tell us about Mr. Orr's sense of self?

*Mr. Orr knows he is mentally retarded and is very ashamed of his disability. {Tell what happened when you explained to him that you would have to talk about him being mentally retarded - Very upset and said but I can draw; he also cried and said he didn't want to be retarded} He has been teased about being retarded all of his life, and this combined with his own sense of his inadequacies affects him dramatically.

*Like may mr people, Mr. Orr hides his disability. Are you comfortable explaining maps like this. I think this also explains why he like to drive cars so much. In Mr. Orr's mind, driving a car makes him like nonretarded people, this is something he can do that doesn't make him feel retarded, and he can do. The same has to do with his drawing. This is something he can do that makes him feel non retarded.

* But again, Mr. Orr understansds that he is impaired and this makes him feel isolated and ashamed. These feelings of differentness, in conjunction with the fact that he was raised in a home where substance abuse was a way of life, explain his history of drug and alcohol abuse, which was found by the state hospital as well as the

records I reviewed.

e) What about Mr. Orr's ability to function in the world?

*While Mr. Orr is able to do some simple things like drive and draw, he is not able to function independently, and has never been able to function independently. He is more impaired than 85% of all the people with mr, and again, as I stated previously is in the bottom one tenth of one percent of all people in terms of intelligence {check #'s}

*Mr. Orr's memory, cognitive abilities and communicative abilities are so impaired that it is impossible for him to funcition indepenndnetly because he has very little ability to plan, to reason, to abstract etc. With the level of Mr. Orr's impairment in all these critical areas, he simply cannot function witout the assistance of others for life's basic needs.

*He would also become disoriented and confused if placed in an unfamiliar situation. Under these circumstances, he would not have the resources to adequately cope with new and unusual surroundigs. This would be extremely stressful for him.

15) Now, Professor Luckasson, are you familiar with the statement Mr. Orr supposedly gave to the police in this case?

Yes

16) Now assuming, Mr. Orr made his way to South Carolina from Michigan, got lost, his car was stuck in the woods near Chester, based on your evaluation, what would that experience be like for Mr. Orr?

* That would be a very frightening experience for Mr. Orr. Again, you have to start with the fact that he is a person who is very impaired, more impaired even than most people with mental retardation. For a person with Ron Orr's deficits in cognitive functioning, memory, communication and lack of knowlegedge of basic facts. Being stuck and lost in an unfamiliar environment would be terrifying for him, as he would not have the ability to rationally evaluate his situation and make choices about how to solve his problem. He would be very disoriented and under extreme stress. His already grave impairments would be augmented under the stress of being lost, stuck and away from his home.

* You may want to consider drawing on the analogy of being an eight year old child and being lost. Almost everyone can remember being lost or seperated from their parents etc. as a young child, and how frightening this was. In may ways, it would be the same but much worse for Ron Orr. He would be in a situation where he did not have the mental resources to appropriately get out of. He would be overwhelmed by this.

* Under these circumstances, his ability to correctly

OPTIONAL QUESTIONS AND OTHER THOUGHTS - DEPENDING ON STATE'S EVIDENCE

1) If escape is in evidence, then you should ask Ruth about Mr. Orr's ability to function in a prison setting?

*People with mr generally make very good inmates as they often function best in a very structured environment such as a prison. They are easily victimized but they seldom cause problems themselves. Mr. Orr's former incarceration records indicate that he functions very well in prison. (A letter from Lt. Short with Mich. DOC calls him a model inmate. Other records indicate he is no threat to security, was never assaultive, etc.).

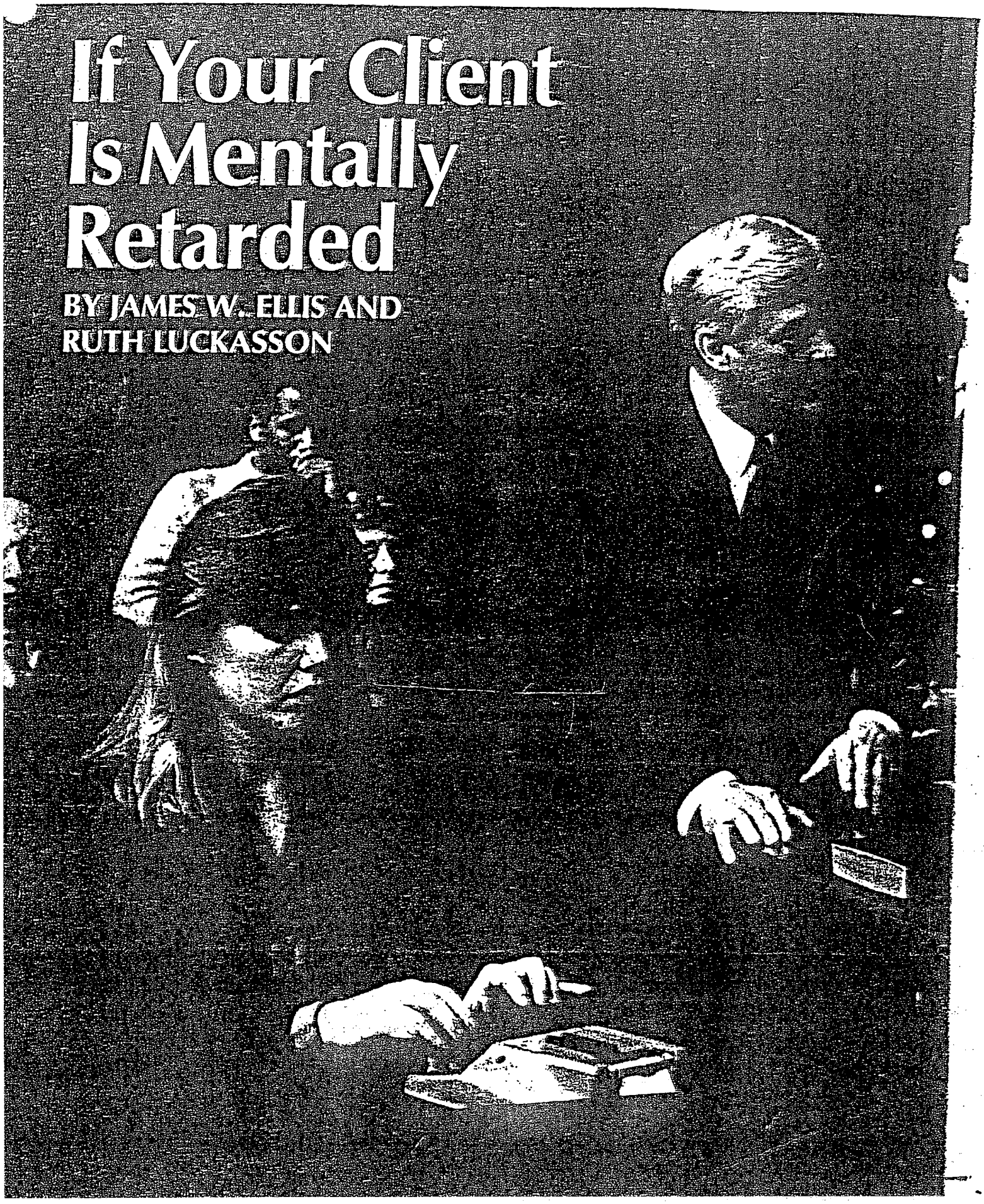
2) If crossed on fact that most mr people don't kill, you should agree with that and link it to both to Ron's unusual situation. Other impaired people in Ron's family hurt his chances for habilitation. His mother has multiple cerebral strokes, his father has Lou Gehrig's disease and is illieterate and worked all his life in a foundry, he has other siblings with mr, and grew up in an impoverished family. His father was also a severe alcoholic. Thus Ron Orr did not have someone to give him the help he needed or to serve as a role model or to otherwise teach him more appropriate behavior. Still, it is important to note that Ron Orr was a nonviolent person. He was also 35 yers old at the time of this offense and he had no history of violent or assaultive behaviour. Something must have happened that set this experience apart from his other life experiences. So if he killed these two

EXHIBIT 4

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If Your Client Is Mentally Retarded

BY JAMES W. ELLIS AND RUTH LUCKASSON





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The defendant needs special help in understanding basic rights and responsibilities

A mentally retarded defendant presents a dilemma for the criminal justice practitioner. The disability is difficult to spot and is often confused with other conditions, such as mental illness. The mentally retarded defendant faces problems at every stage of criminal proceedings; attorneys must address issues of competence and criminal responsibility throughout these proceedings or face the spectre of denied due process. The problem can even be viewed as a life or death matter; recently, several convicts who have been identified as mentally retarded have been executed, and the Supreme Court is considering an Eighth Amendment challenge to the execution of minors. While the parallel to minors is not perfect, characteristics found in many individuals with mental retardation mirror the developmental limitations of minors. Thus, the Court's resolution of the case may suggest a line of analysis applicable to mentally retarded criminal defendants. *Thompson v. Oklahoma*, 724 P.2d (Okla. Cr. 1986), *cert. granted*, 107 S. Ct. 1284 (1987). It is, then, crucial for lawyers to be able to recognize the mentally retarded defendant and to understand the condition's impact on a case.

What is mental retardation?

The American Association on Mental Retardation defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." American Association on Mental Deficiency, *Classifi-*

cation in Mental Retardation 1 (H. Grossman ed. 1983). This definition has been universally accepted by courts and legislatures.

As a practical matter, this means that defendants with an IQ of 70 or lower are mentally retarded (although the cutoff can be somewhat higher, depending on the testing instrument used).

The impact of mental retardation on the individual is substantial. Among the characteristics frequently observed in persons who are mentally retarded are limited communication skills, impaired memory, poor impulse control, and difficulties with attention. In addition, the person with mental retardation lacks basic information that the normal operation of the criminal justice system presupposes of all suspects and defendants. Compounding all of these problems is the fact that people with mental retardation typically exert extraordinary efforts to avoid any detection of their disability, even by individuals seeking to assist them and even when the recognition of the person's handicap would be likely to result in more favorable treatment. The combination of these difficulties makes it impossible for the criminal courts to reach a fair and just result if the nature of an individual's disability is not recognized.

The recent case of Limmie Arther in South Carolina illustrates many of these problems. Mr. Arther, whose IQ has been measured as approximately 65, was convicted of murder and sentenced to death. When asked by an interviewer to recite the alphabet, he had to resort to singing the nursery rhyme, and even then could proceed accurately no further than the letter G. He hummed the rest of the tune. When asked why a judge should understand mental retardation, Arther answered, "I don't know that. . . . Most of the words, you know, I had to listen real close, because, you know, I had to catch on one word, and the next word I have to try to catch on that, and I get lost very quick. . . . It's not good though. It's bad. It's bad to be retarded." Marcus, "Retarded Killer's Sentence Fuels Death-Penalty Debate," *The Washington Post*, June 23, 1987, at A1, Col. 1.

Several misconceptions about mental retardation are commonly encountered in the criminal justice system. The first is that anyone with an IQ below average is mentally retarded. Part of this misunderstanding may derive from the fact that in an earlier era, persons with IQ scores between 70 and 85 were referred to by mental health professionals as "borderline retarded." This classification has been abandoned by the field, and individuals who function at this level are no longer considered to be mentally retarded.

As a corrollary, many of those people unfamiliar with the condition believe that an individual who is only "mildly" mentally retarded is not very seriously disabled, and requires no special attention from the criminal justice system. The professional classification system does divide mentally retarded persons into four categories: mild, moderate, severe, and profound, but this terminology does not support the conclusion that a "mildly" retarded individual has only a minimal disability. As we have written elsewhere, "Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability." Ellis and Luckasson, "Mentally Retarded Criminal Defendants," 53 *George Washington Law Review* 414, 423 (1985).

Every person with mental retardation has a substantial disability. As an expert witness testified in a recent capital case in South Carolina, to minimize the effect of "mild" mental retardation is the equivalent of saying that an amputee who has lost only one limb is "mildly amputated."

Finally, many lawyers and judges confuse mental retardation with mental illness. Mental illness is a diverse group of disorders of emotion and thought processes. Mental retardation, by contrast, is primarily a substantial reduction in the disabled individual's ability to learn. The confusion of these two conditions often leads criminal justice personnel to seek evaluation or treatment of an individual who is retarded from a mental health professional, such as a psychiatrist. Most mental health professionals have little or no training or experience with people with mental retardation. Referring a mentally retarded defendant to such an inappropriate professional invites a misleading evaluation and fruitless "treatment."

Getting help

This is not to suggest that mental retardation is extraordinarily diffcult for competent experts to identify or address. Qualified mental retardation professionals can determine whether an individual is mentally retarded with less ambiguity than the courts often encounter when mental health experts disagree about a diagnosis of mental illness. And, although mental retardation is a permanent condition that cannot be "cured," some of the specific effects of the disability can often be overcome by special education or other forms of habilitation by qualified professionals. The ABA Criminal Justice Mental Health Standards refer to the professional training of mental retardation professionals as well as to their roles as scientists, evaluators, consultants and habilitators. Standard 7-1.1. The Standards stress the critical nature of professional training in the field of mental retardation, and suggest the wide range of professional disciplines that might prove important in

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individual cases. "Mental retardation professionals are individuals who have undergone extensive, formal post-graduate education and training in identifying specific functional deficits or habilitation needs of persons with mental retardation or a developmental disability. They include special education teachers, speech and language pathologists, audiologists, physical therapists, as well as those psychiatrists, psychologists, clinical social workers, psychiatric nurses, and other mental health professionals who have received the necessary education and training in mental retardation matters. Mental retardation professionals must be licensed or certified to practice if licensure or certification is required." Standard 7-1.1 commentary at 6-7.

Competence

The disabilities of suspects and defendants with mental retardation raise questions about individual competence at several stages of the criminal process. The individual may not understand the situation in which he finds himself and may not be able to give reasonable assistance to counsel.

The most familiar setting in which competence arises is the competence to stand trial. It has long been recognized that some persons with mental retardation do not meet the

Nevertheless, it is [illegible] acknowledged that [illegible] competence to stand [illegible] frequently [illegible] defendants, the [illegible] raised for [illegible] persons who may [illegible] The current [illegible] evaluation of competence reflects this [illegible] assessment instruments [illegible] designed for mentally [illegible] s, but only one instrument [illegible] y in development, is specifically [illegible] gned for defendants with mental [illegible] etardation. The forensic evaluation for a defendant with mental [illegible] dation will generally administer [illegible] different from those found in the typical mental illness test battery. If a test is included that was not designed for use with people who have mental retardation, great care must be taken to point out its limitations for this defendant.

Far too often, even when the possibility that a mentally retarded defendant is incompetent is raised, he or she is committed for "treatment" at a mental health facility. It should come as no surprise that when a person with mental retardation is given treatment designed to alleviate mental illness, the retarded individual does not magically become competent to stand trial.

Paradoxically, the prognosis for effecting competence in a defendant whose incompetence results from mental retardation may be particularly hopeful if appropriate professionals are employed. Contrary to the expectations of many courts, it may be easier to effect competence to stand trial in a defendant with mental retardation than it is to "restore" a psychotic individual to competence. The key is the willingness of the court system to make use of the expertise of special educators and other qualified mental retardation professionals. It will often be possible for them to teach the retarded individual those things he needs to know in order to understand the proceedings and assist counsel.

Issues of competence may also arise in other contexts. One is the person's ability to waive *Miranda* rights and make a confession or statement that can be used at trial. When law enforcement officers accept such statements without valid waiver, they may jeopardize subsequent prosecution. If the defen-

(Continued on page 45)

The ABA's Mental Health Standards

The ABA House of Delegates, on August 12, 1987, passed new Criminal Justice Mental Health Standards on the subject of competence and capital punishment. As a result, these standards are now official American Bar Association policy.

The new standard [illegible]

[illegible] punishment [illegible] cient capacity to [illegible]

understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court."

Standard 7-5.7 provides a set

tance of responsibility," a prison term would still be presumed for frauds involving more than $10,000. Moreover, "a defendant who enters a guilty plea is not entitled to a sentencing reduction . . . as a matter of right." Thus, the risk or length of a prison term is not likely to decrease with a guilty plea. With this decrease in the perceived value of the guilty plea, more white-collar defendants may opt to take their charges to trial. (Theoretically at least, the "acceptance of responsibility" credit is to be given "without regard to whether [the] conviction is based upon a guilty plea or a finding of guilt.")

The Sentencing Commission interprets Section 235 of the Comprehensive Crime Control Act as permitting a sentencing judge to use the guidelines as of the effective date, regardless of when the crime was committed. Because of possible *ex post facto* problems, however, the Sentencing Commission has submitted proposed legislation to Congress that would permit application of the guidelines only to crimes committed after the effective date.

Even if the effective date of the guidelines has been (as the Commission desired) delayed for nine months, judges will be asked to use the guidelines in the interim and to report any problems or discrepancies to the Sentencing Commission. If the guidelines are implemented, white-collar defendants may face the spectre of lengthy prison terms more than ever before.

* * *

It is important for the practitioner to understand that white-collar investigations are no longer demure, sometimes courtly exchanges between polite adversaries. They rather frequently involve the application of some of the harshest and more intrusive investigative techniques which the criminal justice system makes available to law enforcement and prosecution officials. CJ

Mentally Retarded Client

(Continued from page 15)

dant's disability is not detected by the time of the trial itself, the individual may be convicted on the basis of improper evidence.

Another context in which questions about competence arise is the plea bargaining process. Serious injustice may result if an incompetent mentally retarded defendant's guilty plea is accepted. If the handicapped individual succeeds in masking his disability, there may not be anybody in the process with an incentive and opportunity to review whether the defendant really understands the nature and consequences of the bargain.

Criminal responsibility

The defense of insanity (or, in the terms of the ABA Standards for Criminal Justice, "mental nonresponsibility") has always been formulated to include individuals with mental "defects." Yet the defense is raised much less frequently in cases involving mental retardation than in cases of mental illness. There is reason to believe that this is beginning to change.

Lawyers and mental retardation professionals are increasingly recognizing the extent to which a mentally retarded individual's handicap may have reduced his understanding of the world and of the consequences of his actions. This may meet the requirements of the insanity defense's cogitive prong—that the individual did not appreciate the wrongfulness of his conduct.

The defense is available to people with mental retardation regardless of which formulation a particular jurisdiction had adopted. Some mentally retarded defendants, however, may be particularly disadvantaged by the recent abandonment of the defense's volitional prong, in federal law and in some states, shifting from the American Law Institute's test to a modified version of the *M'Naghten* test. Defendants with substantial problems of impulsivity, or poor impulse control, whether resulting from their mental retardation or from the way the individuals have been treated in the past, may present especially persuasive cases concerning their inability to conform their conduct to the law's requirements.

Problems also arise in those jurisdictions that have adopted "guilty but mentally ill" (GBMI) statutes. Typically, these statutes have been drafted to include defendants with mental retardation within their scope, but the provisions regarding evaluation of the defendant's mental condition and for disposition following conviction all focus exclusively on mental illness.

Noncapital sentencing

It has long been recognized that even where a defendant's mental illness or mental retardation is insufficient to warrant an acquittal by reason of insanity, it may nevertheless constitute a valid ground for mitigating the punishment imposed. This principle is reflected in ABA Criminal Justice Standard 7-9.3, which provides that "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender."

Despite this consensus, the United States Sentencing Commission failed to permit consideration of mental disability as a mitigating circumstance in many cases. The commission's new guidelines would allow courts to consider "significantly reduced mental capacity" as a possibly mitigating factor, but only for nonviolent offenses. U.S. Sentencing Commission, *Sentencing Guidelines and Policy Statements* '5K2.13 (April 13, 1987). This unprecedented limitation, which the commission has not attempted to justify in commentary, apparently means that if a defendant's mental retardation or mental illness falls short of constituting a complete de-

fense to the charge of a violent crime, it cannot even be considered by the court in determining an appropriate sentence for the disabled offender. This limitation, which was opposed by testimony from the ABA and from mental retardation professional organizations, is likely to be the subject of extensive debate in the coming months.

The death penalty

Jurisdictions that have adopted capital punishment must face two important issues regarding mentally retarded defendants charged with capital crimes. One is the possibility that the defendant's mental disability renders him incompetent to be executed. *See generally*, Ward, "Competence for Execution: Problems in Law and Psychiatry," 14 *Florida State University Law Review* 35 (1986). The United States Supreme Court recently held that it violates the Eighth Amendment's prohibition on cruel and unusual punishment to execute a currently incompetent individual. *Ford v. Wainwright*, 106 S.Ct. 2595 (1986). Although the *Ford* case dealt with an inmate who was mentally ill (or, as the Court referred to him, "insane"), the ruling clearly applies to any incompetent individual, regardless of the nature of his particular disability. In reformulating their laws to meet the new procedural requirements of *Ford*, states should take care to describe both mentally ill and mentally retarded convicts as within the law's scope, and should mandate the use of qualified mental retardation professionals to evaluate those convicts whose possible incompetence may be a result of mental retardation. Meanwhile, defense counsel can persuasively argue that *Ford* applies in any case of mental incompetence, and that the etiology of the incompetence, whether it is caused by mental illness or mental retardation, is irrelevant to the Eighth Amendment challenge.

The broader question is whether it is *ever* permissible, under the Eighth Amendment and equivalent provisions of state constitutions, to execute a person with mental retardation. Despite the fact that some state statutes fail to list mental disability as a mitigating circumstance, it is unconstitutional to deny a defendant the opportunity to present any relevant information that may be mitigating. *See Skipper v. South Carolina*, 106 S.Ct. 1669 (1986). As in noncapital cases, mental retardation will always be a relevant mitigating factor.

But the system under which the capital sentencing authority considers possible factors in mitigation may be insufficient to address the effect of a defendant's mental retardation on his offense. Since the decision whether a particular individual should be executed must always rest on the defendant's "blameworthiness" and "personal responsibility and moral guilt," *Booth v. Maryland*, 107 S.Ct. 2529, 2533-34 (1987), a strong argument can be made that capital punishment should be categorically precluded when the defendant is mentally retarded. Although the effect of some retarded defendant's disabilities will not be sufficient to entitle them to an acquittal on grounds of mental nonresponsibility, the reduced understanding of all mentally retarded individuals about the consequences of human actions supports the conclusion that they never have the extraordinary "blameworthiness" that would justify selection as the extraordinarily exceptional case that arguably merits the death penalty. These considerations led the Association for Retarded Citizens and the American Association on Mental Retardation to call for a ban on the death sentence or execution of any mentally retarded person.

The criminal justice system's awareness of defendants with mental retardation is gradually improving. Lawyers and judges must become increasingly sophisticated in their understanding of this disability and its effects if they are to do justice in cases involving mentally retarded defendants. Defense counsel must improve their ability to identify mental retardation and obtain assistance from properly qualified professional experts in the field of mental retardation. Counsel also has an obligation to make appropriate legal arguments to require the criminal justice system to take fairly into account the special disabilities and circumstances of defendants with mental retardation. CJ

Report to Members

(Continued from inside front cover)

mer" and a "walk"—one that attempts realistically to protect society from further crimes by a convicted offender.

Even for those that believe in a "tougher" criminal justice system, there surely must be a reasonable limit to the need for harshness. Is a system that is twice as "tough," and more than twice as expensive, now "tough enough?" One would expect that the pressure for longer sentences would have begun to ebb. Instead, the momentum for the expanded use of imprisonment continues unabated. Despite evidence that federal criminal sentences had increased in severity by 32 percent during the previous seven years, last year, Congress enacted sweeping new mandatory minimum sentences for federal drug crimes. And this Spring, the United States Sentencing Commission produced a set of federal sentencing guidelines which, if followed by the federal judiciary, will increase, by the Commission's own estimates, federal prison populations by 71 to 88 percent in five years. The Commission acknowledges that one of its principal objectives was to reduce the number of convicted federal offenders who did not receive a prison sentence.

Policy on criminal sentences is made in this country by officials in all three branches of government: governors and correctional depart-

EXHIBIT 5

TRIAL PRACTICE SERIES

BNA CRIMINAL PRACTICE MANUAL

Vol. 5 No. 9

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DATA COLLECTION CRITICAL TO FORENSIC MENTAL EXAM

Common faults of mental health examinations conducted in criminal cases include inadequate gathering of data and inadequate testing for neurological dysfunction, according to John C. Blume, executive director of the South Carolina Death Penalty Resource Center. In the second part of a two-part article, Blume details how to avoid these deficiencies and offers advice on how to select an expert to conduct the examination. (Page 207)

CHOOSING EXPERTS, GATHERING DATA FOR FORENSIC EVALUATION

By John. C. Blume

In the second part of a two-part article, John C. Blume, executive director of the South Carolina Death Penalty Resource Center, outlines some of the common deficiencies in mental health examinations conducted in criminal cases and offers advice on information-gathering, choosing an expert, and testing. The first part of the article appeared in the last issue of the Current Reports.

IV. Common Deficiencies in Forensic Evaluations

It can be readily seen that many, if not most, of the mental health evaluations conducted in criminal cases do not satisfy the five-step process set forth in the first part of the article. This is not surprising because, as in many other areas, the indigent defendant receives short shrift in the criminal justice system. However, in this section of the article, I will focus in on the elements of an evaluation which, in my experience, are generally most deficient and result in the most unreliable results.

A. Client's History

Many forensic evaluations are unreliable because the history upon which they are based is inadequate. All too often, the medical and social history relied upon by mental health professions is cursory at best and comes exclusively from the client, or possibly from the client and discussions with one or two family members.

This is inadequate because clients, and even their family members, are in many cases very poor historians and may fail to relate significant events which are critical to a proper determination of an individual's mental state at the time of the offense.

For example, individuals who are physically and/or sexually abused often minimize the severity and extent of the abuse. Similarly, individuals with organic impairments generally are unable to recall significant events regarding their medical history which may be critical to a reliable diagnosis. It also well established that many mental illnesses, *e.g.*, bipolar mood disorder and schizophrenia, run in families and thus it is important to know the family as well as the client's medical and psychiatric history.

It is for this reason that it is essential that a mental health professional obtained as much information as possible regarding a client's social and medical history to reliably determine what genetic, organic, environmental, and other factors may have played a role in the client's mental state at the time of the offense. Thus all available records for both the client and significant members of his family should be obtained. These records include, but are not limited to:

- Client's and sibling's birth records
- Client's medical records and family medical records
- Any social services records relevant to client or his family
- Client's and siblings' school and educational records
- All jail and/or department of corrections records, including medical records
- All records relevant to any prior psychiatric or psychological evaluation for client or any family members including grandpar-

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ents, parents, siblings, etc., including the evaluating professional's raw data and notes (do not be content with obtaining the discharge summary or final report)
- Death records for any immediate family members
- Any military records, including medical records
- All police or law enforcement records regarding the arrest, offense and any prior offenses
- All records relevant to any co-defendants
- Family court records for parents and client
- Attorney files, transcripts, and court files for any prior offenses by the client or his family members

Reviewing these records will often lead to additional records, documents and material which should be obtained. You should do so because it is impossible before an investigation is complete to determine what will be the fruitful sources of information.

However, you cannot prepare the history solely from talking with your client and obtaining records. Other family members, friends and persons with knowledge about your client must be interviewed. These people, especially family members should not be talked to in a group, but individually. It is important to bear in mind, for example, that any family member or caretaker you interview potentially abused your client or other members of the family. This information will rarely come out in a family gathering, and will even more rarely come out the first time you talk with the individual. In addition to family members, your client's friends, prior counsel, teachers, social workers, probation and parole officers, acquaintances, neighbors, employers, spouses (current or former), and any witnesses preceding, during and after the offense should be interviewed. Any or all of these persons may have critical information relevant to your client's mental state.

B. Inadequate Testing for Neurological Dysfunction

While not all of our clients have organic brain damage, many do. Organic brain damage can and does affect behavior. It can impair judgment and rob an individual of the ability to make decisions in crises rationally and responsibly. It can destroy and diminish a person's ability to learn, to carry out a plan of action, to understand long term consequences of actions, to appreciate cause and effect, and to mediate impulse driven behavior. However, and despite its obvious relevance in a capital case, neurological impairment is often not diagnosed.

Another very common deficiency in state forensic evaluations is the inattention to the possibility of organic damage, other neurological dysfunction, or a physiological basis for psychiatric symptoms. Based on my experience, many of our clients are at risk for organic brain damage. They have a history of serious head injuries from chronic childhood physical abuse, car accidents, and falls. Their developmental years are plagued with chronic illnesses and fevers, frequently untreated, and malnutrition or undernourishment. Poor or nonexistent prenatal care and/or birth trauma are routinely found in their histories. Many clients had mothers who drank alcohol or used drugs during their pregnancies, now well recognized as a cause of permanent and devastating mental disabilities in the developing fetus. Most of our clients are chemically dependent, and their early and prolonged use of drugs and alcohol including brain damaging organic solvents, can cause permanent brain damage.

However, partly as a result of inadequate histories, and for other reasons which are often difficult to identify specifically in any particular case, inadequate attention is frequently given to the possibility of neurological impairment. For example, very few of my clients have ever been examined by a neurologist, despite indications in their histories that warrant a neurological consultation. Occasionally, the extent of the neurological evaluation may be an EEG. It is also a rare case in which any neuropsychological testing has been conducted, even though neuropsychological testing is one of the best ways to determine the presence of more subtle brain damage prevalent in our clients. Unfortunately, I have been involved in numerous cases where it was only discovered after the trial that the defendant had a serious organic deficit. For example, in one case we discovered during the federal habeas corpus proceedings that our client had a brain tumor that was present at the time of the offense. While this is a dramatic example, in countless other cases we have discovered that our clients have serious neurological impairments that went undiagnosed in earlier evaluations.

This can have tragic consequences. It can deny your client of a concrete way to reduce his blameworthiness. It is a fact of death penalty life that juries, and judges, are generally less impressed with psychosocial ex-

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planations. Organic deficits frequently have their origin in events and situations over which the defendant had no control, such as Fetal Alcohol Syndrome, measles, encephalitis, or neurotoxins such as those found in lead-based paint. They can be presented in an empathy provoking manner, as part of a constellation of factors that affected your client's behavior. While we may understand, and believe in, psycho-social diagnoses such as post-traumatic stress disorder, in some cases it is not compelling enough unless it is accompanied by a physical explanation. For example, if you can show that part of your client's brain is literally missing, most jurors and judges can understand that it might affect an individual's behavior. The same presentation can be made with less dramatic or "softer" neurological impairment, e.g., diffuse brain damage. The important thing is to insure that the evaluation your client received at trial, or receives in connection with post-conviction litigation, fully considered the possibility of neurological impairment.

This cannot be done without a reliable history and appropriate testing and examination. A competent neurologist, psychiatrist, or neuropsychologist will recommend a complete neurological examination when indicated by physical symptoms such as one sided paralysis or weakness, facial asymmetry, seizures, headaches, dizziness, blurred vision, or imbalance. Laboratory tests, including blood and endocrine work ups, may also be necessary to determine the presence of diseases that affect behavior. Magnetic Resonance Imaging (MRI), Electroencephalogram (EEG), and CT scans can also useful in this regard. However, it is important to note that a negative (or normal) result on a CT scan, EEG, or MRI does not rule out the possibility of neurological impairment. While a positive finding proves organicity, a negative finding does not rule brain damage out. Organicity may still be discerned through neuropsychological testing and/or a neurological evaluation.

V. Choosing Experts

There are a number of different types of experts you may need in any particular case. However, you will not know exactly what type of experts you will need until the social-medical history is completed. As I have stressed throughout this article, this must always be the first step. It is useful, in compiling and understanding the social and medical history, to obtain the assistance of a social worker. Social workers are trained not only in gathering the type of information you need—both from documents and individuals—but also in interpreting the data. While you or someone in your office can collect most documents and interview the witnesses, you may not be attuned to significant facts in the records, or be less able to obtain information form the client, the client's family and friends, and other persons with relevant knowledge about your client. Thus, you should consider obtaining the assistance of an individual with a social work background in the investigation, compilation and assimilation of the social and medical history.

Depending on the results of the social history, it is then time to obtain your own experts. In doing so, you should search for professionals with expertise in the themes that have developed in the social history, e.g., child abuse; alcoholism and/or substance abuse; familial or genetic pre-disposition to certain mental illnesses; head injuries or other indicators of organicity; mental retardation, or all of the above. It is important to note that one mental health professional can very rarely help you with all of these things.

It is frequently necessary to put together a multidisciplinary team of professionals, including a social workers, to determine the client's mental state reliably. For example, if the history indicates a history of chronic child maltreatment and abuse, it may be best to begin with a full psychological battery, including neuropsychological testing. This testing may confirm or deny the presence of post-traumatic stress disorder, organic impairment or other diagnoses resulting from the abuse. Similarly, in many cases involving child abuse, the individual will often have a long history of substance abuse. Thus, it may be necessary to retain a pharmacologist to explain the nature of the substances abused, their effects on an individual's judgment, impulse control, cognitive functioning, etc., and to explain the long-term effects of these drugs on a person's brain. Furthermore, depending on the results of the neuropsychological examination, a neurological consult may be in order.

Other types of experts may also be necessary. We have enlisted the assistance of audiologists, mental retardation experts, special education teachers, and a variety of other types of experts, in addition to social workers, psychologists, neurologists, neuropsychologists, pharmacologists, and psychiatrists.

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The important thing, however, is to assemble the necessary mental health professionals on the basis of the history as you determine it. Furthermore, it is frequently a good idea to have one professional who can "bring it all together." In other words, many of your experts may be testifying as to only one piece of the mental health picture, for example, your client's history of substance abuse. It is useful to have one person who, in consultation with all the other members of the team, is prepared to discuss all the history, testing, and diagnosis and give the sentencer a comprehensive picture of the individual's mental state at the time of the offense, and, if relevant, at trial.

VI. Attacking Anti-Social Personality Disorder

Many of our clients are diagnosed by mental health professionals, employed by either the state or the defense, as having an anti-social personality disorder. This diagnosis is not only very harmful but, unfortunately for many of our clients, it is often arrived at erroneously. In my opinion, anti-social personality disorder is the lazy mental professional's diagnosis. The criteria for the disorder is really only a description of people's behavior. For example, one of the characteristics is that the individual engaged in sexual activity at a young age, or began using substances at an early age.

Besides the fact that many of these characteristics are economically and racially biased, the diagnosis is often erroneously arrived at because of an inadequate history and lack of other adequate testing and evaluations. For example, if there is an organic or other cause such as mental retardation for some of the behaviors, then the diagnosis should not be given. In this regard, it is useful to look at and study the decision trees published in *the American Psychiatric Association's Diagnostic and Statistical Manual-III*. These "trees" indicate a number of other diagnoses that preempt the diagnosis of anti-social personality disorder. However, because all many psychologists do is talk to the client, and look at his or her criminal record and other behaviors, the diagnosis is often arrived at despite other factors which would either prevent the diagnosis or move it sufficiently far down on an axis as to make it irrelevant to the other more significant diagnoses in explaining the individual's behavior.

The point of this discussion is that you should never accept at face value any professional's, including your own, determination that your client has anti-social personality disorder. The consequences of this diagnosis are devastating. While in some case the diagnosis may be unavoidable, in many it is not. If the steps outlined previously in this article are followed, you dramatically increase your chances of avoiding a diagnosis that establishes aggravating factors, and obtaining one that offers a compelling basis for mental health related claims.

VII. Don't Be Fooled by the Client

Many times when I consult with lawyers, I hear them say when we are discussing the possibility that their client is mentally ill or mentally retarded that "Well, I've talked to him and he seems pretty sharp to me." Or they say "Well, he seems normal to me." Sometimes they describe their client as manipulative, evasive, hostile, or street smart. It is crucial to remember that as lawyers we are not trained to recognize signs and symptoms of mental disabilities. It is equally important to keep in mind that many mentally retarded, mentally ill or brain damaged individuals are quite adept at masking their disabilities. For example, the one universal skill that mentally retarded people have mastered is some degree of hiding their disability. One client of mine sat in his cell for hours at a time pretending he could read because he thought if people thought he could read they wouldn't believe he was mentally retarded. Other clients with severe mental illnesses are often good at masking their illness for short periods of time.

Unfortunately the quality of many attorney client conversations does not allow probing into the client's mind to determine delusional or aberrational thought processes. However, this does not mean that they are not there. Many ill people, for example, know that other people don't think like they do, and may need to get to know you before they share their thoughts. Similarly, many people with brain damage may not appear dysfunctional when engaged in casual conversation. The important thing is that neither you nor any mental health professional should pre-judge a client's mental state based upon casual contact. It is only through the assistance of competent mental health professionals who recognize the importance of a documented social history and who are trained in appropriate testing that you can reliably and adequately determine your client's mental state.

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VIII. Essential References

Because of the pivotal role of mental health issues in criminal and capital litigation, counsel must gain a working knowledge of behavioral sciences. Whether an attorney has only one criminal or capital case or several, it is essential to become familiar with the diagnosis and treatment of psychiatric disorders. Two publications need to be on the shelves of attorneys in criminal litigation and studied: *Comprehensive Textbook of Psychiatry, Fifth Edition*, edited by Harold I. Kaplan, M.D., and Benjamin J. Sadock, M.D. (Williams & Wilkins, 1989) and *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, published by the American Psychiatric Association in 1987. These references offer a guide through the labyrinth of mental health information and allow counsel to participate fully in developing appropriate mental health claims.

IX. Conclusion

Defense counsel in criminal, especially capital, litigation can and should insure that their clients receive a competent and reliable mental health evaluation. In order for a mental health evaluation to meet the nationally recognized standard of care in the psychiatric community it must involve a multistep process that requires far more than a clinical interview. A thorough and documented social history, physical examination, and appropriate testing are necessary components of any psychiatric diagnosis. Mental health professionals must consider if there is an organic cause for behavior before reaching any psychiatric diagnosis. Counsel has a responsibility to ensure that psychiatric evaluations reflect this multistep process.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	C.A. NO.: 98-CP-09-101

Herman Lee Hughes, Jr.,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
-versus-	)	November 17, 2000
	)	
Michael Moore, Commissioner, Department of Corrections, and Charles M. Condon, Attorney General of South Carolina,	)	
	)	
Defendants.	)	

B E F O R E:

Honorable Paula H. Thomas
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

John H. Blume, Esquire
Attorney for Plaintiff

Donald J. Zelenka, Esquire
Attorney for Defendants

Grace L. Hurley, CVR-CM
Official Reporter

(Friday, November 17, 2000.)

THE COURT: This is Herman Lee Hughes, Jr., Applicant versus Michael Moore, Commissioner, Department of Corrections and Charles Condon, Attorney General, Respondents. It's 98-CP-09-101.

This is a hearing that is limited to the issues of -- that have been raised in objection to a proposed order, and let me make it clear that the Court has ruled in this particular case, but there has been a proposed order that has been submitted. That was submitted on September 7th of 2000. There were objections that were submitted as well. Those were received on October 4th, on or about October 4th of 2000, and those have been considered.

This hearing is limited to the issues of the objections as well as any additions that might be required or clarifications that may be required. I understand that there's been some concern in light of the fact that there was a memo that was submitted, an outline of the proposed order. Now, please understand that no order has been signed at this time, and I want to make it very clear. This is very important. Any order that is signed by this Court will be reviewed very carefully and will become the Court's order. I want to make that very clear. It will not be signed without a very thorough review. In fact, this 187-page order, it shows as 188, but there were some