VOLUME X 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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APPENDIX VV

The dangers of heroin use are well known and require no lengthy elaboration. Indeed, one court has characterized use of this drug as a "form of Russian roulette." *Jackson v. National Life & Accident Insurance Co.*, 130 Ga.App. 208, 202 S.E.2d 711, 712 (1973). Our previous interpretations of Virginia law in *Runge* and *International Underwriters* demonstrate that death will be found non-accidental where an insured has deliberately exposed himself to a substantial and foreseeable risk of serious injury or death, even if death is neither intended nor certain to result. We find that because Phillips voluntarily administered an overdose of heroin to himself, fully aware of the manifold risks involved, under Virginia law his death was a natural and probable consequence of his knowing actions and therefore did not occur by "accidental means."

We emphasize that our decision is a narrow one, and would not necessarily be valid under another state's differing precedents. Furthermore, we express no opinion as to whether death from less obviously dangerous drugs or from other risky activities, e.g., mountain climbing, would similarly be found non-accidental under Virginia law. It suffices to hold that, under the facts before us, the judgment of the District Court must be

AFFIRMED.

relied upon by plaintiff, is consistent with Virginia law and our conclusions in *Runge* and *International Underwriters*, as the death there was not a natural and probable consequence of the insured's knowing action, but the entirely unexpected consequence of ingesting a substance thought to be harmless, with no knowledge of its true deadly nature. *Pilot Life Insurance Co. v. Ayers*, 163 F.2d 860 (4th Cir.1947) was decided under West Virginia rather than Virginia law, and prior to the Virginia Supreme Court's *Smith* decision; accordingly, we need not address its continuing validity.

Joseph Carl SHAW, Appellant,

v.

Joseph R. MARTIN, Warden, Central Correctional Institution, and Hon. Daniel R. McLeod, Attorney General for South Carolina, Appellees.

No. 83-6272.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 9, 1984.

Decided April 26, 1984.

Defendant who had been convicted of murder and other crimes and had been sentenced to death brought petition for federal writ of habeas corpus. The United States District Court for the District of South Carolina, Robert W. Hemphill, J., denied relief, and defendant appealed. The Court of Appeals, Widener, Circuit Judge, held that: (1) district judge did not show bias or prejudice which would have warranted recusal; (2) state habeas judge's comment on sentencing of defendant did not reveal bias sufficient to warrant recusal; (3) study proffered by defendant failed to show discrimination in death penalty imposition sufficient to warrant evidentiary hearing; (4) record established that defendant was competent to plead guilty and did so voluntarily; (5) defendant did not receive ineffective assistance of counsel; and (6) defendant did not have constitutional right to jury sentencing after guilty plea.

Affirmed.

1. Judges ⇐49(1)

To warrant disqualification of judge, alleged bias and prejudice must stem from extrajudicial source and result in opinion on merits on some basis other than what

judge learned from his participation in case; nature of bias must be personal rather than judicial.

2. Judges ⇐51(4)

It is not abuse of discretion to deny recusal motion which is merely based upon judge's rulings in instant case or related cases, or attitude derived from his experience on bench.

3. Judges ⇐49(2)

Trial judge's exchanges with defendant's counsel, including admonition not to "fill the record with a whole lot of gobble-de-gook" and ill-advised attempt at humor in remark about retained counsel's organization, did not warrant recusal of judge. 28 U.S.C.A. §§ 144, 455.

4. Habeas Corpus ⇐113(12)

Where district court, in entering summary judgment dismissing habeas petition, adopted large parts of state's proposed opinion, Court of Appeals would examine facts of case and legal consequences thereof with more careful scrutiny than that usually required.

5. Criminal Law ⇐986.1
Habeas Corpus ⇐30(1)

Even assuming that habeas judge had made "joking" statement as to manner in which defendant should be sentenced, such statement did not render state habeas and sentencing proceedings unfair, where habeas judge had no authority or ability to affect sentencing judge's assignment, and there was no evidence of habeas judge's bias or prejudice.

6. Constitutional Law ⇐211(1)

Proof of discriminatory intent or purpose is required to show violation of equal protection clause; official action is rarely unconstitutional merely because it has disproportionate impact. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ⇐223

Assuming that Fourteenth Amendment's prohibition of selective or discriminatory prosecution of defendant on basis of unjustifiable standards such as race also encompasses decisions to prosecute based on race of victim, proof of discriminatory intent or purpose is also necessary in such claims. U.S.C.A. Const.Amend. 14.

8. Habeas Corpus ⇐59

Study proffered by habeas petitioner which purported to show that 4.2% of killers of black victims had death penalty imposed while 6.2% of killers of white victims did failed to raise issue of discrimination in death penalty imposition sufficient to warrant evidentiary hearing in habeas proceeding, especially as study included homicides for which prosecutor had no discretion to seek death penalty and did not compare murders of similar atrocity.

9. Constitutional Law ⇐46(1)

Court of Appeals should not decide constitutional questions when factual ground exists for its decision.

10. Mental Health ⇐432

In order to show incompetence to plead guilty, defendant must demonstrate that his mental faculties were so impaired when he pleaded that he was incapable of full understanding and appreciation of charges against him, of comprehending his constitutional rights, and of realizing consequences of his plea.

11. Mental Health ⇐432

Standard for competence to stand trial is whether defendant has sufficient present ability to consult with his lawyer with reasonable degree of rational understanding, and whether he has rational as well as factual understanding of proceedings against him.

12. Criminal Law ⇐273(2)

Where both defendant's and state's psychiatrists testified that defendant was competent to participate in plea and sentencing proceeding, to assist his attorney in his defense, and in general to stand trial, and sentencing judge asked numerous questions to determine that defendant understood his rights, defendant was competent to plead guilty, and his plea was voluntary.

13. Judges ⇐49(1)

One who has voted as a legislator in favor of statute permitting death penalty in proper case cannot thereafter be presumed disqualified to hear capital cases as judge or predisposed to give death sentence in any particular case.

14. Criminal Law ⇐641.13(5)

Defendant's trial lawyer did not render ineffective assistance of counsel by failing to inform defendant prior to his guilty plea that sentencing judge had voted for statute permitting death penalty while a member of state senate. U.S.C.A. Const.Amend. 6.

15. Habeas Corpus ⇐85.5(11)

In federal habeas proceeding, evidence that defendant's trial counsel recommended that he plead guilty following careful and thorough investigation, in belief that his prospects were better with sentencing judge than with jury in light of brutal nature of crime, supported finding that defendant received effective assistance of counsel. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐1208.1(4)

Although comparative proportionality review may be safeguard against arbitrarily imposed death sentences, it is not required under Constitution.

17. Habeas Corpus ⇐45.2(4)

In absence of intimation that there was federal constitutional error, federal Court of Appeals may not issue writ of habeas corpus on ground that state Supreme Court has made error of state law.

18. Criminal Law ⇐749

United States Constitution does not give state criminal defendants right to jury sentencing.

19. Constitutional Law ⇐250.3(1)

State scheme which allowed jury sentencing after jury trial, but which required judicial sentencing after defendant pled guilty, did not violate equal protection clause of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

Stephen B. Bright, Atlanta, Ga. (John D. Delgado, Furr & Delgado, Kenneth M. Suggs, Suggs & Kelly, Columbia, S.C., on brief), for appellant.

Donald J. Zelenka, Asst. Atty. Gen., Columbia, S.C. (T. Travis Medlock, Atty. Gen., Columbia, S.C., on brief), for appellees.

Before WIDENER, PHILLIPS and SPROUSE, Circuit Judges.

WIDENER, Circuit Judge.

Shaw appeals the district court's judgment in favor of the South Carolina authorities on his petition brought for habeas corpus relief. We find no merit in Shaw's contentions, and affirm the judgment of the district court.

Background

Shaw pleaded guilty as a principal [1] to armed robbery, kidnapping, criminal sexual conduct, two counts of conspiracy, and two counts of murder. The evidence at his sentencing hearing, conducted by the court without a jury as required by S.C.Code § 16–3–20(B), disclosed that after drinking beer and partaking of drugs, Shaw, James Terry Roach, and Ronald Eugene Mahaffey decided on October 29, 1977, in Mahaffey's words, to "see if we could find a girl to rape." The three drove to a baseball park northeast of Columbia, South Carolina, and pulled up beside a parked car occupied by 17-year-old Thomas Taylor and 14-year-old Carlotta Hartness. At a signal from Shaw, Roach leveled a .22-caliber rifle at Taylor and demanded money. Taylor gave the three his wallet. Shaw and Mahaffey got out of the car, and Mahaffey took the keys out of Taylor's car. Shaw ordered Miss Hartness out of the car and forced her into the back seat of his car with Mahaffey. Shaw got back into his car, turned to

1. Shaw pleaded guilty to the murders on the theory that the act of one is the act of all. This is South Carolina's formulation for principal liability. *See State v. Gilbert*, 107 S.C. 443, 446, 93 S.E. 125, 125–26 (1917).

Roach, and said, "OK, now." Roach then shot and killed Taylor as he sat in his car.

Miss Hartness was taken to a dirt road some distance away, was forced to disrobe, was raped once each by Roach and Mahaffey and twice by Shaw, and forced to perform oral sex by both Shaw and Mahaffey. Shaw then asked who would shoot Miss Hartness, and Roach volunteered. Shaw instructed Miss Hartness to put her face to the ground. When she refused and pleaded for her life, he drew a circle in the dirt, drew an X inside the circle, and told Miss Hartness to put her head in the circle. She again refused. Shaw told her a third time to put her head on the ground, and she complied. Roach then shot Miss Hartness in the head, and, according to Mahaffey's testimony, Shaw said Miss Hartness "wasn't dead yet" and took the rifle from Roach and again shot Miss Hartness in the head.

Shaw, Roach, and Mahaffey left Miss Hartness' body, disposed of the rifle and bullets, and returned to Taylor's car to satisfy themselves that Taylor was dead. Later that night, Shaw returned to the scene of Miss Hartness' killing and mutilated her body. *State v. Shaw*, 273 S.C. 194, 197–98, 255 S.E.2d 799, 800–01, *cert. denied*, 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979).

After taking testimony on extenuation, mitigation, and aggravation, as required under S.C.Code § 16–3–20(B), the sentencing judge found that three of the statutory aggravating circumstances were present: murder was committed while in the commission of rape, murder was committed while in the commission of kidnapping, and murder was committed while in the commission of armed robbery. *See* S.C.Code § 16–3–20(C)(a)(1)(a), (c), (e). In mitigation, the judge found that Shaw had no significant history of prior criminal activity involving the use of violence against another person, that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and he considered the age or mentality of the defendant at the time of the crime as a mitigating factor. *See* S.C.Code § 16–3–20(C)(b)(1), (2), (6), (7). Finding that at least one of the statutory aggravating circumstances was present, that the death sentence was warranted under the evidence of the case, and that the death penalty was not the result of prejudice, passion, or any other arbitrary factor, all required findings under S.C.Code § 16–3–20(C), the judge entered sentences of death for Shaw on the murder charges.[2] The South Carolina Supreme Court affirmed on appeal; and, in its first mandatory review of a death sentence under the state's current death penalty statutes, *see* S.C.Code § 16–3–25, found that the sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence supported the judge's finding of a statutory aggravating circumstance, and that there were no similar cases against which the proportionality of Shaw's sentence could be compared. *State v. Shaw*, 273 S.C. at 209–11, 255 S.E.2d at 806–07. The United States Supreme Court denied certiorari on November 13, 1979. *Shaw v. South Carolina*, 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979). The South Carolina Supreme Court, on November 21, 1979, directed that the sentence of death be executed. The execution was scheduled for December 14, 1979.

Shaw then commenced federal and state post-conviction proceedings, which we summarize here. Shaw filed in the district court a petition seeking a writ of habeas corpus and a motion for stay of execution on December 11, 1979, and a supplemental

2. On the conviction for armed robbery, Shaw received a sentence of 25 years' imprisonment, to be served consecutive to the other sentences; for kidnapping, no sentence; for criminal sexual conduct, a sentence of 30 years' imprisonment, to be served consecutive to the other sentences; and for the two charges of conspiracy, two sentences of 5 years' imprisonment each, to be served consecutive to the other sentences.

petition on December 12. The court held a hearing on December 12, and that day entered an order denying a stay. On December 13, 1979, a judge of this court granted Shaw a stay of execution. *Shaw v. Martin,* 613 F.2d 487 (4th Cir.1980). On December 13 Shaw also made an application for post-conviction relief in state court. That state court held extensive hearings from January 28, 1980 through February 6, 1980, and on February 7, 1980 denied relief. The South Carolina Supreme Court affirmed with formal opinion in *Shaw v. State,* 276 S.C. 190, 277 S.E.2d 140 (1981), and on April 24 set a new execution date of May 22, 1981. On the application of Shaw for a writ of mandamus directing the district court not to entertain application for modification or vacation of our previous stay entered December 13, 1979, this court granted the writ, reaffirmed the December 13, 1979 order of the single judge staying execution, and amended the stay to apply to the May 22 execution date and to any subsequent date pending further order of the court. *In re Shaw,* No. 81-1396 (4th Cir. May 15, 1981) (per curiam) (unpublished).[3]

Shaw then refiled his habeas corpus petition in the district court. The district court denied Shaw's motion that the judge recuse himself, and Shaw's motions for leave to take depositions and for the appointment of experts. The court held a hearing on the state respondents' motion for summary judgment on December 8, 1982, and granted this motion, denying further evidentiary hearings. The court entered judgment for the state respondents on December 22, 1982, and Shaw appealed. We deal with Shaw's contentions on appeal in the order in which they are raised in his brief.

I. Bias and Prejudice of the District Judge

[1, 2] Shaw claims that the district judge should have recused himself because of prejudice and bias and that he thus denied Shaw a fair hearing. Alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp.,* 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). The nature of the bias must be personal rather than judicial. *United States v. Carmichael,* 726 F.2d 158, 160 (4th Cir.1984). On review, the question is whether the judge abused his discretion in denying a recusal motion. *Id.* And it is not an abuse of discretion if the complaint is merely based upon the judge's rulings in the instant case or related cases or attitude derived from his experience on the bench. *Id.* at 160–161.

[3] Shaw moved that the district judge recuse himself under 28 U.S.C. §§ 144, 455, based on exchanges between the judge and Shaw's newly retained counsel (retained counsel) during the December 12, 1979 hearing on Shaw's motion for a stay of execution, and based on the judge's opinion in that matter. The facts Shaw depends upon to show that the district judge should have disqualified himself simply do not support the broad generalizations he makes about them.

We have read the entire transcript of the hearing on the request for a stay in the district court, and are of opinion that Shaw's complaint of constant interruption of his attorneys by the judge is simply without factual foundation. Likewise, the district judge taking notice that Shaw's trial attorney was an outstanding member of the bar recognized as such by his court and by him as a judge is entirely lacking in merit as a fact outside the record or a related proceeding or his experience on the bench from which bias or prejudice should be inferred.

3. During the pendency of this case, this court by orders also refused to vacate the stay mentioned in our per curiam opinion of May 15, 1981, *In re Shaw,* No. 81-1396 (4th Cir. July 20, 1981); dismissed an appeal by petitioner on July 30, 1981, *Shaw v. Martin,* No. 79-2390 (4th Cir. July 30, 1981); and dismissed a procedendo and mandamus action brought by a state respondent on December 20, 1982, *In re McLeod,* No. 82-2052 (4th Cir. Dec. 20, 1982).

The district court transcript shows that retained counsel had only come into the case the day before the hearing, that trial counsel was still representing Shaw, that retained counsel was unable to point to any facts in the record or an affidavit to support Shaw's claim, and that retained counsel's argument seemed illogical to the judge. Retained counsel himself apologized to the judge for not having the opportunity to present the facts in a more compelling fashion, and assured the judge that he understood the court's "concern that there may be an appearance of trying to fool with the court, or deceive the court." Nothing here warrants turning the judge's reaction to retained counsel's perhaps necessarily limited preparation into an attack on the judge's impartiality.[4] Considering the position retained counsel took at the hearing, the judge's admonition not to "fill the record with a whole lot of gobble-de-gook" is understandable, even if the colloquial language used by the judge was out of place in that formal setting.

[4] The remainder of Shaw's claim of bias and prejudice rests primarily on the district judge's statements subsequent to denial of the recusal motion. There was, for example, what has now turned out to be an ill-advised attempt at humor in a remark about retained counsel's organization,[5] but the record as a whole does not establish prejudice against Shaw's claim or bias against Shaw that was personal and extrajudicial.[6] The judge therefore did not abuse his discretion in failing to disqualify himself, and Shaw was not denied a fair hearing in district court on that account.[7]

II. Denial of an Evidentiary Hearing in the District Court

Shaw claims that he was improperly denied an evidentiary hearing in the district court. An evidentiary hearing in a federal habeas corpus proceeding on an issue of fact is mandatory only if the petitioner establishes one or more of the criteria mentioned in 28 U.S.C. § 2254(d) or in *Townsend v. Sain*, 372 U.S. 293, 312–18, 83 S.Ct. 745, 756–60, 9 L.Ed.2d 770 (1963). Otherwise, a state court's findings of fact are presumed to be correct. 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 550, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981). Shaw claims he meets four of these criteria for essentially three reasons. He claims that he did not get a full and fair hearing and was otherwise denied due process in state court because of bias of the state habeas judge and extrajudicial influence upon the state sentencing judge; that he was unable to develop evidence of such bias adequately because he was not permitted to subpoena three state court judges; and that he has material facts as to dis-

4. Shaw also finds prejudice in the judge's question, "I assume there is nothing to say that the proceedings which were had before Judge Harwell were not due process? Not orderly and not voluntary on his part?" This claim is simply frivolous.

5. THE COURT: What organization do you belong to?

....

MR. BRIGHT: The Southern Christian Defense Committee.

THE COURT: That is not a subversive organization, is it?

MR. BRIGHT: No, your honor.

THE COURT: I always wondered. Go ahead.

6. The transcript of the December 12, 1979 hearing, for example, shows that upon the Defense Committee's attorney being introduced to the court he was greeted with: "Glad to have you."

7. Shaw also objects to the district court's adoption of large parts of the State's proposed opinion granting summary judgment. The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions. *See, e.g., Miller v. Mercy Hospital, Inc.*, 720 F.2d 356, 368–69 (4th Cir.1983); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 639–42 (4th Cir.), *cert. granted on other grounds*, — U.S. —, 104 S.Ct. 334, 78 L.Ed.2d 305 (1983). We have held, however, that adoption of proposed findings and conclusions will not warrant reversal of the cause per se. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d at 641. We therefore proceed to examine the facts of this case and the legal consequences thereof with more "careful scrutiny" than that usually required. *See id.* In this connection we have satisfied ourselves that the state court fact-finding supports the judgment of the district court, and have not relied upon its opinion.

crimination in the imposition of the death penalty in South Carolina which were not adequately developed in state court. *See* 28 U.S.C. § 2254(d)(2), (3), (6), (7). We cannot agree that Shaw did not get a fair hearing in the state courts or that the taking of additional evidence was required on the bias and related issues, and we find the evidence offered to supplement the state record on discrimination in the application of the death penalty as it relates to the race of the victim and the decision of the prosecutor insufficient to warrant an evidentiary hearing.

A. *Fairness of state proceedings*

[5] In the state post conviction proceeding, Shaw sought to prove bias on the part of the state judge conducting the hearing (the habeas judge) and extrajudicial influence on the state judge who sentenced Shaw (the sentencing judge). Shaw offered affidavits of two lawyers and made offers of proof of their testimony that at or about the time of Shaw's sentencing hearing, the habeas judge had remarked in their presence that he and another judge (apparently a justice of the South Carolina Supreme Court) had already talked to the sentencing judge and told the sentencing judge that if he did not sentence Shaw to death that he would be holding court in Walhalla or a remote part of the State. One of these attorneys testified that the statement was made in a "joking" manner, the other said in an "off-handed" manner. The habeas judge denied making the remarks and refused to recuse himself, and, on the basis of special interrogatories to the sentencing judge, found that the sentencing judge had not been contacted by or influenced by anyone.

The Supreme Court of South Carolina, however, did not depend upon the denials of the habeas judge and the sentencing judge but assumed the truth of the factual allegations in arriving at its decision, making only supportive reference to the denials of the judges involved. Its fact-finding is supported by the record and the presumption of correctness under 28 U.S.C. § 2254(d) and *Sumner v. Mata* has not been overcome. Because the South Carolina Supreme Court assumed the truth of the factual allegations, no further evidence was necessary on the point. Its fact-finding follows just below:

> Assuming the truth of the factual allegations, we think the only reasonable view of the facts alleged are that they indicate an attempt at levity to ease the tensions created by the magnitude of the case concerning Mr. Shaw, rather than any actual personal bias on the part of the judge. Neither of the judges who allegedly discussed the sentencing judge's assignments has any authority or ability to affect a judge's assignment. Under our State's Constitution, this authority rests exclusively with the Chief Justice. The attorneys to whom the statements were made were well-known to the judge as public defenders who are dedicating all of their talents and energies to the defense of others. It is totally unreasonable to conclude that a judge would make such a statement and thereby reveal actual improper conduct to the public defenders, if such actions had actually occurred. In fact, the affidavits belie the conclusion of actual personal bias or improper conduct. They indicate that the comments, if made, were made in a joking manner. The fact that a more reflective manner might have been used to ease the obviously sobering discussion is insufficient, under the facts of this case, to require the judge's disqualification.
>
> Our conclusion is further supported by the denial of the hearing judge that he made the statement attributed to him, his denial of any personal bias or prejudice in this matter, and his affirmance that he could conduct a fair and impartial hearing. The fair and impartial manner in which the proceedings were conducted evidences a complete lack of any personal bias.
>
> In view of the total lack of any reasonable basis for the charge of bias and prejudice on the part of the trial judge,

we conclude that he properly ruled on the motion to recuse.

Of course, the question of recusal of the judge who presided at the post conviction hearing was designed, ultimately, to reach the issue of whether the alleged statements adversely affected the ability of the sentencing judge to consider the matter in an unbiased manner. Alleged errors in the refusal to subpoena the sentencing judge in an attempt to develop prejudice on his part are of no consequence in view of the absence of proof that the nature of the statements, if made, were such as to create a likelihood that they adversely influenced him. There is no intimation that anyone contacted him for the purpose of influencing his decision. The alleged statements were admittedly, jokingly made, if made at all. The sentencing judge also denied any contact of the nature charged. We find the charges of bias and prejudice on the part of the trial judges in this case to be completely without foundation.

Shaw v. State, 276 S.C. 190, 193–194, 277 S.E.2d 140, 141–142 (1981). No claim is made that there was not a fair hearing in the South Carolina Supreme Court,[8] and we adopt its fact-finding quoted just above as our own.

B. *Discrimination in Death Penalty Imposition*

Shaw further contends that an evidentiary hearing is necessary because material facts as to the operation of the South Carolina death penalty statute were not adequately developed in the state proceedings. In particular, he claims that he could show "arbitrariness and discrimination in the imposition of the death penalty in South Carolina," and made an offer of proof in the district court consisting of the deposition of a certain Dr. Raymond Paternoster dated October 8, 1983, taken in another case, and tables reflecting Dr. Paternoster's statistical analysis of 1,826 "offender events" [9] involving homicide and occurring in South Carolina from 1977, when the current death penalty statute was enacted, through 1981.

Shaw, who is white, offered no proof and makes no claim that the death sentence is imposed in South Carolina on members of any race or group more than on any other race or group, a primary concern of the Supreme Court as to discrimination in death penalty cases. *See Godfrey v. Georgia*, 446 U.S. 420, 439, 100 S.Ct. 1759, 1770, 64 L.Ed.2d 398 (1980) (Justice Marshall concurring); *Furman v. Georgia*, 408 U.S. 238, 249–51, 92 S.Ct. 2726, 2731–33, 33 L.Ed.2d 346 (1972) (Justice Douglas concurring); *id.* at 309–10, 92 S.Ct. at 2762–63 (Justice Stewart concurring); *id.* at 365–66, 92 S.Ct. at 2790–91 (Justice Marshall concurring).

[6] He argues, rather, that the death penalty is more likely to be sought and imposed in South Carolina if a defendant has killed a white victim than if he has killed a black victim. In essence, he thus claims that the statute violates the Fourteenth Amendment's equal protection guarantee as so applied [10] and, more specifical-

8. The state Supreme Court justice mentioned in the lawyers' affidavits and testimony did not participate in the decision in *Shaw v. State*, the appeal of the state habeas proceeding, nor did the sentencing judge, who by this time was a member of the state Supreme Court. *See* 276 S.C. at 196, 277 S.E.2d at 143.

9. An "offender event" in the terminology of Dr. Paternoster is an encounter between one offender and one victim that results in homicide. Thus, because there were three offenders (Shaw, Roach, and Mahaffey) and two victims, six offender events occurred in this case.

10. This argument, mentioned in several recent courts of appeals decisions, generally has failed for various reasons. *See Adams v. Wainwright*, 709 F.2d 1443, 1449–50 (11th Cir.1983); *McCorquodale v. Balkcom*, 705 F.2d 1553, 1556 (11th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573, 584–85 (5th Cir.1981), *modified*, 671 F.2d 858, 859–60 (5th Cir.) (per curiam), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 612–13 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). In other cases, courts may have required evidentiary hearings on such claims. The cases are not directly on point. *See Pulley v. Harris*, 692 F.2d 1189, 1197–99 (9th Cir.1982), *rev'd.* — U.S. —, 104 S.Ct. 871, 79 L.Ed.2d 29 (not deciding or mentioning the point except in passing in n. 4); *Ross v. Hopper*, 716 F.2d 1528, 1539 (11th Cir.1983); *Spencer v. Zant*, 715 F.2d 1562, 1578–83 (11th

ly, that South Carolina prosecutors are selectively or discriminatorily prosecuting murder defendants.[11] It is well established that proof of discriminatory intent or purpose is required to show a violation of the equal protection clause. Official action is rarely unconstitutional merely because it has a disproportionate impact. Unless a clear pattern as stark as that in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), emerges, proof of impact alone is not sufficient. *Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252, 264–66, 97 S.Ct. 555, 562–64, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976). We have held, for example, consistently with that principle that a mere percentage difference in arrests of blacks and whites for a given crime is insufficient to support a theory of racial discrimination in the enforcement of the law. *Butler v. Cooper*, 554 F.2d 645, 647 n. 6 (4th Cir.1977).

Dr. Paternoster's statistical tables here indicate that 4.2% of the killers of black victims have the death penalty imposed while 6.2% of the killers of white victims do, hardly significant figures when we consider that 95.8% of the killers of black victims do not have the death penalty imposed, and 93.8% of the killers of white victims do not.

[7] Assuming that the Fourteenth Amendment's prohibition of selective or discriminatory prosecution of a defendant on the basis of an unjustifiable standard such as race, *see Oyler v. Boles*, 368 U.S. 448, 454–56, 82 S.Ct. 501, 504–06, 7 L.Ed.2d 446 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 374–74, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886); *United States v. Duncan*, 598 F.2d 839, 869 (4th Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979), also encompasses decisions to prosecute based on the race of the victim, proof of discriminatory intent or purpose also is necessary in equal protection claims such as these. This rule is particularly appropriate for scrutinizing prosecutorial discretion, which of necessity must be broad. *See United States v. Duncan*, 598 F.2d at 869.

Dr. Paternoster's study, however, was also insufficient as to this selective prosecution claim. First, the study compared sentences imposed for all homicides committed in South Carolina, and as a part thereof compared sentences imposed for homicides accompanied by another felony. Unless a homicide is murder and is accompanied by one or more statutory aggravating circumstances, however, the prosecutor has no discretion to seek the death penalty; and relatively few felonies qualify as statutory aggravating circumstances in South Carolina. The inclusion of cases in which the prosecutor had no discretion to seek a death sentence at all invalidates the conclusion of the study purporting to find fault with prosecutorial discretion in seeking the death penalty.

More importantly, the study lacks statistical validity because it did not adequately compare murders of similar atrocity. Simply put, this study does not show a pattern of incidents where, for example, black and white young women of tender years have been kidnapped, raped, murdered, and mutilated and the prosecutor has prosecuted only the murderer of the white girl.[12]

Cir.), *rehearing en banc granted*, 729 F.2d 1293 (11th Cir.1984).

11. The subject has been mentioned, sometimes obliquely, in a few recent opinions. *See Pulley v. Harris*, — U.S. —, ——, 104 S.Ct. 871, 885–86, 79 L.Ed.2d 29 (1984) (Justice Brennan dissenting); *Smith v. Balkcom*, 660 F.2d at 584 n. 30 (pattern and practice of Georgia prosecuting authorities to discriminate on grounds of race, sex, and poverty); *Spinkellink v. Wainwright*, 578 F.2d at 612 (prosecutors more likely to seek penalty when victim white).

12. Indeed, this is a major problem with the further analysis of apparently the same data described in Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J.Crim.L. & Criminology 754 (1983). Dr. Paternoster did recognize the invalidity of comparing all homicides, and in this article restricted most of his analysis to 321 capital murders. *Id.* at 765. Even this article, however, does not sufficiently compare murders of similar atrocity. The table that seems to come closest to making such a

Moreover, this comparison does not take into account many other factors entering into prosecutorial discretion, such as the willingness of a defendant to plead guilty, or whether the prosecutor has sufficient evidence to prove a defendant guilty. As previously noted, the statistics also do not show percentage differences in white-victim cases and black-victim cases sufficient to raise an inference that the prosecutors are purposefully or intentionally discriminating in their decision to seek the death penalty. Paternoster claimed that race was a significant predictor of whether a prosecutor would seek the death penalty, but admitted that it was a worse predictor than others he deemed significant, namely, whether another felony accompanied the homicide, whether there was more than one victim, and whether a stranger was killed. Further, he admitted that these four factors together did not account for nine percent of the prosecutor's decisions to seek the death penalty. Perhaps most significantly, Dr. Paternoster was unable to say that his data revealed any purposeful or intentional discrimination on the part of the prosecutors seeking the death penalty. The proffered evidence would not have been of sufficient probative value on the issue of discriminatory intent to have required response, and no evidentiary hearing was therefore required. *See United States v. Duncan*, 598 F.2d at 869.

[8] In sum, we wish to be explicit that we do not hold that death penalty sentencing must be proportionately sought after by the prosecutor or awarded by courts or juries on the basis of the race of the victim in order to pass a test of constitutional validity under the Eighth and Fourteenth Amendments, but only that Dr. Paternoster's proffered evidence is insufficient to establish the claims asserted here, assuming their validity for the purpose of argument only.

The Supreme Court has not upheld such a claim but has discussed the one much like it in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). There the opinion of the court (Justices Stewart, Powell, and Stevens) examined the quite similar, if not the same, proposition presented here. In *Gregg*, the prisoner's complaint was:

> ... that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

428 U.S. at 199, 96 S.Ct. at 2937.

The Court rejected the proposition in this language: "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of

comparison analyzes homicides in which there were multiple victims who were strangers to the offender, and this table (based on admittedly insufficient data) shows that in such homicides the prosecutor is 10% more likely to seek the death sentence if the victims were black. *See id.* at 771.

We note in passing at this point that in *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, — U.S. —, 103 S.Ct. 1802, 76 L.Ed.2d 367 (1983), the South Carolina court analyzed the five capital murder cases it had reviewed under the present law. It yet placed Shaw's atrocity in a class by itself, stating that a "comparable crime" of "unspeakable cruelty and mutilation" had yet to come before that court. 300 S.E.2d at 75.

offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg* at 199, 96 S.Ct. at 2937. And a footnote added:

> The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there has been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Gregg at 199, 96 S.Ct. at 2937.

[9] Thus, it is tempting to say that a statute granting the prosecutorial discretion complained of here has previously been approved by the Court as it may involve a defendant, so, as applied to a victim, the same discretion would be without flaw. But that would overlook the fact that the complaint here is against the statute as applied, not as written, and more importantly we should not decide a constitutional question when a factual ground exists for our decision. *Ashwander v. T.V.A.*, 297 U.S. 288, 341, 347, 56 S.Ct. 466, 480, 483, 80 L.Ed. 688 (1936) (Justice Brandeis concurring). Thus, we decide only that the evidence sought to be introduced was insufficient to support the proposition for which it was offered.

III. Validity of Guilty Plea

Shaw claims that he is entitled to relief because his guilty pleas were invalid. We cannot accept either theory on which he bases this claim.

A. *Competence to Plead Guilty*

[10, 11] Shaw claims that his guilty plea could not have been informed, intelligent, or voluntary because he was incompetent to make such a plea. He urges that the standard of competence to plead guilty should be different from the standard of competence to stand trial. This court's rule is that in order to show incompetence to plead guilty, a defendant must demonstrate that "his mental faculties were so impaired ... when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea." *United States v. Truglio*, 493 F.2d 574, 578 (4th Cir.1974). This standard parallels the standard the Supreme Court established in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam), for competence to stand trial,[13] and we see no logical reason that the standards should be different for standing trial and pleading guilty.

[12] Although there was testimony that Shaw abused drugs and alcohol, had been emotionally disturbed, and perhaps had latent schizophrenia, the psychiatrist that he called at trial explained in the post-conviction hearing that Shaw was not psychotic. This psychiatrist and also the State's psychiatrist testified that Shaw was competent to participate in the plea and sentencing proceedings, to assist his attorney in his defense, and in general to stand trial. In addition, the sentencing judge asked numerous questions, first of Shaw's trial counsel and then of Shaw, to test whether Shaw understood the charges against him and his constitutional rights, whether he

13. The standard for competence to stand trial is whether the defendant "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 factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960).

understood the consequences of his plea, and whether he was acting voluntarily. In each instance, Shaw answered affirmatively. The record establishes unequivocally that Shaw was competent to stand trial and thus to plead guilty, and that he entered informed, intelligent, and voluntary pleas of guilty.

B. *Ineffective Assistance of Counsel*

Shaw also claims that his guilty pleas were invalid because he received ineffective assistance of counsel in deciding to plead guilty. He claims that his trial lawyer failed to inform him before he pleaded guilty that the sentencing judge had voted for a statute permitting the death penalty while a member of the South Carolina Senate.

This claim was first raised in the state post-conviction hearing. There, Shaw stated in his petition that his lawyer failed to inform him as to the sentencing judge's remark that he had voted for the death penalty while in the state legislature. The uncontradicted testimony of Shaw's trial lawyer, however, was that "I knew that Judge Harwell had voted for the death penalty when he was in the General Assembly. That was told to Mr. Shaw...." Shaw did not testify, nor does there appear in the state record an affidavit, that his lawyer did not so inform him. The habeas judge made various findings of fact in support of his conclusion that Shaw had received effective assistance of counsel but made no specific finding as to what the lawyer had told Shaw. The judge did, however, review and reject as meritless the allegations of ineffective assistance of counsel upon which he did not specifically comment in his opinion.

Shaw appears not to have challenged this aspect of the state fact-finding either in the state Supreme Court or in the later federal court proceedings. In his appeal to the state Supreme Court, Shaw claimed that it was ineffective assistance of counsel for trial counsel to advise Shaw to plead guilty after the judge had made his remark. He did not, however, press his claim that he had not been informed of the remark. The state Supreme Court held that Shaw had received effective assistance of counsel, but also did not address this specific incident. In the habeas corpus proceedings in the district court, Shaw offered his affidavit that his trial lawyer had not informed him before he pleaded guilty that the sentencing judge was in favor of the death penalty. In argument before the district court, however, Shaw's recently retained counsel were unclear about what was told Shaw, and indeed seemed to indicate that Shaw had been told by his attorney about the sentencing judge's views.[14]

Although at the state post-conviction relief hearing there was no express fact-finding on this issue, a federal court under *Townsend v. Sain*, 372 U.S. 293, 314, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963), could reconstruct a state court finding that Shaw's trial lawyer did tell him of the judge's vote in the state legislature, because of the uncontradicted evidence of Shaw's trial attorney and of the lack of evidence to the contrary, coupled with the findings exonerating the attorney. We need not go so far, however. Even if we assume that Shaw's counsel did not so inform him, we do not find ineffective assistance of counsel in this case.

[13, 14] We can infer no more from Shaw's claim than that his lawyer should have told him that the judge had previously voted for a statute permitting a judge or jury to impose a sentence of death in a proper case. This is no more sinister than

14. The relevant portion of the transcript, cited in Shaw's brief before this court, reads as follows:

MR. BURR: In conversations with my client last night, an issue was raised as to whether or not Mr. King knew prior to the entry of a guilty plea, of judge—the trial judge's bias toward the death penalty.

THE COURT: Was Mr. Shaw contending that he knows about the trial judge's bias?

MR. BURR: Mr. Shaw contends that Mr. King so informed him. That is, I believe, your honor, a valid issue of fact.

the taking of the oath of office by a South Carolina judge. In swearing to exercise the duties of his office and preserve, protect, and defend the State Constitution, *see* S.C. Const. art. VI, § 5, every judge in South Carolina has agreed to be bound by the legislature's decision that the death penalty should be imposed in a proper case. Shaw could not have found a state judge to hear his case who was not so bound, and we cannot infer more from the judge's prior vote in the state legislature. One who has voted as a legislator in favor of a statute permitting the death penalty in a proper case cannot thereafter be presumed disqualified to hear capital cases as a judge or predisposed to give a death sentence in any particular case. See *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (memorandum opinion of Justice Rehnquist), with respect to the disqualification of a judge, and the opinion of Judge Murnaghan in *Hutchins v. Woodard*, 730 F.2d 953 (4th Cir.1984), especially at 959–961, with respect to the disqualification of jurors. Failure to inform one's client of information about which such insignificant inferences can be drawn simply does not of itself establish ineffective assistance of counsel. In that respect, *Wyatt v. United States*, 591 F.2d 260, 267 (4th Cir.1979), is persuasive. In *Wyatt*, the failure, in a case in which a jury was waived, as here, to inform a client that the judge had presided at an alleged co-conspirator's trial was held not to be ineffective representation of counsel, but informed professional deliberation.

[15] After a review of the state post-conviction hearing transcript, which covers seven days of testimony, we believe that the historical facts established in the state court support the legal conclusion that Shaw received effective assistance of counsel. *See Knight v. Johnson*, 699 F.2d 162, 166 (4th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 112, 78 L.Ed.2d 113 (1983); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978). The record shows that the advice and decision of trial counsel to recommend that Shaw plead guilty followed a careful and thorough investigation, and was the product of their sound deliberation and judgment that Shaw's prospects were better with the sentencing judge than with a jury, especially considering the brutal and utterly sadistic facts of the case. The record does not establish error at all, much less "counsel[ ] error ... so flagrant that a court could conclude that it resulted from neglect or ignorance," *Marzullo v. Maryland*, 561 F.2d at 544, or that Shaw's attorneys did not perform at or above the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). Shaw's claim that his pleas were invalid because of ineffective assistance of counsel therefore must fail.[15]

IV. Proportionality Review

[16, 17] Shaw also challenges his sentence on the ground that the South Carolina Supreme Court improperly compared his case to other similar South Carolina cases to determine whether the death sentence given was proportionate. Although the court conducted such an inquiry and found no similar cases with which to compare Shaw's sentence, *State v. Shaw*, 273 S.C. 194, 211, 255 S.E.2d 799, 807, *cert. denied*, 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329

15. Shaw also claims that his trial counsel were constitutionally ineffective because they believed that a guilty plea would suppress much of the evidence of the murders and that guilty pleas to the charges of rape, robbery, and kidnapping would establish statutory aggravation and preclude further testimony on these crimes. We note that this was the first case under South Carolina's death penalty statute to reach that Supreme Court, and that counsel thus had little guidance on the statute's operation. We also note that the lawyers' judgment was correct insofar as it predicted that the evidence would not be as extensive if a jury trial were waived. For example, of the state's list of 72 or 73 witnesses who could testify at a full trial, only eight were called to testify for the State at the sentencing hearing. We do not view trial counsel's actions as resulting from anything but "informed, professional deliberation." *Marzullo v. Maryland*, 561 F.2d at 544.

(1979), he claims that the court under S.C. Code § 16–3–25(C)(3) should not limit its comparison to other cases under the new statute in which the death penalty is actually imposed. *See State v. Copeland*, 278 S.C. 572, 579–591, 300 S.E.2d 63, 71–74 (1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1802, 76 L.Ed.2d 367 (1983). Although a comparative proportionality review may be a safeguard against arbitrarily imposed death sentences, it is not required under the Constitution, *Pulley v. Harris*, —— U.S. ——, ——, 104 S.Ct. 871, 880, 79 L.Ed.2d 29 (1984); see *Barfield v. Harris*, 719 F.2d 58, 61–62 (4th Cir.1983). With no intimation that there was any such error, this court may not issue a writ of habeas corpus on the ground that the South Carolina Supreme Court has made an error of state law. *Pulley v. Harris*, —— U.S. at ——, 104 S.Ct. at 874. Shaw's challenge to the South Carolina Supreme Court's sentence review is without merit.

V. Judicial Sentencing

Shaw's final claim is that he was entitled under the Constitution to have a jury determine his sentence even though he pleaded guilty, and that the State violated his equal protection rights by denying him jury sentencing when defendants in South Carolina who do not waive a jury trial are sentenced by a jury.[16]

[18] The Constitution does not give state criminal defendants the right to jury sentencing. The judgment of the Court and its plurality opinion in *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976), rejected this proposition in affirming a sentence of death imposed by a judge:

> This court has pointed out that jury sentencing in a capital case can perform an important societal function, ... but it has never suggested that jury sentencing is constitutionally required (citation omitted).

[19] As to Shaw's equal protection argument, he cites no authority that finds an equal protection violation in a state scheme such as this, which allows jury sentencing after jury trials and requires judicial sentencing after a defendant pleads guilty. States "have always enjoyed 'wide leeway in dividing responsibility between judge and jury in criminal cases.'" *Chaffin v. Stynchcombe*, 412 U.S. 17, 22, 93 S.Ct. 1977, 1980, 36 L.Ed.2d 714 (1973), *citing Spencer v. Texas*, 385 U.S. 554, 560, 87 S.Ct. 648, 652, 17 L.Ed.2d 606 (1967). After pointing out the virtues of both judge and jury sentencing, the Court stated that "nothing in the Due Process Clause of the Fourteenth Amendment intrudes upon that choice." 412 U.S. at 22, 93 S.Ct. at 1980. We think the Equal Protection Clause likewise is not violated.

We are thus of opinion to, and do, affirm the judgment of the district court. Our stay or stays of any state court orders giving effect to the sentence of the state court shall be, and they hereby are, dissolved.

AFFIRMED.

WEST KEY NUMBER SYSTEM

16. S.C.Code § 16–3–20 sets out sentencing procedures:

> (B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court.

APPENDIX WW

just on the individual validity of each of Alexander's three contentions. Similarly, in light of the New York court's clear statement conclusively determining the issue of jurisdiction, Alexander's related objection to the phrasing of our certified question is beside the point.

As to Alexander's procedural argument and request for discovery, nothing in the opinion of the New York Court of Appeals indicated that the magnitude of New York risks insured or reinsured by Syndicate 317 would make any difference; to the contrary, the court implied by its manufacturing analogy that underwriting New York risks, "however substantial," would not make Syndicate 317 amenable to suit in New York. In any event, the court clearly held that the alleged activities of Syndicate 317 in New York were legally insufficient to support a finding of "doing business" in New York for purposes of personal jurisdiction under CPLR § 301, a failing that discovery could not cure.

We have considered all of appellees' arguments, and for the reasons stated above, we reverse the order of the district court and direct it to dismiss the action against Syndicate 317 for lack of personal jurisdiction.

Ronald PHILBROOK, Plaintiff–Appellant,

v.

ANSONIA BOARD OF EDUCATION, and Nicolas Collicelli, Dr. Charles J. Conners, Kenneth Eaton, William Eavens, Del Matricaria, and Susan Schumacher (as President), and Faith Tingley (as Secretary), individually and as members of said Board, Robert E. Zuraw, individually and as Superintendent of the Ansonia School System, and Ansonia Federation of Teachers, Local 1012, AFL–CIO, and Josa Neves, Kathleen Roberts, Mary Ghirardini, Dennis Gleason, Dominick Brogolia, Maureen Wilkinson, and Georgette Williams, individually and as officers of said local, Defendants–Appellees.

No. 538, Docket 89–7726.

United States Court of Appeals, Second Circuit.

Argued Nov. 30, 1989.

Decided Jan. 25, 1991.

High school teacher brought action under Title VII alleging that school board's policy of allowing only three days of paid leave for religious observance and not allowing three days of paid leave for personal business to be used for religious observance was discriminatory. The United States District Court for the District of Connecticut, held that teacher failed to prove religious discrimination, and teacher appealed. The Court of Appeals, 757 F.2d 476, reversed and remanded. Certiorari was granted, 106 S.Ct. 848. The Supreme Court, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305, remanded. The United States District Court for the District of Connecticut, Thomas F. Murphy, J., found that the collective bargaining agreement as administered was not discriminatory with respect to conditions of employment on account of religion. Teacher appealed. The Court of Appeals, Mahoney, Circuit Judge, held that district court's conclusion that collective bargaining agreement as administered was not discriminatory was not clearly erroneous.

Affirmed.

Civil Rights ⇐151

District court's conclusion that collective bargaining agreement between high school teachers and school board, which allowed three days' paid leave for religious observance, and did not allow "personal business" leave days to be used for religious observance, was not discriminatory as administered with respect to conditions of employment on account of religion was

not clearly erroneous; there was no evidence to support finding that leave could be taken pursuant to "necessary personal business" provision of agreement for all purposes except religious ones. Civil Rights Act of 1964, §§ 701 et seq., 701(j), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e(j); U.S.C.A. Const.Amend. 1.

David N. Rosen, New Haven, Conn., for plaintiff-appellant.

Thomas N. Sullivan, Hartford, Conn. (Robert J. Murphy, Sullivan, Lettick & Schoen, Hartford, Conn., of counsel), for defendants-appellees Ansonia Bd. of Educ., Nicolas Collicelli, Dr. Charles J. Conners, Kenneth Eaton, William Eavens, Del Matricaria, Susan Schumacher, Faith Tingley, and Robert Zuraw.

James Ferguson, Berlin, Conn., for defendants-appellees Ansonia Federation of Teachers, Local 1012, AFL–CIO, Josa Neves, Kathleen Roberts, Mary Ghirardini, Dennis Gleason, Dominick Golia, Maureen Wilkinson, and Georgette Williams.

Before KEARSE, ALTIMARI, and MAHONEY, Circuit Judges.

MAHONEY, Circuit Judge:

Plaintiff–Appellant Ronald Philbrook appeals from findings of fact and conclusions of law [1] of the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge*. The case involves a claim by plaintiff-appellant Ronald Philbrook of religious discrimination as to conditions of employment, in violation of 42 U.S.C. § 2000e–2(a) and (c) (1988),[2] with respect to the administration of the leave provisions of collective bargaining agreements between defendants-appellees Ansonia Board of Education (the "Board") and Ansonia Federation of Teachers, Local 1012, AFL–CIO (the "Union"). The initial round of the litigation terminated when the Supreme Court modified our decision to remand to the district court and directed that court to make "findings as to past and existing practice in the administration of the collective-bargaining agreements." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71, 107 S.Ct. 367, 373, 93 L.Ed.2d 305 (1986). On remand, the district court concluded that the administration of the leave provisions of the collective bargaining agreements did not result in a statutory violation.

1. Apparently, despite the requirements of Fed.R. Civ.P. 58, no separate judgment was entered following the district court's entry of findings of fact and conclusions of law adverse to Philbrook's claims on July 18, 1989. Philbrook filed a notice of appeal "from the Findings of Fact and Conclusions of Law filed July 18, 1989" on July 21, 1989. We nonetheless conclude that a proper appeal has been taken from a "final decision[ ]" of a district court within the meaning of 28 U.S.C. § 1291 (1988), thus vesting this court with appellate jurisdiction. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam); *Fennell v. TLB Kent Co.*, 865 F.2d 498, 499 n. 1 (2d Cir. 1989).

2. 42 U.S.C. § 2000e–2(a) and (c) (1988) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

On appeal, Philbrook contends that the findings of the district court "are inconsistent with the views and instructions of the United States Supreme Court and are, therefore, clearly erroneous." For the reasons that follow, we affirm the decision of the district court.

Background

The background of this litigation is set forth in detail in published opinions of this court and the Supreme Court, *see Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476 (2d Cir.1985), *aff'd and remanded*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986) (*"Philbrook"*), familiarity with which is assumed. Accordingly, although briefly recounting earlier developments, we focus herein on the facts as they pertain to the issue remaining on appeal.

Ronald Philbrook has taught typing and business at the Ansonia High School since 1962. In February 1968, he was baptized as a member of the Worldwide Church of God. Church teachings require that members refrain from secular employment on certain designated holy days. As a result, Philbrook must miss about six days of work a year.

The school's leave policy allows teachers to take eighteen days of paid "sick leave" a year.[3] This leave may be taken, however, not only for "personal illness and/or illness in the immediate family," but also for the following purposes, subject to the specified limitations as to the number of days allowable therefor:

1. Death in the immediate family ..... 5 day limit each time
2. Family funeral attendance .... 1 day each time
3. Friend funeral attendance .... 1 day each time—limit of 2 days per year
4. Immediate family wedding .... 1 day each time
5. Immediate family graduation .... 1 day each time
6. Immediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism) ..... 1 day each time
7. Official delegate to national veterans organization .... 1 day per year
8. Official delegate (President and/or Business Agent) to national or state teachers organization .... 1 day per year—without charge
9. Official delegate (other than President and/or Business Agent)—(limit of 3) to national or state teachers organization ..... 1 day per year
10. Mandated religious observance ..... 3 days per year—without charge

Those holidays which are required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year.

11. Necessary personal business ..... 3 days total per year

a. Necessary personal business (without approval) ..... 1 day per year

Granted at the discretion of the professional staff member with 48 hour notification to the immediate supervisor. Professional staff member will note personal day on the form provided by Board of Education. In no case shall leave for personal business without approval be used to extend a weekend.

b. Necessary personal business (with approval) ..... 2 days per year

Professional staff member must request the days for personal business on a form provided by the Board of Education forty-eight (48) hours pri-

3. As we stated previously, "[t]he school board's leave policies, as outlined in collective bargaining agreements with the union [(collectively the "Agreement")], have changed over time." *Philbrook*, 757 F.2d at 478. Different versions of the Agreement are described at 757 F.2d 478–79, and the then-current version is set forth at *id.* 479 n. 2. Changes for the most part were minor, and are not material to the issue presented on this appeal.

or to such leave. Reasons for such leave must be stated in sufficiently detailed terms to apprise the Superintendent of the need for such leave, after taking into account the educational needs of the school system.

c. Exceptions regarding the forty-eight (48) hour notice provision, use of prepared forms, and extension of weekends may be made in cases of emergencies.

d. Necessary personal business shall not include (without limitations):

1. Marriage attendance or participation;
2. Day following marriage or wedding trip;
3. Attendance or participation in a sporting or recreational event;
4. Any religious observance;
5. Travel associated with any provision of annual leave;
6. Purposes set forth under annual leave or another leave provision of this contract.

Further, absences resulting from "any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena" or "due to jury duty" are considered as authorized leave and not charged to annual leave.

This appeal centers upon the categories entitled "mandated religious observance" and "necessary personal business." The key provisions are: (1) the "mandated religious observance" category permits three absences per year "without charge" [4] for "holidays which are required by and obligatory due to written denominational law," but "[n]o annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year;" and (2) the "necessary personal business" category excludes absences for "[p]urposes set forth under annual leave or another leave provision of this contract," and for "[a]ny religious observance."

The Board refused to allow Philbrook to use his three "necessary personal business" days for paid leave for religious observance beyond the three-day limit. The Board also rejected Philbrook's offer to pay a substitute teacher, rather than being docked the considerably larger amount of a day's pay, for religious observance days in excess of the three allowed. Instead, the Board allowed Philbrook to take additional days, as required, in the form of unpaid leave.

After exhausting all available administrative avenues to contest the Board's decision, Philbrook filed a complaint in the United States District Court for the District of Connecticut against the Board and the Union which alleged that the foregoing practices and policies (1) "[have] operate[d] to deprive [Philbrook] of equal employment opportunity on account of his religion, in violation of 42 U.S.C. [§] 2000e–2(a) and (c), and defendant Union has failed to assist [Philbrook] fully in gaining relief from these unlawful practices;" and (2) "have operated to deprive [Philbrook] of his right to the free exercise of his religion and have operated as an establishment of religion, in violation of the First and Fourteenth Amendments to the United States Constitution." Philbrook sought both damages and injunctive relief.

In an unpublished opinion, the district court dismissed the complaint, ruling that Philbrook "has not been placed by the School Board or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job."

On appeal, this court reversed, holding that Philbrook had established a prima facie case of religious discrimination. We assumed that the Board's leave policy constituted a reasonable accommodation to Philbrook's religious beliefs, *Philbrook*, 757 F.2d at 484, but ruled that "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal

4. We note that the only other categories of leave that are "without charge" against the eighteen-day annual leave allowance are those for court attendance as a party, witness, or juror, and one day per year as an official delegate (president and/or business agent) to a national or state teachers organization.

the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business." *Id.* The ruling was a gloss on 42 U.S.C. § 2000e(j) (1988), which provides that:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Because the district court had not addressed all the issues which we deemed relevant, we remanded the case to the district court for further proceedings. 757 F.2d at 488.

The Supreme Court, however, granted certiorari. The Court addressed only the Title VII claim, observing that although Philbrook's complaint also alleged a violation of his free exercise rights under the first amendment, this court on appeal did not address the issue, and thus the Supreme Court had no occasion to do so. *Philbrook*, 479 U.S. at 65 n. 4, 107 S.Ct., at 370 n. 4.

The Court framed the issue before it as "whether the employer's proposed accommodation of [Philbrook's] religious practices comports with the statutory mandate of § [2000e(j)]." *Id.* at 68, 107 S.Ct. at 372. The Court rejected our ruling requiring recognition of an employee preference, absent undue hardship, finding "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation." *Id.* at 68, 107 S.Ct. at 372. Rather, the Court held "that an employer has met its obligation under § [2000e(j)] when it demonstrates that it has offered a reasonable accommodation to the employee." *Id.* at 69, 107 S.Ct. at 372. Accordingly, the Court concluded that the "remaining issue in the case is whether the school board's leave policy constitutes a reasonable accommodation of Philbrook's religious beliefs." *Id.* at 70, 107 S.Ct. at 372.

Addressing this issue, the Court said: "We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one." *Id.* at 70, 107 S.Ct. at 373. The Court added, however, that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones," because "[a] provision for paid leave 'that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free ... not to provide the benefit at all.'" *Id.* at 71, 107 S.Ct. at 373 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75, 104 S.Ct. 2229, 2233, 81 L.Ed.2d 59 (1984)).

The Court concluded:

> Whether the policy here violates this teaching turns on factual inquiry into past and present administration of the personal business leave provisions of the collective-bargaining agreement. The school board contends that the necessary personal business category in the agreement, like other leave provisions, defines a limited purpose leave. Philbrook, on the other hand, asserts that the necessary personal leave category is not so limited, operating as an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes. We do not think that the record is sufficiently clear on this point for us to make the necessary factual findings, and we therefore affirm the judgment of the Court of Appeals remanding the case to the District Court. The latter court on remand should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreements.

Id.

On remand, the district court requested proposed findings of fact and conclusions of law from the parties before holding a hearing. The court then issued a brief memorandum, which stated in pertinent

part, "Defendants have submitted on November 9, 1987 ... proposed findings of fact and conclusions of law to which we have agreed and signed." The court added, however:

> We and plaintiff's counsel remain puzzled ... by the Supreme Court's direction that we should make the necessary findings as to the "past and existing practices in the administration of the Collective Bargaining Agreement." We surmise that this direction to the existing practice was based on its surmise that the Bargaining Agreement might have been changed since the date of the trial. If so, we should be advised and accordingly will conduct future hearings on that issue if the Agreement has been changed.

On May 4, 1989, the district court conducted an evidentiary hearing concerning the remand issue. Despite the limitation intimated in the foregoing quotation, however, evidence was received regarding the various versions of the Agreement and their administration dating back to 1973. Numerous personal leave request forms submitted by teachers were received in evidence.

Testimony was provided by the current superintendent of schools for the Ansonia public school system, Robert E. Zuraw, a former superintendent, Richard F. Nicolari, and the president of the Ansonia Federation of Teachers, Josa Neves. Zuraw, who approves leave requests, testified that "necessary personal business" leave may not be taken for reasons specified in the other leave provisions of the Agreement. In addition, he continued, the stated reason "has to be necessary, as far as being important, having some part in the persons [sic] family or personal life." Accordingly, not all requests for "necessary personal business" leave are approved. The "necessary personal business" leave day that is provided "without approval," although "at the professional staff member's discretion" and not requiring a prior specification of its purpose, still cannot be taken for a purpose otherwise specified in the contract. Further, the reason for taking the day is subject to inquiry after the fact to assure compliance with the Agreement. As a general rule, teachers who wish to take a day's leave for a non-qualifying reason may do so, but are not paid.

Nicolari's testimony did not vary in substance from Zuraw's regarding any of the foregoing. Nicolari stated that he would define "necessary personal business" to mean "necessary and essential as opposed to frivolous and recreational." Neves also confirmed Zuraw's testimony concerning the interpretation and administration of the various versions of the Agreement. Neves further testified that paid leave had been denied on the basis of the limitations specified in the Agreement, and that some teachers, aware of those limitations, had at the outset requested unpaid leave for nonconforming leave requests.

After the hearing, the district court issued the further findings of fact and conclusions of law that are the subject of this appeal. They closely parallel, but are not identical to, the findings and conclusions previously submitted by defendants and endorsed by the district court. The key findings of fact are:

> 10. "Necessary personal business" leave continues to be a limited purpose leave under the provisions of the current bargaining agreement.
>
> * * *
>
> 13. The thrust of the restrictions on the use of the three days of "necessary personal business" leave is to disallow the taking of such leave by any teacher for reasons for which leave is provided under other provisions of the Agreement.
>
> 14. The leave provisions treat the plaintiff equally with other teachers with respect to the use of "necessary personal business" leave.

The district court's conclusions of law were:

> 1. In *Ansonia Board of Education et al v. Philbrook*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986), the Supreme Court ruled that providing the plaintiff in this case with unpaid leave for religious observance beyond the amount of paid leave provided for that purpose in the

bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious needs unless paid leave is provided for all purposes except religious ones.

2. Under the facts of this case, providing the plaintiff with unpaid leave for religious observance beyond the amount of paid leave allowed for that purpose under the collective bargaining agreement constitutes a reasonable accommodation to the plaintiff's religious beliefs.

This appeal followed.

Discussion

A. *Standard of Review.*

Fed.R.Civ.P. 52(a) provides that "[f]indings of fact ... shall not be set aside unless clearly erroneous." "[U]nder the clearly erroneous standard, we may only reject findings by the trial court when we are left with the 'definite and firm conviction that a mistake has been committed.'" *Ottaviani v. State Univ.*, 875 F.2d 365, 375 (2d Cir.1989) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)), *cert. denied*, — U.S. —, 110 S.Ct. 721, 107 L.Ed.2d 740 (1990); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In this case, the district court on remand initially adopted the findings of fact proposed by the Board. Verbatim adoption of findings prepared by prevailing parties has been criticized by the Supreme Court, *see, e.g., Anderson*, 470 U.S. at 571–72, 105 S.Ct. at 1510; *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n. 13, 94 S.Ct. 2856, 2866 n. 13, 41 L.Ed.2d 978 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 & n. 4, 84 S.Ct. 1044, 1047 & n. 4, 12 L.Ed.2d 12 (1964), and by circuit courts. *See, e.g., Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407–08 (D.C.Cir.) *on rehearing*, 852 F.2d 619 (D.C.Cir.1988), *cert. denied*, 490 U.S. 1105, 109 S.Ct. 3155, 104 L.Ed.2d 1018 (1989); *see also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2578, at 704–08 (1971 & Supp.1990). As we have stated, however, "[t]his method of complying with Fed.R.Civ.P. 52(a) is frowned upon, but is not necessarily fatal." *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 n. 2 (2d Cir.1987) (citation omitted).

After the remand hearing, furthermore, the district court issued new findings. Although these were also taken in large part from those proposed by the Board, modifications were made by the court. The Supreme Court has observed that when a court does not "simply adopt" a party's proposed findings, "the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules." *Anderson*, 470 U.S. at 572–73, 105 S.Ct. at 1511.

B. *The Findings of the District Court.*

Philbrook contends that the district court's findings of fact did not squarely address the issue posed by the Supreme Court's remand, because "the only limitations the district court found on the scope of personal leave were the ones that the Supreme Court had already noted when it requested further findings from the district court: Personal leave is not permitted for uses otherwise specified in the contract." Accordingly, he asks this court to set aside the factual findings of the district court and decide the case in his favor.

We disagree. Far from missing the point of the remand, the district court directed its attention to the precise issue as to which the Supreme Court required further findings. As we view the matter, the Court was concerned whether the Agreement was essentially administered in accordance with its terms, or whether, on the contrary, "necessary personal business" leave "may [in practice] be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes." *Philbrook*, 479 U.S. at 71, 107 S.Ct. at 373. Accordingly, a determination that the Agreement is in fact administered

according to its terms addresses and settles the issue posed by the Court's remand.

The remand record not only supported, but compelled, that conclusion. There is *no* evidence in the remand record to support a finding that leave may be taken pursuant to the "necessary personal business" provision of the Agreement for all purposes except religious ones. Rather, such leave may be taken for any reason deemed by the relevant administrator to fall within this general category, with the limitation that such leave may not be taken for those activities otherwise specified in another leave provision, *whether religious in nature or not*, or for "[a]ny religious observance." [5] Thus, Philbrook is limited to three days of paid leave for mandated religious observance, and a colleague who is a delegate to a national veterans organization is limited to one day a year for activity in that capacity. Neither may take any leave for such activity under the "necessary personal business" category, whether or not there is available unused leave in that category. Either may take excess days for these purposes, but without pay. The only difference is that the delegate will be charged against his leave account for the single day that he is allowed to take, should he take it, but Philbrook will not be charged for any of the three days of mandated religious observance that he may take. *See supra* note 4.

The category of "necessary personal business" is, of course, somewhat nebulous, and thus requires judgment calls by the supervisors responsible for administering such leave. No showing was made on remand, however, that in doing so, there is any general animus towards activities that are religious in nature or purpose, or that leave is denied for such activities except as specifically provided by the Agreement. Accordingly, no case is made that religious discrimination violative of 42 U.S.C. § 2000e–2(a) and (c) (1988) has occurred.

Conclusion

The decision of the district court is affirmed.

UNITED STATES of America, Appellee,

v.

Stanford CHAMPEGNIE, Defendant–Appellant.

No. 665, Docket 90–1419.

United States Court of Appeals, Second Circuit.

Submitted Jan. 11, 1991.

Decided Jan. 29, 1991.

Defendant was convicted by jury of illegally reentering United States after deportation and making false statement to Immigration and Naturalization Service before United States District Court for the Northern District of New York, Thomas J. McAvoy, J., and he appealed. The Court of Appeals held that: (1) there was no defense of good faith or mistake to charge of violating statute which makes it felony for alien who has previously been arrested and deported to reenter United States without express consent of Attorney General, and (2) defendant was not denied due process due to fact that two allegedly favorable

5. We do not construe the prohibition of "necessary personal business" leave for "[a]ny religious observance" as erecting a general bar against any leave having a religious *purpose*. Nor, obviously, did the Supreme Court so read it, for the Court would hardly have remanded for findings concerning the *administration* of the Agreement if it deemed its very terms to require prohibited religious discrimination. The Agreement specifies, we note, that leave may be taken for "[i]mmediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism)," as well as for family and friend funeral attendance and family weddings, thus making clear that the separately specified categories of "mandated religious observance" and "religious observance" do not exhaustively cover all activities having a religious purpose.

APPENDIX XX

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34 A.F.T.R.2d 74-6007, 74-2 USTC P 9714
(Cite as: 503 F.2d 1291)

United States Court of Appeals, Tenth Circuit.

A. H. KELSON and Nyla C. Kelson, Plaintiffs-Appellees,
v.
UNITED STATES of America, Defendant-Appellant.

No. 73-1914.

Sept. 23, 1974.

Suit was brought for the refund of income taxes paid. The United States District Court for the District of Utah, Willis W. Ritter, Chief Judge, entered judgment for taxpayer, and an appeal was taken. The Court of Appeals, Breitenstein, Circuit Judge, held that taxpayer's cause of action based on stock loss accrued when notice of disallowance of refund claim was mailed and was not extended or interrupted by the filing of a second claim reasserting first claim but stating no facts or legal theories amplifying first claim, even though IRS acted on portion of second claim which asserted separate claim based on a different series of transactions; and that where taxpayer loaned over $199,000 to his closely held corporation and received small salary for help and management, loans were made to protect taxpayer's investment rather than in connection with his trade or business, and thus, with respect to note loss, taxpayer sustained a capital loss, not proximately related to his trade or business, which could not be carried back to a prior year for income tax purposes.

Reversed and remanded with directions to enter judgment for United States.

West Headnotes

[1] Internal Revenue k5044
220k5044
(Formerly 220k2073)
[1] Internal Revenue k5045
220k5045
(Formerly 220k2074)
Taxpayer's cause of action based on stock loss accrued when notice of disallowance of refund claim was mailed and was not extended or interrupted by the filing of a second claim reasserting first claim but stating no facts or legal theories amplifying first claim, even though IRS acted on portion of second claim which asserted separate claim based on a different series of transactions. 26 U.S.C.A. (I.R.C.1954) §§ 6511, 6532(a)(1, 4), 7422(a).

[2] Internal Revenue k5045
220k5045
(Formerly 220k2074)
Reconsideration of claim for refund of taxes could not extend period for taxpayer's suit for recovery of tax refund. 26 U.S.C.A. (I.R.C.1954) §§ 6511, 6532(a)(1, 4), 7422(a).

[3] Federal Civil Procedure k2280
170Ak2280
The mechanical adoption of a litigant's findings is an abandonment of duty imposed on trial judges by rule 52. Fed.Rules Civ.Proc. rule 52, 28 U.S.C.A.

[4] Federal Courts k848
170Bk848
(Formerly 106k406.3(6))
Under rule 52, question for an appellate court is whether on the entire evidence it is left with the definite and firm conviction that a mistake has been committed. Fed.Rules Civ.Proc. rule 52, 28 U.S.C.A.

[5] Internal Revenue k3236
220k3236
(Formerly 220k612.6)
[5] Internal Revenue k3438
220k3438
(Formerly 220k669)
Where taxpayer loaned over $199,000 to his closely held corporation and received small salary for help and management, loans were made to protect taxpayer's investment rather than in connection with his trade or business, and thus, with respect to note loss, taxpayer sustained a capital loss, not proximately related to his trade or business, which could not be carried back to a prior year for income tax purposes. 26 U.S.C.A. (I.R.C.1954) §§ 166, 166(d)(1, 2), 172, 1211, 1212, 6532(a)(1).

*1291 J. Jay Bullock, Salt Lake City, Utah, for plaintiffs-appellees.

Jonathan S. Cohen, Atty., Tax Div., Dept. of Justice (Richard M. Roberts, Acting Asst. Atty. Gen., Meyer Rothwacks and Jane M. Edmisten, Attys., Tax Div., Dept. of Justice, and C. Nelson Day, U.S. Atty., of counsel, on the brief), for defendant-appellant.

Before BREITENSTEIN, McWILLIAMS and BARRETT, Circuit Judges.

*1292 **BREITENSTEIN, Circuit Judge.**

This is an income tax case for the refund of taxes paid in 1964, and concerns the carryback of losses incurred in 1966 on the worthlessness of corporate stock and in 1967 on the worthlessness

of corporate notes. The issues are the applicability of the statute of limitations to the corporate stock loss claim and the determination of the deductibility of the note loss as an ordinary business loss rather than a capital loss. The district court gave the plaintiff taxpayer judgment for $135,476.65 against the United States. We reverse.

Plaintiff-appellee A. H. Kelson, whose wife Nyla is a party only because of a joint return, incurred capital gains through the liquidation of corporate stock in 1964 and paid a federal income tax for that year of $135,476.65. In 1963 taxpayer formed Bonneville Capital Corporation and was its president and a director in 1964-1967. During the same period he was, and still is, chairman of the board of the Bank of Salt Lake and a director of Continental Thrift and Loan Company, both of which were subsidiaries of Bonneville. By 1965 taxpayer had acquired about 2/3 of the Bonneville stock and had an adjusted base therefor of $366,119.65. Between 1964 and 1966 taxpayer loaned to Bonneville $199,440 and held its notes in that amount.

In 1966 the Bonneville stock became worthless and in his return for that year taxpayer claimed as an ordinary business loss $366,119.65, his adjusted base for the stock. During the 1967 liquidation of Bonneville taxpayer received, in exchange for his notes, stock of the two mentioned Bonneville subsidiaries. The court found that he had a $166,288.42 loss on the notes. The government does not question this amount. In his 1967 return he claimed the loss on the notes as an ordinary business loss.

On April 14, 1967, taxpayer filed a claim for refund of the 1964 tax. The reason given for the claim was 'Carryback of 1966 operating loss.' The loss for that year arose out of the worthlessness of the Bonneville stock. On March 21, 1968, taxpayer filed a second claim for refund of the 1964 tax. The reason given for this claim was 'Claim amended to include carryback of 1967 operating loss. Original claim filed to carryback 1966 net operating loss.' The 1967 loss arose out of the Bonneville notes. The first refund claim was disallowed on May 7, 1968, and the second was disallowed on December 31, 1969. The instant suit was filed on December 15, 1971.

So far as applicable, 26 U.S.C. § 6532(a)(1) provides:

> 'No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax * * * shall be begun * * * after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.'

The instant suit is brought under § 7422(a) for recovery of a tax refund. Notice of disallowance of the first claim based on the stock loss was properly mailed on May 7, 1968, more than two years before the filing of suit on December 15, 1971. The government contends that the statute bars consideration of the stock loss claim.

Taxpayer's reliance on § 6511 is misplaced. That section relates to the filing of refund claims. The government concedes that each claim was filed within time. The question is whether the two-year limitation bars suit on the stock loss claim. It does unless the second claim extends the period within which suit may be brought.

[1] The argument that the second refund claim amends the first and hence protects it from the bar of the statute is not persuasive. The second claim asserts an additional ground for relief based on the note loss. It states no facts or legal theories amplifying the first claim. In Charlson Realty Company v. United States, 181 Ct. Cl. 262, 384 F.2d 434, the second claim was not a *1293 repetition of the first but was based on new grounds. 384 F.2d at 440. In the instant case we have a repetition of the first claim and the assertion of another claim based on a different series of transactions. The taxpayer's cause of action based on the stock loss accrued when the notice of disallowance was mailed and may not be extended or interrupted by the filing of a second claim reasserting the first. Einson-Freeman Co., Inc. v. Corwin, 2 Cir., 112 F.2d 683, 684, cert. denied 311 U.S. 693, 61 S. Ct. 75, 85 L. Ed. 449, and 18th Street Leader Stores, Inc. v. United States, 7 Cir., 142 F.2d 113, 115, cert. denied 323 U.S. 725, 65 S. Ct. 61, 89 L. Ed. 583. Thus the 'taxpayer may not keep his claim 'fresh indefinitely' by merely reasserting it.' Mertens, Law of Federal Income Taxation § 58.23, Ch. 58, p. 74 (1970). In the instant case we have nothing more than repetition of the stock loss claim. Section 6532(a)(1) makes the statutory bar applicable to the disallowance of 'part' of a claim and by its terms bars suit on the stock loss.

[2] The fact that IRS acted on the second claim is of no moment. It had to so far as the claim was based on the note loss. The record shows no reconsideration of the first claim but, even if there was, reconsideration does not extend the period. 26 U.S.C. § 6532(a)(4). The decision of the district court would permit the indefinite extension of the statute by the filing of repetitive claims and defeat the purpose of the statute. The claim based on the 1966 stock loss is barred by § 6532(a)(1) and recovery on that claim cannot be had in the instant suit. See Real Estate-Land Title & Trust Co. v. United States, 309 U.S. 13, 18, 60 S. Ct. 371, 84 L. Ed.2d 542.

The suit is timely in so far as the note loss is concerned. Section 166 of the Code allows a deduction for any business debt which becomes worthless during the taxable year. Such debts are subject to the net operating loss carryback provisions of § 172. Losses from nonbusiness debts are considered as capital losses, § 166(d)(1), and subject to §§ 1211 and 1212. A nonbusiness debt is a debt other than one created 'in connection with' taxpayer's trade or business. § 166(d)(2). The regulations define a nonbusiness debt as a debt other than one created 'in the course of' taxpayer's trade or business, or a debt, the loss from which is not proximately related to the conduct of taxpayer's trade or business. 26 C.F.R. § 1.166-5(b).

The loans were made to Bonneville in 1964-1966 and the loss occurred in 1967. In 1964, 1965, and 1966 taxpayer received compensation from Bonneville in the amounts of $1,750, $6,000, and $6,000 respectively, and in the same years from the Bank of Salt Lake in the amounts of $3,355, $9,223, and $12,320 respectively. He devoted 1/4 of his time to Bonneville and the remainder to the Bank of Salt Lake, a Bonneville subsidiary. The total of the loans to Bonneville was $199,440.

In United States v. Generes, 405 U.S. 93, 92 S. Ct. 827, 31 L. Ed.2d 62, the Court noted that taxpayer testified that his sole motive in making loans to his closely held corporation was to protect his employment and salary. 405 U.S., at 99, 92 S. Ct. 827. The Court characterized the testimony as self-serving, 405 U.S. at 106, 92 S. Ct. 827, and said that the proper test to determine whether a bad debt had a 'proximate' relation to taxpayer's trade or business is that of dominant motivation. 405 U.S. at 103, 92 S. Ct. 827. The objective facts surrounding loans, rather than the subjective intent, control. 405 U.S. at 104, 92 S. Ct. 827. The courts should compare the accompanying risks of the loans with the potential reward. 405 U.S. at 104, 92 S. Ct. 827. Evidence of a large disparity between the loans and the taxpayer's salary is of some weight. 405 U.S. at 106-107, 92 S. Ct. 827. Mere activity by a stockholder in his corporation's affairs is not enough. 405 U.S. at 104, 92 S. Ct. 827.

The business of the corporation to which a loan is made must be distinguished from the business of the lender. In Whipple v. Commissioner of Internal Revenue, 373 U.S. 193, 83 S. Ct. 1168, 10 ***1294** L. Ed.2d 288, the Court said that the mere devotion of time and energy to the affairs of a corporation does not establish a trade or business. 373 U.S. at 202, 83 S. Ct. 1168. Although such activities may create income or gain, they are more closely related to the successful operation of the corporation's business than to that of the lender. Ibid. The Court rejected the contention that 'one who actively engages in serving his own corporations for the purpose of creating future income through those enterprises is in a trade or business.' 373 U.S. at 203, 83 S. Ct. at 1174. In the instant case, Bonneville was taxpayer's corporation. Without 'substantial additional evidence' management of and assistance to the corporation for a reward are akin to the activities of an investor. Ibid.

Trent v. Commissioner of Internal Revenue, 2 Cir., 291 F.2d 669, and Lundgren v. Commissioner of Internal Revenue, 9 Cir., 376 F.2d 623, are not in point. In the first, the taxpayer made the loan because he was expected to as an employee and would be fired if he did not. 291 F.2d at 670; see also Rev. Rul. 71-561. In the second, the taxpayer was in the same business as his corporation. 376 F.2d at 628.

In Hogue v. Commissioner of Internal Revenue, 10 Cir., 459 F.2d 932, 937-938, we recognized the Generes and Whipple decisions and sustained the Tax Court which had held that the requisite relationship did not exist between the loans and the taxpayer's accounting business. In that case the fact finder found against the taxpayer.

In the instant case the court found that the dominant purpose of taxpayer 'was to obtain and secure for himself an executive position with the Corporation and its subsidiaries so as to enable him to obtain compensation for his personal services.' Taxpayer did not testify as to his intent in making the loans. He said that the dominant purpose in acquiring Bonneville stock was 'to create a position, a job, and give me a chance to build sort of empire.' We are concerned with the loans, not with the stock acquisition. The only bit of the record which pertains to the loans is taxpayer's answer to a written interrogatory in which he said that his trade or business was that of an employee and that the loans to Bonneville were made to obtain and secure 'a position of employment with the borrower and/or its affilliated (sic) corporations.'

We have no question of credibility. The question is whether the self-serving answer to a written interrogatory suffices to establish the dominant purpose which under Generes entitles the taxpayer to prevail. Generes says that objective facts rather than subjective intent control. 405 U.S. at 104, 92 S. Ct. 827. Taxpayer's salary from Bonneville ranged from $1,750 to $6,000. The total loans were over $199,000. He controlled Bonneville, and the record shows no effort to oust him. Bonneville was a holding company, and taxpayer acquired its stock 'to building sort of an empire.'

In his 1964 tax return, taxpayer gave his occupation as 'banker,' and in 1967 as 'executive.' Nothing shows that he was in the business of making loans. He spent only 1/4 of his time with Bonneville. The relationship between his stated occupations and the business of Bonneville is, at the most, speculative.

The disparity between salary and loans is some evidence that the loans were made to protect taxpayer's investment, and only incidently to protect his salary. See Gross v. Commissioner of Internal Revenue, 9 Cir., 401 F.2d 600, 602, and Millsap v. Commissioner of Internal Revenue, 8 Cir., 387 F.2d 420, 422-423.

[3][4][5] At the conclusion of the hearing the trial court said that judgment would be for the taxpayer and against the United States, and that counsel should 'prepare the papers.' Two days later the court signed findings of fact and conclusions of law which show on their face that they were prepared by the attorney for the taxpayer. This practice of the same trial judge was condemned over ten years ago by the Supreme Court in United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657, 84 S. Ct. 1044, 12 L. Ed.2d 12. The mechanical ***1295** adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52, F.R. Civ. P., because findings so made fail to 'reveal the discerning line for decision * * *.' Ibid. and particularly n.4. Under Rule 52 the question for an appellate court is whether 'on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746; see also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed.2d 129. In the case at bar we have that definite and firm conviction. The objective facts establish that the loans were made to protect taxpayer's investment rather than in connection with his trade or business. Accordingly, taxpayer sustained a capital loss not proximately related to his trade or business and that loss may not be carried back to 1964.

Reversed and remanded with directions to enter judgment for the United States.

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APPENDIX YY

376 U.S. 651

UNITED STATES, Appellant,

v.

EL PASO NATURAL GAS COMPANY et al.

No. 94.

Argued Feb. 25 and 26, 1964.

Decided April 6, 1964.

Civil suit charging violation of the Clayton Act. The United States District Court for the District of Utah dismissed the complaint after trial, and a direct appeal was taken. The Supreme Court, Mr. Justice Douglas, held that under circumstances, and in view of booming incremental need for natural gas in California, physical proximity, resources and abilities of acquired company (which served adjacent areas), evident opportunities for acquired company's expansion into California, and evident effect of acquired company's previous unsuccessful attempt to enter California, acquisition of stock and assets by natural gas company which then exclusively served California violated Clayton Act, although it was not established that acquired company could in fact have obtained contracts, supplies, financing or licensing to serve California.

Reversed.

Mr. Justice Harlan dissented in part.

1. Federal Civil Procedure ⇐2282

Findings prepared by counsel for prevailing party and adopted verbatim by district court were formally those of district court, and, although not product of district judge's mind, would not be rejected out-of-hand and would stand if supported by evidence. Fed.Rules Civ. Proc. rule 52, 28 U.S.C.A.

2. Monopolies ⇐20

Under circumstances, and in view of booming incremental need for natural gas in California, physical proximity, resources and abilities of acquired company (which served adjacent areas), evident opportunities for acquired company's expansion into California, and evident effect of acquired company's previous unsuccessful attempt to enter California, acquisition of stock and assets by natural gas company which then exclusively served California violated Clayton Act, although it was not established that acquired company could in fact have obtained contracts, supplies, financing or licensing to serve California. Clayton Act, § 7 as amended 15 U.S.C.A. § 18; Fed.Rules Civ.Proc. rule 52, 28 U.S.C.A.

3. Monopolies ⇐20

Production, transportation and sale of natural gas is "line of commerce", and California is "section of the country", within Clayton Act prohibition on certain acquisitions. Clayton Act, § 7 as amended 15 U.S.C.A. § 18; Expediting Act, § 2, 15 U.S.C.A. § 29.

See publication Words and Phrases for other judicial constructions and definitions.

4. Monopolies ⇐20

Congress used words "may be substantially to lessen competition", in indicating proscribed mergers under amended Clayton Act provision, to indicate its concern with probabilities, not certainties, and it was mergers with probable anti-competitive effect that were proscribed. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

5. Monopolies ⇐20

One purpose of Clayton Act provision prohibiting certain acquisitions was to arrest trend toward concentration, the tendency to monopoly, before consumers' alternatives disappear through merger. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

6. Appeal and Error ⇐1176(1)

Upon determination that acquisition of stock and assets of natural gas company violated Clayton Act, Supreme Court not only reversed district court judgment but would direct district court

to order divestiture without delay, where acquirer had been on notice of antitrust charge from almost the beginning. Clayton Act, § 7 as amended 15 U.S.C.A. § 18.

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Archibald Cox, Sol. Gen., for appellant.

Gregory A. Harrison, San Francisco, Cal., for appellees.

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice CLARK.

This is a civil suit charging a violation of § 7 of the Clayton Act,[1] by reason of the acquisition of the stock and assets of Pacific Northwest Pipeline Corp. (Pacific Northwest) by El Paso Natural Gas Co. (El Paso). The District Court dismissed the complaint after trial, making findings of fact and conclusions of law, but not writing an opinion. The case is here on direct appeal. 15 U.S.C. § 29. We noted probable jurisdiction, 373 U.S. 930, 83 S.Ct. 1537, 10 L.Ed.2d 689.

The ultimate issue revolves around the question whether the acquisition substantially lessened competition in the sale of natural gas in California—a market of which El Paso was the sole out-of-state supplier at the time of the acquisition.[2]

In 1954, Pacific Northwest received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin, New Mexico, to the State of Washington, to supply gas to the then unserved Pacific Northwest area. Later it was authorized to receive large quantities of Canadian gas and to enlarge its system for that purpose. In addition, Pacific Northwest acquired Rocky Mountain reservoirs along its route. At the end of 1957 it had an estimated 3.51 trillion cubic feet of gas reserves owned outright in the San Juan Basin; 1.04 trillion under contract in the San Juan Basin; 1.59 trillion under contract in the Rocky Mountain area; and 2.33 trillion under contract in Canada—8.47 trillion in all. By 1958 one-half of its natural gas sales were of gas from Canada.

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In 1954 Pacific Northwest entered into two gas exchange contracts with El Paso—one to deliver 250 million cubic feet per day to El Paso in Idaho for transportation to California via Nevada, the other to gather gas jointly in the San Juan Basin for a five-year period. Under the latter agreement El Paso loaned gas to Pacific Northwest from its wells in the San Juan Basin; to avoid duplication of facilities, Pacific Northwest agreed to gather gas with its own facilities from El Paso's wells in the eastern portion of the basin, and El Paso agreed to perform the same service for Pacific Northwest in the western portion. At the same time Pacific Northwest undertook to purchase 300 million cubic feet per day from Westcoast Transmission Co., Ltd., a Canadian pipeline.

An executive of Pacific Northwest called these agreements a "treaty" to "solve the major problems which have been confronting us." A letter from Pacific Northwest to its stockholders stated:

> "This tri-party deal will benefit all concerned. It will give Westcoast what they have been fighting for—a pipeline. It will mean that Pacific

1. Section 7 of the Clayton Act, 38 Stat. 731, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, 64 Stat. 1125, 15 U.S.C. § 18, provides in relevant part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition *may be substantially to lessen competition*, or to tend to create a monopoly." (Italics added.)

2. In 1956, El Paso supplied more than 50% of all gas consumed in the State, the remainder coming from intrastate sources.

will expand

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its facilities, be a larger company, will protect its market from future competition by a Canadian pipeline and it caused the dismissal of the law suit of Westcoast against Pacific's present certificate. *It means that El Paso's California market will be protected against future competition,* and further it results in all parties *now working together for a common end rather than fighting each other.*" (Italics added.)

El Paso, however, could not get Commission approval to build the pipeline necessary to deliver the 250 million cubic feet of gas to California. Consequently, a new agreement on that aspect was negotiated in 1955, whereby El Paso undertook to purchase 50 million cubic feet a day to be delivered on an exchange basis in Colorado. Pacific Northwest, still obligated to take 300 million cubic feet per day from Westcoast, disposed of the balance in its own market areas.

Prior to these 1954 and 1955 agreements Pacific Northwest had tried to enter the rapidly expanding California market. It prepared plans regarding the transportation of Canadian gas to California, where it was to be distributed by Pacific Gas & Electric (PGE). That effort—suspended when the 1954 agreements were made—was renewed when the new agreement with El Paso was made in 1955; and the negotiation of the 1955 contract with El Paso was conceived by Pacific Northwest as the occasion for "lifting of all restrictions on the growth of Pacific." In 1956 it indeed engaged in negotiations for the sale of natural gas to Southern California Edison Co. (Edison). The latter, largest industrial user of natural gas in Southern California, used El Paso gas, purchased through a distributor. It had, however, a low priority from that distributor, being on an "interruptible" basis, *i. e.*, subject to interruption during periods of peak demand for domestic uses. Edison wanted a firm contract

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and, upon being advised that it was El Paso's policy to sell only to distributors, started negotiations with Pacific Northwest in May 1956. The idea was for Pacific Northwest to deliver to Edison at a point on the California-Oregon border 300 million cubic feet of Canadian gas a day. In July 1956 they reached a tentative agreement. Edison thereupon tried to develop within California an integrated system for distributing Canadian gas supplied by Pacific Northwest to itself and others. El Paso decided to fight the plan to the last ditch, and succeeded in getting (through a distributor) a contract for Edison's needs. Edison's tentative agreement with Pacific Northwest was terminated. Before Edison terminated that agreement with Pacific Northwest, Edison had reached an agreement with El Paso for firm deliveries of gas; and while the original El Paso offer was 40¢ per Mcf, the price dropped to 38¢ per Mcf, then to 34¢ and finally to 30¢. Thereafter, and while the merger negotiations were pending, Pacific Northwest renewed its efforts to get its gas into California.

El Paso had been interested in acquiring Pacific Northwest since 1954. The first offer from El Paso was in December 1955—an offer Pacific Northwest rejected. Negotiations were resumed by El Paso in the summer of 1956, while Pacific Northwest was trying to obtain a California outlet. The exchange of El Paso shares for Pacific shares was accepted by Pacific Northwest's directors in November 1956, and by May 1957 El Paso had acquired 99.8% of Pacific Northwest's outstanding stock. In July 1957 the Department of Justice filed its suit charging that the acquisition violated § 7 of the Clayton Act. In August 1957 El Paso applied to the Federal Power Commission for permission to acquire the assets of Pacific Northwest. On December 23, 1959, the Commission approved and the merger was effected on December 31, 1959. In 1962 we set

aside the Commission's order, holding that

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it should not have acted until the District Court had passed on the Clayton Act issues. People of State of California v. Federal Power Comm'n, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54. Meanwhile (in October 1960) the United States amended its complaint so as to include the asset acquisition in the charged violation of the Clayton Act.

[1, 2] There was a trial, and after oral argument the judge announced from the bench [3] that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees "Prepare the findings and conclusions and judgment." They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. United States v. Crescent Amusement Co., 323 U.S. 173, 184–185, 65 S.Ct. 254, 89 L.Ed. 160. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.[4] See 2B Barron

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and Holtzoff, Federal Practice and Procedure (Wright ed. 1961), § 1124. Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in United States v. Forness, 2 Cir., 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case. On review of the record —which is composed largely of undisputed evidence—we conclude that "the effect of such acquisition may be substantially to lessen competition" within the meaning of § 7 of the Clayton Act.

[3] There can be no doubt that the production, transportation, and sale of natural gas is a "line of commerce" within the meaning of § 7. There can also be no doubt that California is a "section of the country" as that phrase is used in §

3. "The Court. Judgment will be for the defendant in this case. Prepare the findings and conclusions and judgment.

"How much time do you want within which to submit it?

"Mr. Harrison. Does the court have a rule, your Honor?

"The Court. No, I have no rule about that.

"Mr. Harrison. Could we have twenty days, your Honor?

"The Court. Twenty days to prepare the findings and conclusions and judgment. I shan't write an opinion in this case.

"Mr. Harrison. I didn't hear you.

"The Court. I don't intend to write an opinion in this case. I think it is a factual matter. I think we have taken a full, fair look at the evidence and the factual issues, and I am not satisfied that the Government has discharged its burden."

4. Judge J. Skelly Wright of the Court of Appeals for the District of Columbia recently said:

"Who shall prepare the findings? Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and state separately its conclusions of law.' We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

"I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." Seminars for Newly Appointed United States District Judges (1963), p. 166

7. The sole question, therefore, is whether on undisputed facts the acquisition had a sufficient tendency to lessen competition or is saved by the findings that Pacific Northwest, as an independent entity, could not have obtained a contract from the California distributors,

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could not have received the gas supplies or financing for a pipeline project to California, or could not have put together a project acceptable to the regulatory agencies. Those findings are irrelevant.

[4] As we said in Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S.Ct. 1502, 1522, 8 L.Ed.2d 510: "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." See also United States v. Philadelphia National Bank, 374 U.S. 321, 362, 83 S.Ct. 1715, 10 L.Ed.2d 915.

Pacific Northwest, though it had no pipeline into California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso. At that time El Paso was the only actual supplier of out-of-state gas to the vast California market, *a market that expands at an estimated annual rate of 200 million cubic feet per day.*[5] At that time Pacific Northwest

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was the only other important interstate pipeline west of the Rocky Mountains. Though young, it was prospering and appeared strong enough to warrant a "treaty" with El Paso that protected El Paso's California markets.

[5] Edison's search for a firm supply of natural gas in California, when it had El Paso gas only on an "interruptible" basis, illustrates what effect Pacific Northwest had merely as a potential competitor in the California market. Edison took its problem to Pacific Northwest and, as we have seen, a tentative agreement was reached for Edison to obtain Pacific Northwest gas. El Paso responded, offering Edison a firm supply of gas and substantial price concessions. We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes.

5. California, in a brief *amicus curiae*, pp. 5–6, tells us:

"The dependence of California upon natural gas as a fuel is unique among the states. California does not possess coal deposits sufficient for energy requirements. It is dependent upon natural gas for its energy needs and approximately three quarters of the natural gas utilized in California comes from out-of-state sources. Ninety per cent of all homes in California are heated by natural gas and California industry depends upon natural gas as a fuel. In California the percentage of total energy provided by natural gas is substantially greater than for the nation as a whole.

"During 1962, California Gas distributing utilities purchased over 745,000,000,000 cubic feet of natural gas at a cost somewhat in excess of $266,850,000. California takes in excess of ten per cent of all of the natural gas moving in interstate commerce throughout the United States and exceeds the volume of gas imported by any other state.

"The interest of California in this proceeding is evident. More than 80 per cent of the customers of El Paso before merger resided in the State of California and California ratepayers bear most of the costs of service of El Paso.

"California, alone, consumes more natural gas than the Middle Atlantic states combined, more than half as much as the highly industrialized, thickly populated East North-Central states of Illinois, Indiana, Michigan, Ohio and Wisconsin, and as much as the seven states that make up the West North-Central area. Out-of-state deliveries to California averaged three billion cubic feet per day in 1961. At a price of slightly more than thirty cents per thousand cubic feet (Mcf), this business was worth then about $1,000,000 per day."

within the State. We repeat that one purpose of § 7 was "to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger * * *." United States v. Philadelphia National Bank, 374 U.S. at 367, 83 S.Ct. at 1744, 10 L.Ed.2d 915.

This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless it has excess capacity) must

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compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Those transactions with distributors are few in number. For example, in California there are only two significant wholesale purchasers —Pacific Gas & Electric in the north and the Southern Companies in the south. Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas.*

The effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on. Pacific Northwest's position as a competitive factor in California was not disproved by the fact that it had never sold gas there. Nor is it conclusive that Pacific Northwest's attempt to sell to Edison failed. That might be weighty if a market presently saturated showed signs of petering out. But it is irrelevant in a market like California, where incremental needs are booming. That is underscored in the case by a memorandum dated October 18, 1956, which summarized a meeting at which terms of the acquisition were negotiated. It recited that Pacific Northwest had substantially concluded additional contracts for Canadian gas and that "Pacific plans on selling this additional volume of gas to the California market. * * *" On November 5, 1956, just three days prior to approval by the directors of Pacific Northwest of the

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stock exchange, it made a firm offer to PGE to supply up to 350 million cubic feet a day for 20 years. Even after that approval and before the actual exchange, the chief executive of Pacific Northwest, writing November 22, 1956, said: "I do not think for the present moment we should confuse the sale of gas from our system to California with El Paso taking part of the gas through their present system to California. Reason for this should the El Paso-Pacific deal collapse we would have nothing of substance with California."

Pacific Northwest had proximity to the California market—550 miles distant in Wyoming, even nearer in Idaho only 250 miles away in Oregon. Moreover, it had enormous reserves in the San Juan Basin, the Rocky Mountains, and western Canada. Had Pacific Northwest remained independent, there can be no doubt it would have sought to exploit its formidable geographical position *vis-à-vis* California. No one knows what success it would have had. We do know, however, that two interstate pipelines in addition to El Paso now serve California—one of the newcomers being Pacific Gas Transmission Co., bringing down Canadian gas. So we know that opportunities would have existed for Pacific Northwest had it remained independent.

Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice. Pacific Northwest was

no feeble, failing company;[6] nor was it inexperienced and lacking in resourcefulness. It was one of two major interstate pipelines serving the trans-Rocky Mountain States; it had raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern, and coveted, by El

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Paso.

If El Paso can absorb Pacific Northwest without violating § 7 of the Clayton Act, that section has no meaning in the natural gas field. For normally there is no competition—once the lines are built and the long-term contracts negotiated—except as respects the incremental needs.

[6] Since appellees have been on notice of the antitrust charge from almost the beginning—indeed before El Paso sought Commission approval of the merger—we not only reverse the judgment below but direct the District Court to order divestiture without delay.[7]

Reversed.

Mr. Justice WHITE took no part in the consideration or decision of this case.

Mr. Justice HARLAN (concurring in part and dissenting in part).

I.

Contrary to what I had first thought, the Government is not asking in this case, as it did in United States v. Yellow Cab Co., 338 U.S. 338, at 340, 70 S.Ct. 177, at 178, 94 L.Ed. 150, that we "in effect * * * try the case *de novo*,". Rather it contends that on the undisputed facts of record the ultimate determination below was clearly erroneous. See id., 338 U.S. at 341–342, 70 S.Ct. 177, 94 L.Ed. 150. For reasons given in the Court's opinion, I agree that a violation of § 7 of the Clayton Act has been established, and that the District Court erred in deciding otherwise. On this score I shall comment only on two matters.

First. The Court's strictures concerning the District Court's findings seem to me to miss the mark. Findings of fact should, of course, be the product of the conscientious and independent judgment of the district judge. Nevertheless, if they are supported by evidence, they are not rendered suspect simply because the trial court, as

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here, has accepted *in toto* the findings proposed by one side or the other. The real lack in this case is that the District Court wrote no opinion setting forth the reasoning underlying any of the subsidiary findings on disputed issues of fact or connecting the subsidiary findings with its ultimate determination that the Clayton Act had not been violated by this merger.

Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has foundered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance.

Second. This case affords another example of the unsatisfactoriness of the existing bifurcated system of antitrust and other regulation in various fields. In this case, the Federal Power Commission had indicated its approval of this merger as being in the public interest. The Department of Justice, however, considered the merger to be violative of the antitrust laws and, for that reason alone, against the public interest. This Court, under the present scheme of things has

6. Cf. International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431.

7. Cf. Wisconsin v. Illinois, 281 U.S. 179, 197, 50 S.Ct. 266, 74 L.Ed. 799.

no choice on this record* but to sustain the position of the Department of Justice, as indeed it has felt constrained to do, albeit in my view with less justification, in other recent cases involving dual regulation. Cf. United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915; United States v. First National Bank & Trust Co., 376 U.S. 665, 84 S.Ct. 1033, and my dissenting opinions in those cases. It would be unrealistic not to recognize that this state of affairs has

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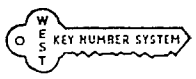
the effect of placing the Department of Justice in the driver's seat even though Congress has lodged primary regulatory authority elsewhere.

It does seem to me that the time has come when this duplicative and, I venture to say, anachronistic system of dual regulation should be re-examined. Had the subtle and necessarily speculative questions involved in assessing the short-term and long-term effects of this merger been subject to appraisal by a single agency, under congressionally established standards marking the relationship between the different and often competing objectives of the antitrust laws and those governing the regulation of "interstate" natural gas, who can say that this case might not have called for a different outcome?

II.

While I agree with the Court's decision on the merits, I dissent from its peremptory ordering of divestiture. "The framing of" appropriate relief "should take place in the District rather than in Appellate Courts." International Salt Co., Inc., v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 92 L.Ed. 20 (footnote omitted). United States v. E. I. du Pont De Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318, is not to the contrary; that case had already been here before on the merits (353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057), and when it came here again at the relief stage the Court observed that "the District Courts [have] the responsibility *initially* to fashion the remedy * * *." 366 U. S. at 323, 81 S.Ct. at 1248, 6 L.Ed.2d 318. I know of no case where this Court has in the first instance itself directed divestiture or any other particular kind of relief. The fact that these appellees have been "on notice," *ante*, p. 1050, of the charges against them affords no justification for this departure from normal practice. See the cases cited in the second du Pont case, 366 U.S., at 322, 81 S.Ct. 1243, 6 L.Ed.2d 318.

I would remand the case to the District Court for the fashioning of appropriate relief.



377 U.S. 13

Richard S. SIMPSON, Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA.

No. 87.

Argued Jan. 15 and 16, 1964.

Decided April 20, 1964.

Rehearing Denied May 25, 1964.

See 377 U.S. 949, 84 S.Ct. 1349.

Private antitrust case. The United States District Court for the Northern District of California, Southern Division, granted defendant's motion for summary judgment. The Court of Appeals, 311 F.2d 764, affirmed the judgment of the district court and the plaintiff brought certiorari. The Supreme Court, Mr. Justice Douglas, held, inter alia, that gasoline resale price maintenance through coercive type of "consignment" agreement between company and

* This Court has not had the benefit of an *amicus* brief from the Federal Power Commission.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	C/A No. 98-CP-09-101
)	
)	
Herman Lee Hughes, Jr., # 5018)	
)	
Applicant,)	
)	MEMORANDUM IN OPPOSITION TO
vs.)	MOTION TO ALTER OR AMEND JUDGMENT
)	
Dodge Frederick, Director,)	
South Carolina Department)	
of Corrections, and)	
Charles M. Condon,)	
Attorney General of the State of)	
South Carolina,)	
)	
Respondent.)	
)	

FILED
JAN 31 10 57 AM '01
J. KELLY [illegible]
CLERK OF COURT
CALHOUN COUNTY

The applicant, Herman Hughes, has moved the court to alter or amend its judgment in this case. The court should deny the motion.

ARGUMENT

Hughes contends that the court improperly applied the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), in reaching its conclusion that his trial counsel was not ineffective. In so contending, Hughes ignores the plain words of the court's order, instead misconstruing the order's clear and obvious meaning in favor of an "analysis" of the order that takes words and sentences out of context and borders on the disingenuous.

Hughes's first contention focuses on two words in a 189-page document: "uniquely undermined," torturing the court's language in attempting to argue that the court somehow used these two words as substitutes for the Strickland standard requiring that the applicant demonstrate a "reasonable likelihood" that the outcome of his trial would have been different but

for the performance of his attorney. In its order, however, the court used the phrase "uniquely undermined" to address a witness's credibility, not to address the outcome of the trial. The court used the words in refusing to find that the difference between a witness's testimony concerning his belief about the length of his sentence and the actual length of the sentence damaged–"undermined"–the witness's credibility. In the very same paragraph, the court goes on to find that "this difference [in the actual sentence and the witness's belief] created no 'reasonable likelihood' that the outcome of the jury could have been affected." (Order at 186.)

Hughes's focus on two words, rather than on paragraphs, is misleading, and his assertions are simply wrong. The court applied the correct standard, and even quoted it in so doing.

Hughes next argues that the court did not consider the totality of the evidence presented at the hearing in reaching its conclusion. It is clear, though, that the court did just that. The court recited, at length, the Strickland standard to which it was bound, including its obligation to consider omitted evidence. (Order at 35.) It then concluded that Hughes did not carry his burden of meeting this standard. (Order at 36.) That the court thereafter also considered each of Hughes's multitude of claims individually is of no moment. Surely, had the court not done so, Hughes would have moved to alter or amend on those grounds.

Hughes's counsel argues blithely that "this case could have ended up with the defendant on death row only in the hands of an inexperienced attorney trying his first capital case" and that "the slightest change in the consideration of aggravation and mitigation could easily have led at least one juror to decide that the death penalty was not the appropriate punishment . . . ." He fails, however, to cite any evidence to support this argument, instead citing only a law review article that he himself authored. It is thus Hughes who fails to understand the Strickland

standard, for to carry the burden of proof that counsel was ineffective and that but for his ineffectiveness there was a reasonable probability that the outcome of the proceeding would have been different, Hughes must "affirmatively prove prejudice." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067 (emphasis added).

Hughes goes on to argue that the court discredited Dr. Venn's testimony because of his views on the death penalty. It is this court's duty, however, as the finder of fact, to judge the credibility the witnesses appearing before it. See, e.g., Foye v. State, 335 S.C. 586, 589 (1999); Drayton v. Evatt, 312 S.C. 4, 11 (1993). It is entirely appropriate for a court in a collateral death penalty case to judge the credibility of an expert witness based on the witness's views concerning the death penalty. See Bonin v. Vasquez, 807 F. Supp. 589, 598 (C.D. Cal. 1992) (" Forced to choose between competing psychiatric and neurological testimony, the Court finds that Drs. Dietz and Nuwer were more credible than Dr. Pincus. The Court cannot help but believe that Dr. Pincus' views on the inappropriateness of the death penalty affect his clinical interpretations in this highly subjective area of medicine.") , affirmed sub nom. Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995).

In any event, Hughes once again focuses on the minutiae to the exclusion of the court's real ruling, homing in on a three-sentence footnote regarding Dr. Venn's testimony as support for his contention that the court's findings concerning the family court transfer hearings are incorrect, rather than addressing the nearly thirty pages concerning the larger issue. Notwithstanding its determination of Dr. Venn's lack of credibility, the court nonetheless analyzed his testimony and rejected it on its merits.

Hughes criticizes the court's rulings on his counsel's impeachment tactics, apparently asking the court to believe that its order finds that Mr. Newsom did not impeach Mr. Owens at all, as a matter of trial strategy. This argument misrepresents the order. The court found (a) that Newsom did impeach Owens, and that (b) even if it were to accept Hughes's contention, Hughes failed to prove prejudice. Once again, Hughes zeroes in on a clause in the court's order–"impeachment tactics have been held to be matters of trial strategy"–divorcing that clause completely from its context, rather than addressing the court's broader ruling.

As to the impeachment of the victim, Kelly Hoffman, the court's order, contrary to the intimations in Hughes's memorandum, says nothing of Newsom's failure to take a "bellicose approach" to cross-examination. Rather, the court properly found that Newsom's strategy in eliciting, by playing the tape at the trial, the inconsistencies that Hughes now says Newsom should have and could have elicited only by cross-examining Kelly Hoffman, was a valid strategy. That Hughes may, in hindsight, disagree with that strategy is immaterial. The court is charged under the Constitution to judge counsel's performance not by second guessing it with the benefit of 20-20 hindsight, but in light of the situation as it existed at trial.

Hughes further contends that the court erred when it found that Newsom's failure to call Amy Presley as a witness was justified because Amy Presley was the "only available source of crucial testimony" that Pearce planned the robbery in advance. Again, such an assertion blatantly mischaracterizes the court's order. Indeed, the court's finding was precisely the converse: that the jury knew this information from the testimony of Owens and from Hughes's own statement. (Order at 100.) This fact alone makes State v. Fisher, 730 P.2d 825 (Ariz. 1986) (en banc), to which Hughes devotes two pages in his memorandum, wholly inapplicable.

Hughes impugns the court's finding that Newsom articulated a valid strategic reason for not calling Duane Gilmore, arguing that Newsom's testimony "is not true." In essence, Hughes argues that the court, as the finder of fact, should find Newsom incredible. It is for the court, however, not the applicant, to judge the credibility of the witnesses. More significantly, though, the court again found that the information to which Gilmore would have testified was presented to the jury even without Newsom's calling Gilmore as a witness.

Hughes complains that the court's finding that Newsom was not ineffective for failing to call an expert on mental retardation. Hughes cites the DSM-IV, and even attaches portions of it to his memorandum, as evidence that Hughes could be considered mentally retarded.

The court found, however, that Newsom did present evidence of mental retardation. (Order at 112.) Hughes did not present any evidence at the PCR hearing on this issue, other than the affidavits of the two experts who actually testified at trial. Hughes apparently asks the court now to make a finding of fact that Hughes is mentally retarded based on the diagnostic criteria in the DSM-IV, without amplification from a qualified expert witness; in essence, he asks this court to take judicial notice that he is mentally retarded. The notion is ludicrous.

In the absence of any evidence in the PCR proceeding, the essence of Hughes's contentions regarding mental retardation is that his experts were ineffective for not concluding that Hughes is mentally retarded. That argument fails. The focus of this proceeding must be on the effectiveness of Hughes's attorneys, not on the effectiveness of his experts. A criminal defendant has no constitutional right to the effective assistance of an expert. See Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam).

Hughes also disputes the court's finding that Newsom was not ineffective for failing to retain an expert to test Hughes for brain damage. Hughes attempts to support this argument by referring to the affidavits of Doctors Dewitt and Morgan, who state that they did not know that Hughes had been exposed to syphilis. The court found as a fact, however, that Newsom provided this information to his experts. (Order at 116.) Hughes has a Sixth Amendment right to effective assistance of counsel, not to effective assistance of expert witnesses. His counsel "did the objectively reasonable thing" by providing the information to his experts. Pruett v. Thompson, 996 F.2d 1560, 1573 (4th Cir. 1993).

Hughes next argues that the execution of a mentally retarded person is proscribed by international law. In the first instance, Hughes has not proven his mental retardation. In the second, Hughes once again argues that this court is governed by international law, and, by extension, not by the Constitution when it conflicts with international law. The respondents will not again set forth their extensive argument showing that this contention is incorrect.

Finally, Hughes makes an impassioned argument that the court's "wholesale reproduction" of the state's proposed order is somehow nefarious and improper. This is not, however, a case in which the court asked each side to prepare a proposed order and simply adopted one of them. Hughes's argument that the court's order is merely a "wholesale [adoption] of one party's findings of fact and conclusions of law" is simply not true. Rather, the court reached its findings of fact and conclusions of law, broadly, after an independent analysis, and then asked the state–after informing the parties concerning those findings of fact and conclusions of law–to document the court's ruling.

Even so, the South Carolina Rules of Civil Procedure expressly contemplate and permit the court's request for and adoption of proposed orders. See S.C.R. Civ. P. 5(b)(3). Moreover, Hughes received notice and the opportunity to be heard–and in fact was afforded a hearing–before the court signed its order. Indeed, the sole and specific purpose of that hearing was to allow the applicant to voice his objections to the proposed order and the manner in which the court decided to adopt it. The court considered Hughes's objections before it signed the order.

Hughes's complaint is not that the court adopted the state's proposed order; it is that the court agreed with the state's position. The court's findings of fact and conclusions of law, however, are supported by the evidence and by the cases of the United States and South Carolina Supreme Courts. This court should deny the applicant's motion.

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

JEFFREY A. JACOBS
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-5624

By: Jeffrey Jacobs
ATTORNEYS FOR RESPONDENT

January 30, 2001

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
Herman Lee Hughes, Jr., #5018	)	No. 98-CP-09-101
Applicant,	)	
-vs-	)	
Dodge Frederick, Director, South Carolina Department of Corrections, and Charles M. Condon, Attorney General of the State of South Carolina,	)	CERTIFICATE OF SERVICE
Respondents.	)	

I, Jeffrey A. Jacobs, Assistant Attorney General, Office of the Attorney General of South Carolina, do hereby certify that I have this date served Respondents' Memorandum in Opposition to Motion to Alter or Amend Judgment in the foregoing action on counsel for Applicant as follows:

Pamela Ann Wilkins, Esquire
Center for Capital Litigation
P. O. Box 11311
Columbia, South Carolina 29211-1131

John H. Blume, III, Esquire
Cornell Law School
116 Myron Taylor Hall
Ithaca, New York 14853-4901

This 30th day of January, 2001.

Jeffrey A. Jacobs

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

March 20, 2001

The Honorable Paula H. Thomas
Judge, Fifteenth Judicial Circuit
P.O. Box 1270
Georgetown, SC 29442

Dear Judge Thomas:

Per our conference call with your law clerk last week, in which she outlined your ruling on the applicant's Rule 59 motion, I have enclosed a proposed order. If the order does not accurately reflect your ruling, or if you would like changes made, please let me know.

Thank you for your consideration.

Sincerely,

Jeffrey A. Jacobs
Assistant Attorney General

JAJ/

Enclosure

cc: John Blume, Esquire
Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	C/A No. 98-CP-09-101
Herman Lee Hughes, Jr., # 5018 Applicant, vs. Dodge Frederick, Director, South Carolina Department of Corrections, and Charles M. Condon, Attorney General of the State of South Carolina, Respondent.	ORDER

The applicant, Herman Hughes, has moved the court to alter or amend its judgment in this case. The court denies the motion.

I.

A. Hughes contends that the court improperly applied the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), in reaching its conclusion that his trial counsel was not ineffective, asserting that "the court's order denying post-conviction relief at various points treats the Strickland prejudice inquiry as an outcome determinative test." In so contending, Hughes misconstrues the order's clear and obvious meaning.

1. Hughes's first contention focuses on two words in a 189-page document: "uniquely undermined." He argues that the court somehow used these two words as substitutes for the Strickland standard requiring that the applicant demonstrate a "reasonable likelihood" that the outcome of his trial would have been different but for the performance of his attorney. The

court, however, used the phrase "uniquely undermined" to address the credibility of Dr. Venn, not to address the outcome of the trial. The court used the words in refusing to find that the difference between a witness's testimony concerning his belief about the length of his sentence and the actual length of the sentence damaged–"undermined"– the witness's credibility. In the very same paragraph of the order, the court found that "this difference [in the actual sentence and the witness's belief] created no 'reasonable likelihood' that the outcome of the jury could have been affected." (Order at 186.)

Hughes's focus on two words, rather than on paragraphs, is misplaced. The court applied the correct standard.

2. The court's order applied Strickland and its progeny, including Williams v. Taylor, 120 S. Ct. 1495 (2000), which Hughes cites, in reaching its conclusion. It specifically applied the "reasonable probability" standard, even quoting it in the order. (Order at 35.) The court considered the totality of the evidence presented to it, and reaffirms its finding that Hughes did not carry his burden of establishing a probability sufficient to undermine confidence in the outcome of the trial. See Jones v. State, 332 S.C. 329, 333 , 504 S.E.2d 822, 824 (1998).

B. Hughes next argues that the court did not consider the totality of the evidence presented at the hearing in reaching its conclusion. The court's order, though, shows that the court did just that. The court recited, at length, the Strickland standard to which it was bound, including its obligation to consider omitted evidence. (Order at 35.) It then concluded that Hughes did not carry his burden of meeting this standard. (Order at 36.) That the court thereafter also considered each of Hughes's multitude of claims individually is immaterial.

C. Hughes's counsel argues that "this case could have ended up with the defendant on death row only in the hands of an inexperienced attorney trying his first capital case" and that "the slightest change in the consideration of aggravation and mitigation could easily have led at least one juror to decide that the death penalty was not the appropriate punishment . . . ." Hughes fails, however, to cite any evidence to support this argument, which he must do to carry his burden of proof that counsel was ineffective. Hughes must adduce evidence to prove that but for his attorney's ineffectiveness there was a reasonable probability that the outcome of the proceeding would have been different; as Strickland itself counsels, Hughes must "affirmatively prove prejudice." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067 (emphasis added).

D. Hughes argues that the court erred because it found that his attorney articulated a strategy for his actions at trial and on appeal, but did not analyze whether that strategy was reasonable. I disagree. The court analyzed Hughes's attorneys' testimony, found that they had strategic reasons for taking the action they did, and that those decisions were reasonable under the circumstances as they existed at the time. Further, the court found that Hughes failed to meet the second prong, the prejudice prong, of the two-part Strickland test, which the strategic reasonableness of counsel's actions does not address. These claims are discussed in specific detail below.

II.

Hughes argues that the court discredited Dr. Venn's testimony because of his views on the death penalty. It is this court's duty, however, as the finder of fact, to judge the credibility the witnesses appearing before it. See, e.g., Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999); Drayton v. Evatt, 312 S.C. 4, 11 , 430 S.E.2d 517, 521(1993). It is entirely appropriate

for a court in a collateral death penalty case to judge the credibility of an expert witness based on the witness's views concerning the death penalty. See Bonin v. Vasquez, 807 F. Supp. 589, 598 (C.D. Cal. 1992) (" Forced to choose between competing psychiatric and neurological testimony, the Court finds that Drs. Dietz and Nuwer were more credible than Dr. Pincus. The Court cannot help but believe that Dr. Pincus' views on the inappropriateness of the death penalty affect his clinical interpretations in this highly subjective area of medicine.") , affirmed sub nom. Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995).

In any event, Hughes misstates the court's ruling, instead focusing on a footnote regarding Dr. Venn's testimony as support for the contention that the court's findings concerning the family court transfer hearings are incorrect, rather than addressing the nearly thirty pages concerning the larger issue. Notwithstanding its determination of Dr. Venn's lack of credibility, the court nonetheless analyzed his testimony and rejected it on its merits.

III.

Hughes criticizes the court's rulings on his counsel's impeachment tactics, asserting that the court found that Mr. Newsom did not impeach Mr. Owens at all, as a matter of trial strategy. This argument misrepresents the order. The court found (a) that Newsom did impeach Owens, and that (b) even if it were to accept Hughes's contention, Hughes failed to prove prejudice. Hughes's arguments relies on a discrete clause in the court's order–"impeachment tactics have been held to be matters of trial strategy"– but Hughes divorces that clause completely from its context, rather than addressing the court's broader ruling.

IV.

A. As to the impeachment of the victim, Kelly Hoffman, the court's order, contrary to the Hughes's argument, says nothing of Newsom's failure to take a "bellicose approach" to cross-examination. Rather, the court found that Newsom's strategy in eliciting, by playing the tape at the trial, the inconsistencies that Hughes now says Newsom should have and could have elicited only by cross-examining Kelly Hoffman, was a valid strategy. That Hughes may, in hindsight, disagree with that strategy is immaterial.

Newsom stated that he avoided "going after" Kelly Hoffman because doing so might alienate the jury. I found that Newsom's explanation was a reasonable strategy, and reaffirm that finding. The court is charged under the Constitution to judge counsel's performance not by second guessing it with the benefit of 20-20 hindsight, but in light of the situation as it existed at trial.

B. Hughes further contends that the court erred when it found that Newsom's failure to call Amy Presley as a witness was justified because Amy Presley was the "only available source of crucial testimony" that Pearce planned the robbery in advance. The court's finding, though, was precisely the converse: that the jury knew this information from the testimony of Owens and from Hughes's own statement. (Order at 100.) This fact alone makes State v. Fisher, 730 P.2d 825 (Ariz. 1986) (en banc), to which Hughes devotes two pages in his memorandum, wholly inapplicable.

C. Hughes impugns the court's finding that Newsom articulated a valid strategic reason for not calling Duane Gilmore, arguing that Newsom's testimony "is not true." In essence, Hughes argues that the court, as the finder of fact, should find Newsom incredible. It is for the court,

however, not the applicant, to judge the credibility of the witnesses. The court found Newsom to be a credible witness, and expressly states that finding here. More significantly, though, the court again found that the information to which Gilmore would have testified was presented to the jury even without Newsom's calling Gilmore as a witness.

V.

Hughes complains that the court's finding that Newsom was not ineffective for failing to call an expert on mental retardation. Hughes cites the DSM-IV, and even attaches portions of it to his memorandum, as evidence that Hughes could be considered mentally retarded.

Hughes did not present any evidence at the PCR hearing on this issue, other than the affidavits of the two experts who actually testified at trial. Hughes apparently asks the court now to make a finding of fact that Hughes is mentally retarded based on the diagnostic criteria in the DSM-IV, without amplification from a qualified expert witness; in essence, he asks this court to take judicial notice that he is mentally retarded. This the court cannot do.

In the absence of any evidence in the PCR proceeding, the essence of Hughes's contentions regarding mental retardation is that his experts were ineffective for not concluding that Hughes is mentally retarded. That argument fails. The focus of this proceeding must be on the effectiveness of Hughes's attorneys, not on the effectiveness of his experts. A criminal defendant has no constitutional right to the effective assistance of an expert. See Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam). Further, the court found as a fact that Newsom did present evidence of mental retardation. (Order at 112.)

Hughes also disputes the court's finding that Newsom was not ineffective for failing to retain an expert to test Hughes for brain damage. Hughes attempts to support this argument by

referring to the affidavits of Doctors Dewitt and Morgan, who state that they did not know that Hughes had been exposed to syphilis. The court found as a fact, however, that Newsom provided this information to his experts. (Order at 116.) Hughes has a Sixth Amendment right to effective assistance of counsel, not to effective assistance of expert witnesses. His counsel "did the objectively reasonable thing" by providing the information to his experts. Pruett v. Thompson, 996 F.2d 1560, 1573 (4th Cir. 1993).

Hughes next argues that the execution of a mentally retarded person is proscribed by international law. In the first instance, Hughes has not proven his mental retardation. In the second, Hughes once again argues that this court is governed by international law, and, by extension, not by the Constitution when it conflicts with international law. The court reaffirms its conclusion of law in the original order that this contention is incorrect.

Finally, Hughes makes an impassioned argument that the court's "wholesale reproduction" of the state's proposed order is somehow nefarious and improper. This is not, however, a case in which the court asked each side to prepare a proposed order and simply adopted one of them. Hughes's argument that the court's order is merely a "wholesale [adoption] of one party's findings of fact and conclusions of law" is simply not true. Rather, the court reached its findings of fact and conclusions of law, broadly, after an independent analysis, and then asked the state–after informing the parties concerning those findings of fact and conclusions of law–to document the court's ruling.

Even so, the South Carolina Rules of Civil Procedure expressly contemplate and permit the court's request for and adoption of proposed orders. See S.C.R. Civ. P. 5(b)(3). Moreover, Hughes received notice and the opportunity to be heard–and in fact was afforded a

hearing–before the court signed its order. Indeed, the sole and specific purpose of that hearing was to allow the applicant to voice his objections to the proposed order and the manner in which the court decided to adopt it. The court considered Hughes's objections before it signed the order.

The court concludes that its original order was correct, both legally and factually. The court correctly applied the Strickland standard in concluding that Hughes's trial and appellate counsel were not ineffective, and that Hughes was not denied his Sixth Amendment right to effective assistance of counsel. Accordingly, the court denies Hughes's motion to alter or amend the judgment.

IT IS SO ORDERED.

PAULA H. THOMAS
Presiding Judge

_____, South Carolina

_____, 2001

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, 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 MOTION TO STAY THE PROCEEDINGS, INCLUDING THE MOTION TO ALTER OR AMEND THE JUDGMENT, PENDING THE OUTCOME OF *McCARVER V. NORTH CAROLINA*

Applicant, Herman Lee Hughes, Jr., by and through undersigned counsel, respectfully moves this Court pursuant to the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution, Article I, Sections 3, 14 & 15 of the South Carolina Constitution and other applicable state and federal law to stay the proceedings in this case, including the pending motion to alter or amend the judgment, until announcement of the Supreme Court's decision in *McCarver v. North Carolina*, — U.S. —, — S. Ct. —, 2001 WL 215804 (U.S.

March 26, 2001) (No. 00-8727) (mem.) (order granting certiorari). In support of this motion, defendant apprises this Court of the following facts and legal principles:

I. *Discussion*

On Monday, March 26, 2001, the United States Supreme Court granted certiorari in *McCarver v. North Carolina*, to address the following question:

> Whether petitioner's execution would violate the Eighth and Fourteenth Amendments to the United States Constitution because petitioner is retarded and there is now a national consensus against executing the mentally retarded.

In the event the Court answers this question in the affirmative, the death penalty will no longer be available as a constitutionally permissible sentencing option for defendants with mental retardation.

The applicant in this case, Herman Lee Hughes, Jr., has a long and well-documented history of brain damage, deficits in adaptive functioning and low IQ testing, which is consistent with a diagnosis of mental retardation. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 39-46 (4th ed. 1994) (setting forth the established position that a person can be determined to have mental retardation with an IQ as high as 75). Experts at his trial testified that he is mentally retarded, as did an expert in mental retardation called during the state post-conviction proceedings.

Because *McCarver* raises the distinct possibility that applicant will become categorically ineligible for the sentence of death that the Attorney General seeks to have upheld in this proceeding, it would be a waste of time and scarce judicial resources to proceed any further with the matters now before this Court. Moreover, even if the Supreme

amend the judgment, until such time as the United States Supreme Court issues its decision in *McCarver v. North Carolina*.

Respectfully submitted,

JOHN H. BLUME, ESQ.
SHERI LYNN JOHNSON, ESQ.
Cornell Law School
Myron Taylor Hall
Ithaca NY 14853-4901
(607) 255-9653

ATTORNEYS FOR APPLICANT

March 28, 2001

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, 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

I, John H. Blume, hereby certify that I have served upon the attorney for the Respondents one (1) copy of the Applicant's Motion to Stay the Proceedings, Including the Motion to Alter or Amend the Judgment, Pending the Outcome of *McCarver v. North Carolina* 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 SC 29201

This the 23rd day of March, 2001, in Columbia, South Carolina.

John H. Blume

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN Herman Lee Hughes, Jr., # 5018 Applicant, vs. Dodge Frederick, Director, South Carolina Department of Corrections, and Charles M. Condon, Attorney General of the State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS C/A No. 98-CP-09-101 MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION TO STAY THE PROCEEDINGS

The applicant, Herman Hughes, has moved the court to stay these proceedings pending the decision of the United States Supreme Court in McCarver v. North Carolina, 2001 WL 215804 (U.S. March 26, 2001). Hughes failed to raise this issue in his application for post-conviction relief, as amended. He therefore is not entitled to amend to raise an entirely new cause of action after an order denying relief has been entered in hopes of potentially gaining relief if the United States Supreme Court decides the pending case in a manner that is favorable to his belated assertion. The court thus should deny the motion.

Citing the Diagnostic and Statistical Manual of Mental Disorders, Hughes contends that he "has a long and well-documented history of brain damage, deficits in adaptive functioning and low IQ testing, which is consistent with a diagnosis of mental retardation." In essence, Hughes is arguing to the court not that the record in this case proves that he is mentally retarded and entitled to the protection of any favorable Supreme Court ruling in McCarver, but that the court should now find

him to be mentally retarded so that, if the Supreme Court in McCarver rules as he hopes, Hughes will be positioned to take advantage of that ruling.

There has never been a finding in this case that Hughes is mentally retarded. Although there has been evidence adduced to support his claim,[1] there has also been evidence adduced to refute it. The jury at the trial was asked only to consider whether there was evidence of mental retardation. Neither the jury nor the PCR court made a finding that Hughes is mentally retarded.

Hughes apparently now asserts for the first time, in a motion filed after the court has issued its order, that executing him would violate his Eighth Amendment right to be free from cruel and unusual punishment because he is mentally retarded. He has not heretofore asserted this claim. The court has conducted an exhaustive evidentiary hearing on Hughes's claims, and has issued its ruling. Hughes subsequently moved to alter or amend the judgment under Rule 59. He cannot now assert a new claim, as he apparently seeks to do in his motion to stay. The Post-Conviction Relief Act requires that all claims be raised in the original, amended, or supplemental application. This claim, in essence, asks the court for leave to file a successive PCR application. See Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Hughes could have asserted an Eighth Amendment

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[1]Dr. George Woods, a witness for the applicant, diagnosed Hughes as mentally retarded and so testified at the PCR hearing. The respondents unintentionally overlooked this testimony when drafting their memorandum in opposition to Hughes's Rule 59 motion to alter or amend the judgment, in which the respondents asserted that there was no such evidence, and hereby clarifies that issue for the court. There is also evidence in the record that Hughes was not mentally retarded, as defined in the DSM-IV.

claim in his original application; McCarver did not create that claim.[2] Accordingly, Hughes's motion is improper. See id., 420, S.E.2d at 842.

Hughes is not entitled to a stay because he has not been found to be mentally retarded, and he has not raised this issue previously. Because this issue is not properly before this court, the action by the United States Supreme Court will not affect the court's ruling on the properly presented allegations in this action. Accordingly, the court should deny the motion.

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

JEFFREY A. JACOBS
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-5624

By: _____
ATTORNEYS FOR RESPONDENT

April 5, 2001

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[2]Even so, had Hughes raised this claim in his application, it likely would have been procedurally barred as a free-standing Eighth Amendment claim. To be cognizable in this action, the claim would have to have been couched as a Sixth Amendment claim concerning either trial or appellate counsel's failure to raise an objection to his death sentence. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (holding that issues that could have been raised at trial or on appeal cannot be asserted in a PCR action); Simmons v. State, 264 S.C. 17, 215 S.E.2d 883 (1975) (same); cf. State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989) (in which the defendant raised an Eighth Amendment claim based on mental retardation at trial and on direct appeal).

CERTIFICATE OF SERVICE

I, Jeffrey A. Jacobs, hereby certify that I have served the Respondent's ***Memorandum in Opposition to Applicant's Motion to Stay the Proceedings*** in the foregoing action by depositing copy of same in the United States mail, postage prepaid, on the following:

John H. Blume, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

Pamela Wilkins, Esquire
Palmetto Legal Services
426 S. Lake Drive
Lexington, South Carolina 29072

This 5th day of April, 2001.

JEFFREY A. JACOBS

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, Applicant, v. **MICHAEL MOORE,** Commissioner, South Carolina Department of Corrections; and **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	CA#: 98-CP-09-101

APPLICANT'S OBJECTIONS TO RESPONDENTS' PROPOSED ORDER WITH RESPECT TO APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT

Applicant, Herman Lee Hughes, Jr., by and through undersigned counsel, respectfully submits this memorandum in opposition to the Attorney General's proposed order. Applicant also reiterates his motion that this Court stay the proceedings in this case, including the pending motion to alter or amend the judgment, pursuant to the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution, Article I, Sections 3, 14 & 15 of the South Carolina Constitution and other applicable state and federal law, until

ATTORNEY GENERAL'S OFFICE
RECEIVED 4-9-01
ADMINISTRATIVE INSTRUCTIONS
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announcement of the Supreme Court's decision in *McCarver v. North Carolina*, — U.S. —, — S. Ct. —, 2001 WL 215804 (U.S. March 26, 2001) (No. 00-8727) (mem.) (order granting certiorari).

I. MOTION TO STAY

A. Discussion

On Monday, March 26, 2001, the United States Supreme Court granted certiorari in *McCarver v. North Carolina*, to address the following question:

> Whether petitioner's execution would violate the Eighth and Fourteenth Amendments to the United States Constitution because petitioner is retarded and there is now a national consensus against executing the mentally retarded.

In the event the Court answers this question in the affirmative, the death penalty will no longer be available as a constitutionally permissible sentencing option for defendants with mental retardation.

The applicant in this case, Herman Lee Hughes, Jr., has a long and well-documented history of brain damage, deficits in adaptive functioning and low IQ testing, which is consistent with a diagnosis of mental retardation. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 39-46 (4th ed. 1994) (setting forth the established position that a person can be determined to have mental retardation with an IQ as high as 75). Experts at applicant's trial testified that he is mentally retarded, as did an expert in mental retardation called during the state post-conviction proceedings.

Because *McCarver* raises the distinct possibility that applicant will become categorically ineligible for the sentence of death that the Attorney General seeks to have

upheld in this proceeding, it would be a waste of time and scarce judicial resources to proceed any further with the matters now before this Court. Moreover, even if the Supreme Court stops short of declaring the execution of individuals with mental retardation unconstitutional, there is a strong likelihood that its decision in *McCarver* will clarify or update the circumstances under which mentally retarded defendants may be sentenced to death, the standards by which claims of mental retardation are evaluated in capital cases, the procedures trial courts must follow when presiding over such cases, and the standards applied in any collateral review of trial court decisions on these matters. Under this scenario as well, further action on this matter by the Court without the benefit of the decision in *McCarver* would involve an unreasonably high risk that reversible error would arise from adherence to procedures and standards whose constitutionality is currently under review by the Supreme Court. Thus, no matter what the outcome of *McCarver*, the most prudent course for this Court is to stay these proceedings and continue applicant's motion to alter or amend the judgment, pending the Supreme Court's decision in *McCarver*.[1]

[1]Undersigned counsel submit, upon information and belief, that the Supreme Court will hear oral argument in *McCarver* early next Term, and that a decision can be expected as early as late fall 2001.

1. "Uniquely Undermined" was Directly Relevant to, and a Misapplication of, the *Strickland* Standard of Proof

Respondents first attempt to divorce their use of the phrase "uniquely undermined" from *Strickland*'s "reasonable probability" standard for determining whether counsel's ineffective assistance prejudiced applicant. (The Supreme Court stated that "[a] reasonable probability is a probability sufficient to *undermine confidence* in the outcome." 466 U.S. at 694 (emphasis added).) The section of respondent's argument in which that phrase appears, however, is thoroughly invested in the application of *Strickland*'s "reasonable probability" standard — a standard for which "to undermine confidence" is the touchstone, constantly invoked to demonstrate or rebut prejudice. It is not plausible that the appearance of "uniquely undermined" was merely a felicitous turn of phrase, wholly unrelated to the *Strickland* standard.

Respondents' description of their use of the phrase "uniquely undermined" is confused. They first assert that it "address[ed] the credibility of Dr. Venn, not . . . the outcome of the trial," then they assert that it referred to the effect of another witness's false testimony on his credibility. (*See* Proposed Order at 2.) Respondents did *not*, in fact, use that phrase in relation to Dr. Venn's credibility. They instead invoked it with respect to the testimony of state's witness Henry Daniel Owens Jr. (*See* Order at 185-87.)

Moreover, the context in which respondents actually used the phrase crystallizes its relation to the *Strickland* standard. Respondents argued that there was no prejudice from the witness's false testimony, because there was no "reasonable likelihood" that the truth could have affected the outcome. This was so, respondents continued, because, had trial counsel

timely raised the issue of the false testimony and corrected the witness's statement, the truth about the witness's plea bargain could not have "uniquely undermined" his credibility. The sequence of logical connections from the *Strickland* standard to the criterion of "uniquely undermine" is short, clear and purposeful — and erroneous, because to show prejudice under *Strickland* applicant need not show that revealing the witness's falsehood would have "uniquely undermined" the witness's credibility, but only to establish a "reasonable probability" — or a "significant possibility," as Justice Souter phrases it, *see Strickler v. Greene*, 527 U.S. 263, 298 (1999) (Souter, J., concurring) — that the difference could have changed the outcome.

Applicant's burden is a modest one; he need only "undermine confidence" in the outcome. *Strickland*, 466 U.S. at 694. Respondents' injection of "*uniquely* undermined" into that analysis cannot be credibly dissociated from its application to the *Strickland* standard, and was simply wrong. Accordingly, having failed to apply the correct standard to applicant's claim, respondents' critique of the claim was constitutionally inapt — at the level of the phrase *and* the paragraphs that used it.

2. The Use of "Uniquely Undermined" Exemplified a Pervasively Erroneous Application of the *Strickland* Standard of Proof in Respondents' Argument

Not only did the appearance of "uniquely undermined" demonstrate a misapplication of the *Strickland* standard with respect to whether applicant was prejudiced by trial counsel's failure to object to the prosecution's eliciting false testimony, but — as is clear from applicant's Memorandum at 5 — the phrase was symptomatic of a pervasively erroneous

B. An Expert Witness's Views on the Death Penalty for Juvenile Offenders are Not Grounds for Finding Him Not Credible

Respondents would have this Court dismiss the credibility of an expert witness solely because of his personal opposition to the death penalty for juvenile offenders. (*See id.* at 3-4.) They fail to address the absurdity of holding the Court to this position when the vast majority of professionals in the expert's field who could be qualified as experts — and the professional organizations that represent informed consensus in those fields — hold exactly the same view. The logical extension of respondents' position would be that the views of members of the American Psychological Association, the American Psychiatric Association, and most other mental health organizations must be presumed not credible, because those bodies have taken the position that juvenile offenders should not be subject to the death penalty.

Indeed, respondents would have this Court presume as not credible a most impressive array of witnesses who also oppose the execution of juvenile offenders: ministers of almost all major religious denominations in the United States, the Pope, the Rev. Pat Robertson, former President Jimmy Carter, essayist George Will, and the leaders of the American Bar Association. None of these people, respondents must maintain, could be a credible witness in a proceeding in which the death penalty for a juvenile offender was at issue.

Respondents' invocation of *Bonin v. Vasquez*, 807 F. Supp. 589 (C.D. Cal. 1992), in support of their contention that Dr Venn was not credible, is inapt. The principal fault the *Bonin* court found with Dr. Pincus's testimony was that the petitioner failed to correlate the Doctor's findings with "petitioner's mental condition at the time of the murders," eleven or

more years prior to the examination. *Id.* at 598. Moreover, the *Bonin* court was choosing between Dr. Pincus's testimony and that of experts for the respondents; it deemed them "*more* credible," *id.* (emphasis added), but it did *not* conclude that Dr. Pincus simply was *not* credible.

In the present case, the respondents have in no fashion argued that Dr. Venn's findings about the applicant are less compelling than findings by other experts that dispute Dr. Venn. There is in the record, in fact, *no* testimony that disputes that of Dr. Venn. Instead, respondents propound a blanket dismissal of Dr. Venn's findings because of his personal position on the appropriateness of the death penalty for juvenile offenders. The *Bonin* court made no comparable finding about any expert witness.

Notably, in affirming *Bonin*, the Ninth Circuit endorsed the district court's finding that the petitioner had failed to correlate his expert's findings to his mental condition at the time of the crimes — but merely noted the district court's observation about credibility without discussing its merits, other than to observe that in a case arising from "a string of shockingly brutal murders" with "overwhelming" aggravating circumstances, a battle of the experts was not likely to have changed the outcome. *Bonin v. Calderon*, 59 F.3d 815, 821, 836 (9th Cir. 1995).

D. Respondents Have Mischaracterized Applicant's Arguments Concerning Trial Counsel's Options for Impeaching Kelly Hoffman

With respect to trial counsel's actions in cross-examining Kelly Hoffman, respondents clearly credited the implications of trial counsel's testimony, that the only alternative he had to the style of questioning he used was to be harshly confrontational. (*See*

a yawning credibility gap, and failing to call the best witness on such a crucial, life-or-death issue, would be inexcusably ineffective, and would have rendered a gross disservice to his client. Finally, it is risible to suggest that it would be effective for counsel to forego calling a witness to testify under oath because the defendant will cover the same ground in a statement. It should be superfluous to explain that a jury will very likely view defendant's statement as self-serving, and far less persuasive than the same information coming from a sworn witness subject to cross-examination. And if that potential witness is the sister of the victim, then no rational person — let alone any effective counsel — could possibly believe that any jury would find defendant's statement anywhere near as compelling as the witness's.

(For the record, contrary to respondents' assertion, applicant did not devote "two pages" of his Memorandum to *State v. Fisher*; at most, a terse review of that decision occupied a page and a third. *See* Memorandum at 16-18.)

E. Respondents' Statements, Regarding Applicant's Arguments Concerning Counsel Newsom's Decisions, are Factually Inaccurate

Respondents are mistaken that applicant has asked the Court to find Phillip F. Newsom incredible as a witness. (*See* Proposed Order at 5-6.) Applicant instead points out that Newsom's stated reason for not calling Duane Gilmore to testify about Pearce's bragging about the shooting — that it would have been inconsistent with the defense's theory of the case — is objectively irreconcilable with counsel's evident intent to develop evidence that Pearce was inside the crime scene and fired at least some of the shots. If this Court wishes to find Newsom incredible, applicant will not gainsay that decision. There is, however, no

basis for concluding that, by pointing out the insurmountable inconsistencies in Newsom's testimony, applicant has demanded that the Court do so.

F. Respondents' Characterizations of Applicant's Discussion of the Mental Retardation Issue are Inconsistent, and Alternately Meaningless and Unfounded

In section V of their proposed order, respondents make rapid assertions in successive paragraphs that individually are devoid of any cogent relation to applicant's actual arguments, and which taken as a whole can only be regarded as incoherent.

1. Citation to Persuasive Authority is a Normal Feature in a Legal Document

Respondents first imply that applicant is taking an extraordinary step in citing to the DSM-IV in support of the proposition that he "could be considered" mentally retarded, and in appending the relevant pages to his memorandum of law. (*See id.* at 6.) Respondents' recitation of these matters lacks a discernible point. At the risk of dwelling on the obvious, applicant is arguing that trial counsel was ineffective for failing to retain witnesses who would have been qualified to testify — as experts on *that* issue — that applicant is mentally retarded. In order to make that argument in a cogent fashion, applicant must cite to authority that indicates the argument meets a threshold of plausibility.

The discussion in DSM-IV of circumstances in which I.Q. scores above 70 are consistent with a diagnosis of mental retardation bears upon trial counsel's reasonableness in deciding, on the basis of some of his client's I.Q. scores, not to retain a mental retardation expert. Applicant's *present* counsel would be derelict in their duty if they *failed* to cite such authority in presenting this argument. To state a truly elementary point, it is a professional

obligation to cite to authority when one wishes to persuade a court of one's argument. Applicant appropriately cited to the DSM-IV to support the plausibility of his contention that a qualified expert in mental retardation might find him mentally retarded. Respondents propose no alternative way to present this legitimate argument, and their cavil on the matter is pointless.

2. Respondents' Assertion, that Applicant Presented No Expert Testimony that He is Mentally Retarded, is Demonstrably False

In the next paragraph, respondents make utterly false assertions about the testimony in the record, and about the relation to that evidence of applicant's DSM-IV citation. Respondents assert that applicant "did not present any evidence at the PCR hearing" that he is retarded. (*See* Proposed Order at 6.) That is absolutely wrong. Dr. George Woods testified at PCR that Applicant is mentally retarded, and Dr Dennis Keyes, an expert in mental retardation, was also called as a witness to explain the deficiencies in the trial presentation of the mental retardation issue. Accordingly, respondents' statement, that applicant is asking the Court to take judicial notice on the basis of the DSM-IV's diagnostic criteria that he is mentally retarded, is at best a flight of fancy; applicant has made no such request.[4]

3. Respondents' Assertion, that Applicant is Arguing "Ineffective Assistance of *Experts*," is Bereft of Factual Foundation

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[4]Respondents having suggested such action, however, applicant will note for the record that he will offer no objection if the Court wishes to take their suggestion under advisement.

Rushing forward to its next misstatement, respondents' Proposed Order proceeds to assert that applicant is arguing "that his *experts* were ineffective for not concluding that Hughes is mentally retarded." (Proposed Order at 6.) That assertion simply bears no relation to applicant's actual argument. Applicant has argued that *trial counsel* was ineffective, and has demonstrated that claim by showing that trial counsel failed to secure experts familiar with mental retardation, and capable of testing applicant to determine whether he was mentally retarded. (Moreover, applicant's experts *did* conclude that he is mentally retarded, although a precise evaluation of his intelligence was outside their area of expertise. On that basis alone respondents' assertion fails in its premise, and is simply nonsense, bearing no relation to the facts of this case or applicant's argument.)

4. Respondents' Dismissal of Applicant's Experts' Statements Regarding Applicant's Brain Damage Rests on Misrepresentation of the Record and the Court's Order

Likewise, there is no basis for respondents' assertion that the Court "found as a fact" that trial counsel provided applicant's experts with information about applicant's exposure to syphilis. (*Id.* at 7.) Nothing in the record would support such a conclusion, and, contrary to respondents' characterization, the Court's order indicates — with no citation to the record — only that trial counsel himself stated nebulously that he was "aware" of a "syphilis finding" and that records "were provided" to his experts. It is a serious misrepresentation for respondents to characterize these vague observations, unsupported by the record, as (1) a finding of fact by the Court, and (2) specifically a finding that trial counsel gave his experts information concerning applicant's *in utero* exposure to syphilis. Certainly, this slender reed

that respondents hold out is no basis for rejecting the sworn statements of Drs. Morgan and DeWitt, emphatically and explicitly stating that they were not informed by counsel or otherwise aware at the time they evaluated applicant that he had been exposed to syphilis.

G. Respondents' Characterization of Applicant's International Law Discussion is Baseless

It will suffice to say that applicant has not argued "that this court is governed by international law, and . . . not by the Constitution when it conflicts with international law" (*id.*), and scrutiny of applicant's Memorandum will uncover no such assertion. Moreover, respondents fail to show that the Constitution *requires* the execution of the mentally retarded, and thus fail to establish a necessary premise for arguing that a conflict exists between the Constitution and international law in this matter.

H. Respondents' Justification of the Court's Mechanical Reproduction of Attorney General's Work Product as the Court's Decision is Non-Responsive

Respondents reply to applicant's arguments on this point by explaining that the Court reached its decision and then asked the Attorney General "to document the court's ruling." (*Id.*) Their statement evades the crux of applicant's argument — and of a wealth of express judicial disfavor: that the largely uncritical adoption of a party's findings of facts and conclusions of law are an abdication of the court's fundamental obligation to apply and express a disinterested and independent intelligence to the controversy before it, and do not merit the respect and deference that the court's own work would.

Moreover, the foregoing discussion of respondents' proposed order shows an even more important reason for heeding applicant's arguments on this point. The proposed order

is crippled by profound factual errors and gross misstatements of applicant's argument and the law of the case. If nothing else, a healthy self-regard should deter this Court from signing on to any further documents proffered by respondents. Their product is manifestly unreliable, and can only discredit this Court.

WHEREFORE, for the foregoing reasons, applicant respectfully requests that the Court enter an order staying these proceedings and continuing applicant's motion to alter or amend the judgment, until such time as the United States Supreme Court issues its decision in *McCarver v. North Carolina*; or that the Court reject respondent's proposed order, or both.

Respectfully submitted,

JOHN H. BLUME, ESQ.
SHERI LYNN JOHNSON, ESQ.
Cornell Law School
Myron Taylor Hall
Ithaca NY 14853-4901
(607) 255-9653

ATTORNEYS FOR APPLICANT

April 6, 2001

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, Applicant, v. **MICHAEL MOORE,** Commissioner, South Carolina Department of Corrections; and **CHARLES M. CONDON,** Attorney General, State of South Carolina, Respondents.	CA#: 98-CP-09-101 **CERTIFICATE OF SERVICE**

I do hereby certify that I have served upon the attorney for the respondents the Applicant's Objections to Respondents' Proposed Order 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 6th day of April, 2001, in Columbia, South Carolina.

John H. Blume

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	C/A No. 98-CP-09-101
)	
)	
Herman Lee Hughes, Jr., # 5018)	
)	
Applicant,)	
)	RESPONSE TO APPLICANT'S
vs.)	OBJECTIONS TO PROPOSED ORDER
)	
Dodge Frederick, Director,)	
South Carolina Department)	
of Corrections, and)	
Charles M. Condon,)	
Attorney General of the State of)	
South Carolina,)	
)	
Respondent.)	

April 12, 2001
Response to Objects

The applicant, Herman Hughes, has filed objections

Other than to state that the respondents drafted the order in a

a conference call in which those rulings were outlined to th

position as set forth in their memorandum in opposition to the applicant's motion to stay the proceedings.

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

JEFFREY A. JACOBS
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-5624

By: _____
ATTORNEYS FOR RESPONDENT

April ___, 2001

CERTIFICATE OF SERVICE

I, Jeffrey A. Jacobs, hereby certify that I have served the Respondent's ***Response to Applicant's Objections to Proposed Order*** in the foregoing action by depositing copy of same in the United States mail, postage prepaid, on the following:

John H. Blume, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

This 12th day of April, 2001.

JEFFREY A. JACOBS

STATE OF SOUTH CAROLINA

IN THE CALHOUN COUNTY COURT OF COMMON PLEAS

HERMAN LEE HUGHES, JR., Prison Number 5018, 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

ORDER TO STAY THE PROCEEDINGS, PENDING THE OUTCOME OF *McCARVER V. NORTH CAROLINA*

Applicant, Herman Lee Hughes, Jr., has moved that this Court stay the proceedings in this case, including his pending motion to alter or amend the judgment, until the announcement of the Supreme Court's decision in *McCarver v. North Carolina* (*see McCarver v. North Carolina*, — U.S. —, 121 S. Ct. 1401 (2001) (mem.) (order granting certiorari)). This Court hereby GRANTS the motion to stay these proceedings, on the basis of the following facts and legal principles.

I. *Discussion*

On Monday, March 26, 2001, the United States Supreme Court granted certiorari in *McCarver v. North Carolina*, to address the following question:

> Whether petitioner's execution would violate the Eighth and Fourteenth Amendments to the United States Constitution because petitioner is retarded and there is now a national consensus against executing the mentally retarded.

In the event the Supreme Court answers this question in the affirmative, the death penalty will no longer be available as a constitutionally permissible sentencing option for defendants with mental retardation.

The applicant in this case, Herman Lee Hughes, Jr., presented evidence at his trial that he is mentally retarded. Other evidence of mental retardation was presented at the post-conviction relief hearing. Because *McCarver* raises the distinct possibility that mentally retarded persons will become categorically ineligible for the imposition of the death penalty, and because applicant is contending that he is mentally retarded, the outcome of *McCarver* may have an effect on this case.

Furthermore, this Court notes that on April 16, 2001, the South Carolina Supreme Court issued an order staying the capital trial in the case of *South Carolina v. Pearson*, pending the issuance of the United States Supreme Court's decision in *McCarver*. In *Pearson*, as in the present case, the possible mental retardation of the accused is at issue. In view of our state Supreme Court's order in *Pearson*, it is all the more appropriate that this Court stay these proceedings pending the forthcoming *McCarver* decision. This Court will

not attempt to cover ground that, in all probability, *McCarver* will subsequently require it to cover again.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that applicant's motion to stay these proceedings, and to continue his motion to alter or amend the judgment, until such time as the United States Supreme Court issues its decision in *McCarver v. North Carolina*, is **GRANTED;** and

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order by regular mail upon the parties to this action.

IT IS SO ORDERED.

JUDGE PAULA H. THOMAS
GEORGETOWN, S.C.

April May 4, 2001

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	CA#: 98-CP-09-101
HERMAN LEE HUGHES, JR.,)	
Prison Number 5018,)	
)	
Applicant,)	
)	
v.)	
)	**CERTIFICATE OF SERVICE**
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 Respondents the Order to Stay the Proceedings Pending the Outcome of *McCarver v. North Carolina* 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 May, 2001, in Columbia, South Carolina.

Jill A. Rider

Jill A. Rider

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN **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.	)	IN THE COURT OF COMMON PLEAS No. 98-CP-09-101 **MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO ALTER OR AMEND THE JUDGMENT**

Applicant, Herman Lee Hughes, Jr., by and through undersigned counsel, hereby moves this court, pursuant to the United States Supreme Court's decision in *Roper v. Simmons* 125 S.Ct. 1183(2005) for summary judgment in regard to the sentencing phase of his trial.

1. On May 26, 1994, Applicant was indicted in Calhoun County on the charges of murder, assault and battery with intent to kill, armed robbery, and grand larceny.

2. On March 21 and March 24, 1994 the prosecutor filed petitions in the Family Court requesting the case be transferred to the Court of General Sessions.

3. On April 28, 1994 a waiver hearing was held before the Honorable Maxey G. Watson and the case was transferred to the Court of General Sessions.

4. On October 31, 1994, Applicant was served with the Notice of Intent to See the Death Penalty.

5. Applicant's trial began on September 5, 1997, and the jury rendered a death verdict.

6. Applicant appealed his sentence to the South Carolina Supreme Court. On October 27, 1997, the Supreme Court affirmed his sentence.

7. Applicant then filed a Petition for Writ of Certiorari to the United States Supreme Court. The Court denied the petition on April 27, 1998.

8. Applicant filed his initial application for Post-Conviction Relief, with this Court on June 22, 1998. The evidentiary hearing was held in Horry County on October 11-13, 1999. This Court subsequently issued an Order of Dismissal. A timely motion was filed, pursuant to SCRCP 59(e), requesting that this court alter or amend the judgement.

9. In his application for Post-Conviction Relief, applicant contended that it was cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, to execute someone who was under the age of eighteen at the time of the offense. In *Simmons*, the Supreme Court so held.

10. The attached birth certificate establishes that, applicant was sixteen years old at the time of the offense. Therefore, he is entitled to have his sentence modified accordingly.

WHEREFORE, Applicant requests that this Court grant summary judgment vacating the prior order denying Post-Conviction Relief, and amend the judgment in applicant's case to comply with the Supreme Court's mandate in *Simmons*.

Respectfully submitted,

JOHN H. BLUME
SHERI LYNN JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14857
(607) 255-1030

BY: _____
COUNSEL FOR APPLICANT

March 15, 2005

Attachment

4591 2381

CERTIFIED COPY

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

DIVISION OF VITAL RECORDS

REC

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

CERTIFICATE OF LIVE BIRTH

BIRTH NUMBER 139-77-025427

CHILD—NAME FIRST	MIDDLE	LAST	SEX	DATE OF BIRTH (Mo., Day, Yr.)	HOUR
1. HERMAN	LEE	HUGHES, JR.	2. M	3. 977	3b. 1:01 P

HOSPITAL—NAME (If not in hospital, give street and number)	CITY, TOWN OR LOCATION OF BIRTH	COUNTY OF BIRTH
4a. Orangeburg Regional	4b. Orangeburg	4c. Orangeburg

I certify that the stated information concerning this child is true to the best of my knowledge and belief.	DATE SIGNED (Mo., Day, Yr.)	NAME AND TITLE OF ATTENDANT AT BIRTH IF OTHER THAN CERTIFIER (Type or print)
5a. (Signature) ▶ Sister Bernadette Farrell CNM	5b. July 26,1977	5c.
CERTIFIER—NAME AND TITLE (Type or print)	MAILING ADDRESS (Street or R.F.D. No., City or Town, State, Zip)	
5d. Sister Bernadette Farrell CNM	5e. Orangeburg, S. C. 29115	

REGISTRAR	DATE RECEIVED BY REGISTRAR (Month, Day, Year)
6a. (Signature) ▶ Myra T. Strickland	6b. July 29, 1977

MOTHER—MAIDEN NAME FIRST	MIDDLE	LAST	AGE (At time of this birth)	STATE OF BIRTH (If not in U.S.A., name country)
7a. Lucille		General	7b. 46	7c. S. C.

RESIDENCE—STATE	COUNTY	CITY, TOWN OR LOCATION	STREET AND NUMBER OF RESIDENCE	INSIDE CITY LIMITS (Specify yes or no)
8a. S. C.	8b. Calhoun	8c. St. Matthews	8d.	8e.

9. MOTHER'S MAILING ADDRESS—If same as above, enter Zip Code only

FATHER—NAME FIRST	MIDDLE	LAST	AGE (At time of this birth)	STATE OF BIRTH (If not in U.S.A., name country)
10a. Charlie		Hughes	10b. 56	10c. S. C.

I certify that the personal information provided on this certificate is correct to the best of my knowledge and belief. (Signature of Parent or other informant)	RELATION TO CHILD
11a. ▶	11b.

DEC -3 1981

DATE ISSUED

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT REPRODUCTION OF THE ORIGINAL RECORD FILED WITH THE DIVISION OF VITAL RECORDS, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, COLUMBIA, SOUTH CAROLINA.

V0029401

Robert E. Jackson MD
COMMISSIONER AND STATE REGISTRAR

Ann D. Owens
ASSISTANT STATE REGISTRAR

WARNING: IT IS ILLEGAL TO COPY THIS CERTIFICATE

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	CA#: 98-CP-09-101
HERMAN LEE HUGHES, JR.,)	
)	
Applicant,)	
)	
v.)	
)	**CERTIFICATE OF SERVICE**
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 Respondents the Motion for Partial Summary Judgment and to Alter or Amend the Judgment by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 15th day of March, 2005, in Columbia, South Carolina.

JOHN H. BLUME

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 RESPONSE TO APPLICANT'S MOTION FOR PARTIAL SUMMARY JUDGEMENT AND TO ALTER OR AMEND THE JUDGEMENT IN LIGHT OF ROPER v. SIMMONS**

This matter comes before this Court by a motion for partial summary judgement and to alter or amend the judgement in light of the recent decision of the United States Supreme Court in Roper v. Simmons, 125 S.Ct. 1183 (2005) involving the constitutional prohibition of the execution of offenders under the age of eighteen which abrogated and reversed its prior holding in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).[1] The Applicant is essentially amending his application making a *new* free-standing new federal constitutional claim and requesting retroactive application as applied to him.[2] Based upon the foregoing,

[1]The South Carolina Supreme Court had previously rejected challenges to the execution of offenders similarly situated. See, State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997); State v. Shaw and Roach, 273 S.C. 194, 255 S.E.2d 799 (1979).

[2] S.C. Code Ann. § 17-27-45 provides in pertinent part that:

Respondents submit that the amendment and such relief are timely and appropriate as a matter of law. [3]

> (A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.
>
> *(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.*

[3] In his third amended application, Hughes raised the following claims for relief which specifically address the matters ultimately decided by Roper. Although appellate and trial counsel cannot be deemed deficient under Strickland v. Washington, 466 U.S. 668 (1984) because of the status of the law concerning the juvenile at the time counsel's decisions were made, these claims are mooted, along with other claims, presented below which address sentencing phase issues:

> 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(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

I. The New Roper v. Simmons Constitutional Claim.

On December 8, 2000, the Honorable Paula Thomas entered a one-hundred and eighty-nine (189) page order denying state post-conviction relief in its entirety. Subsequently, the Applicant has filed various motion to alter or amend and motions to stay pending resolution of constitutional questions involving mental retardation as well as juvenile execution matters. The judgement is still pending before this Court. In the recent motion, Hughes asserts that he is entitled to partial summary judgement because according to both court and birth records he was under the age of eighteen at the time of the murder of Kenneth Presley on March 18, 1994. He

---

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).

contends that his birth date was July 26, 1977. He asserts that at the time of the March 18, 1994 incident, he would have been the age of 6079 days old or 16 years and 239 days old. There is a plethora of evidence in the record before this Court, including the juvenile transfer records and social work testimony at trial which cannot be contested by Respondents as a conclusive showing as a matter of fact and law that Herman Lee Hughes, Jr. was "under the age of eighteen" at the time of the March 1994 murder.

On March 1, 2005, the Supreme Court declared that the Eighth Amendment proscribes the execution of persons who commit capital murder before they have reached age eighteen. Roper v. Simmons, 543 U.S. ----, 125 S.Ct. 1183, 1198, --- L.Ed.2d---- (2005). ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."). The rule announced in Roper--that a person cannot be sentenced to death for a crime committed before the age of eighteen--is clearly a substantive, rather than procedural, rule. It alters the class of persons eligible for the death penalty. Accordingly, Roper applies retroactively to all cases involving offenders under the age of eighteen at the time of the offense, including those cases on collateral review. See Roper, --- U.S. at ----, 125 S.Ct. at 1198 ("In holding that the death penalty cannot be imposed upon juvenile offenders, we ... [hold] that Stanford [v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)] should no longer control in those few pending cases or in those yet to arise.") (emphasis added). Cf. Bell v. Cockrell, 310 F.3d 330, 332 (5th Cir.2002) (holding Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which forbid the execution of the mentally retarded, applies retroactively to cases on collateral review); Santana-Madera v. United States, 260 F.3d 133, 139 (2nd Cir.2001) (holding that Richardson v.

United States, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), announced a new substantive rule of law and therefore should be applied retroactively in habeas proceedings).

Pursuant to Roper, the State of South Carolina is no longer permitted to impose the death penalty on Petitioner for his involvement in the Presley murder. Respondents submit that the judgment of the death sentence on Indictment 94-GS-09-154 should be granted state post-conviction relief and the matter remanded to the Court of General Sessions for resentencing on that indictment.

II. MOOTNESS OF REMAINING SENTENCING PHASE CLAIMS

Respondents respectfully submit that in light of Roper, the Applicant's death sentence must be vacated pursuant to the conditional grant of state post-conviction relief and the matter remanded to the Court of General Sessions for resentencing consistent with the law at the time of the crime for murder on March 14, 1994. Therefore a number of allegations set out in the original and amended applications for state post-conviction relief have been effectively rendered moot. See AT & T Communications of the Southwest v. City of Austin, 235 F.3d 241, 243 (5th Cir.2000) (stating that a case is moot if the issues presented are no longer live); Piggly Wiggly Clarksville v. Mrs. Baird's Bakeries, 177 F.3d 380, 383 (5th Cir.1999) ("A claim becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.").

The record reveals the following allegations must be deemed mooted by this conditional grant:

(INITIAL APPLICATION)

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).

(Third Amended Application dated October 7, 1999):

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:

> ....(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(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(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(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(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).

Respondents submit that each of the above claims are mooted by the effect of Roper and mandatory remand for resentencing as a result. Therefore, we assert that an order altering judgment is appropriate.

III.

WHEREFORE, the Respondents request that the Order made December 8, 2000 and judgement be altered and amended as appropriate for the reasons set forth above.

Respectfully submitted,

HENRY D. McMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
(Counsel of Record)
P. O. Box 11549
Columbia, SC 29211
(803) 734-3601

April 7, 2005

By: _____

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Respondents Response to Applicant's Motion for Partial Summary Judgment and to Alter or Amend the Judgment in Light of Roper v. Simmons*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

John H. Blume, Esquire
Sheri Johnson, Esquire
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853

This 7th day of April, 2005.

DONALD J. ZELENKA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	98-CP-09-101

HERMAN LEE HUGHES, JR	)	
	)	
Applicant,	)	**ORDER VACATING DEATH SENTENCE IN ACCORDANCE WITH *ROPER v. SIMMONS*, 125 S.Ct. 1183 (2005), BY CONSENT OF THE PARTIES**
	)	
v.	)	
	)	
JON E. OZMINT, Director, S.C. Department of Corrections, et al.,	)	
	)	
Respondents.	)	

Pursuant to Rule 56 SCRCP, the Applicant moved for partial summary judgment related to his punishment phase claims in this matter. The motion was based on the United States Supreme Court's recent decision in *Roper v. Simmons*, 125 S.Ct. 1183 (2005), which hold that the death penalty was unconstitutional under the Eighth Amendment's prohibition against cruel and unusual punishment when applied to persons who were under the age of eighteen at the time of the offense.

The South Carolina Supreme Court found that the Applicant, who was born on [redacted] 1977, was sixteen-years old when the crime for which he was convicted and sentenced to death occurred, and that the crime occurred March 18, 1994. *See State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997) (reciting the date of crime and the age of the defendant); *see also* State-issued birth certificate of Herman Lee Hughes, attached to the Motion for Partial Summary Judgment as Exhibit A. The Respondents concede that the Applicant was 16 years of age on March 18, 1994.

The Court hereby grants Applicant's unopposed motion for partial summary

judgment as to punishment phase issues only. The Court further orders that Applicant's sentence of death is vacated. The case is remanded to the Calhoun County Court of General Session for resentencing in accordance with the law which existed at the time of the offense.

AND IT IS SO ORDERED.

Paula Thomas
Circuit Court Judge
Presiding by Order of the
South Carolina Supreme Court

May 9, 2005.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	CA#: 98-CP-09-101
HERMAN LEE HUGHES, JR.,)	
)	
Applicant,)	
)	
v.)	
)	**CERTIFICATE OF SERVICE**
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 Respondents the Order Vacating Death Sentence in Accordance with *Roper v. Simmons*, 125 S.Ct. 1183 (2005), by Consent of the Parties by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Donald J. Zelenka, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 15th day of June, 2005, in Columbia, South Carolina.

Jill A. Rider

JILL A. RIDER

The South Carolina Court of Appeals

Herman Lee Hughes, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-167667

ORDER

Counsel has submitted a petition pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 210 (1988), and a motion to be relieved as counsel. We deny the motion to be relieved as counsel and direct the parties to address the following question and any other questions of arguable merit:

Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395, should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?

Petitioner shall serve and file a petition on this question within thirty days of the date of this order. Thereafter, Respondent shall have thirty days to serve and file its return.

J.

RECEIVED

FEB 11 2014

SC OFFICE OF APPELLATE DEFENSE

Columbia, South Carolina

cc: Robert M. Pachak
Donald J. Zelenka

FILED

Feb. 11, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

HERMAN LEE HUGHES, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395, should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?

STATEMENT

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

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

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

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

Petitioner filed his current pro se application for post-conviction relief on June 26, 2007. Respondent filed a return and motion to dismiss the application as being successive on August 27, 2007. The Honorable Diane S. Goodstein issued a conditional order of dismissal on September 27,

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

On October 29, 2010, a Johnson petition was submitted on petitioner's behalf addressing the following question: Whether petitioner's case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief application? On June 11, 2013, this Court issued the following request:

> The Court is requesting that you provide a supplemental appendix pursuant to the South Carolina Appellate Court Rules (SCACR). The Supplemental Appendix is to include the following documents:
>
> (1) Initial PCR application dated June 22, 1998 & all subsequent amended applications.
> (2) The PCR hearing transcript, October 11 – 13, 1999, Hughes v. Moore, 98-CP-09-101.
> (3) The December 8, 2000, order in Hughes v. Moore, 98-CP-09-101.
> (4) Post-PCR motions to alter or amend and motions to stay.
> (5) The May 9, 2005 order, which amended the 12/8/2000 order
> (6) The October 10, 2006, sentencing hearing transcript.
> (7) Deposition of Jeffrey Bloom.

On August 21, 2013, petitioner complied with the above request and submitted a five-volume supplemental appendix. On February 11, 2014, the Court issued an order denying counsel's motion to be relieved and directed the parties to address the question now presented which is the issue that was originally raised by appellate counsel.

This petition follows.

ARGUMENT

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

In Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989), the court held that a second application for post-conviction relief was not successive where the first application was dismissed at the request of the applicant and the State consented and the order dismissing the application did not do so with prejudice. The applicant was entitled to one bite at the apple. In Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982), the court held that a successive application was allowed when the applicant's first application was dismissed without the assistance of counsel and without a hearing. In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the court held that a second application for post-conviction relief was not successive when an applicant was alleging that PCR counsel was ineffective in failing to appeal the denial of the first PCR application. In King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), a procedure was set forth for the review of the denial of PCR applications based on an applicant's failure to properly waive the right to appellate review of a prior denial. And, in Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), the court held that the one-year statute of limitations did not apply to a petitioner's appeal from the summary denial of an application for post-conviction relief based on the denial of the right to appeal.

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

In petitioner's reply to the conditional order of dismissal petitioner argued that his case should not be deemed successive because he never waived his right to challenge his convictions. He asked to be allowed to pursue an appeal of his prior PCR case. (App. p. 117)

The issue of whether a PCR applicant knowingly and intelligently waived the right to appeal the denial of his first application for post-conviction relief requires a remand for an evidentiary hearing as was held in Austin v. State, supra.

CONCLUSION

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

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari in this case have been served on Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of February, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day of February, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge
Case No. 2007-CP-09-00103
APPELLATE CASE NUMBER 2010-167667

HERMAN LEE HUGHES, JR., ... PETITIONER,

v.

STATE OF SOUTH CAROLINA, ...RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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If merely stating in a response to a conditional order conclusory terms like "involuntarily waived" in contrast with "never waived" without any supporting facts is sufficient under Austin - King – Odom to sufficiently set forth a showing for an evidentiary hearing on either "either: (1) the applicant requested and was denied an opportunity to seek PCR appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived," then Petitioner is entitled to a remand for an evidentiary hearing where testimony can be taken from the Petitioner and prior PCR counsel Blume on why an appeal from the 1998 PCR proceeding was not done in 2005, the advice, if any given to Petitioner concerning an appeal and counsel Blume's reasons for why an appeal was not taken and Petitioner's reasons for why an appeal was not taken.....21

Alternately, if the Court is of the opinion that it is a condition precedent for an Austin -type appeal to make a factual claim in the PCR application itself that as a ground for the PCR application that the applicant requested PCR counsel Blume to appeal and he refused – which has not been factually alleged in these

proceedings – then certiorari should be denied, particularly where this 1998 proceeding was before Bray v. State had been decided.....21

CERTIFICATE OF SERVICE

STATEMENT OF THE ISSUE ON CERTIORARI PURSUANT TO FEBRUARY 11, 2014 ORDER

"Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?"

STATEMENT OF THE CASE

This matter comes before this Court by an appeal from a denial of a successive application for post-conviction relief brought by former death row inmate Herman Lee Hughes, Jr. The Petitioner filed a second application for post-conviction relief on June 26, 2007. Hughes v. State of South Carolina, 2007-CP-09-000103. App.p. 1. In the application, Hughes, *pro se*, raised the following claims:

I. Ineffective Assistance of Counsel:

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

App.p. 4.

On August 27, 2007, the Respondent State made a motion to dismiss asserting that the application was a successive application. App.p. 8-98. Respondent asserted that Hughes was challenging his 1995 convictions claiming his retained counsel, Phil Newsom, was ineffective in three specifications. The Respondent submitted that the entire application must be dismissed as successive under S.C. Code Ann. § 17-27-90 (1985) to his 1998 application for post-conviction

relief which challenged the same convictions which was dismissed on December 8, 2000, as amended May 9, 2005 by the Honorable Paula Thomas after a hearing on the merits. See Hughes v. Moore, 98-CP-09-101, Order, December 8, 2000. The State contended the motion was well founded and conditionally dismiss where the claims sought to be raised in this 2007 action were raised and ruled upon in the prior action and no showing can be made that they were inadequately raised in the earlier action when a full evidentiary hearing, depositions and post-hearing briefing were done prior to the adjudication.

On October 18, 2007, the Honorable Diane Goodstein, presiding circuit court judge issued her order conditionally dismissing the application as a successive application. App.p. 99-115. On November 20, 2007, the Petitioner, pro se made a response to the Conditional Order of Dismissal. App.p. 117. In this response, he stated:

> The issues raised by the Applicant were ruled upon by a prior judge, but each issue was inadequately raised. Furthermore the Applicant's right to appeal these issues to a higher court was involuntarily waived. Upon the prior PCR judge's ruling on the issues in this case, the Applicant's case was placed on hold, for a ruling from the United States Supreme Court, regarding children being put to death in this country. Upon a favorable ruling, the Applicant was removed from death row and resentenced. What the Applicant places emphasis on here is that he never waived his right to continue challenging his conviction. Therefore the Applicant should have a rehearing on the issues presented, and for this Court to rule whether or not the Applicant should be allowed to pursue an appeal from the prior PCR ruling or from a ruling of this Court. All the Applicant seeks is his full bite one full bite at the apple.

App.p. 117.

On January 2, 2008, Judge Goodstein after reviewing the response from the Petitioner, found that a sufficient reason had not been shown why the conditional order should not be final. App.p. 119-120.

The Petitioner made a notice of appeal on July 16, 2010. In his explanation pursuant to SCACR Rule 243(c), the Petitioner, *pro se,* contended:

1. Whether the lower courts determination that this PCR action is impermissive;
2. Whether the issues raised in the present and original pleadings now present a novel claim of Eighth and Fourteenth Amendment via Roper v. Simmons and Graham v. Florida;
3. Whether in fact that petitioner was denied the effective assistance of counsel on opportunity to seek appellate review from his 2005 re-sentence via White v. State;
4. Whether the statute of limitations should apply to this novel claim.

Hughes v. State, Explanation, July 15, 2010.

On October 29, 2010, appointed appellate counsel, Robert M. Pachak, made a Johnson Petition for Writ of Certiorari asserting as the sole arguable ground:

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

Johnson Petition for Writ of Certiorari, p. 2.

On February 11, 2014, the South Carolina Court of Appeals entered its order denying the motion to be relieved as counsel pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988) and directing that the following issue be presented in another certiorari petition:

> "Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?"

Hughes v. State, Appellate Case No. 2010-167667, Order (S.C.Ct. App. February 11, 2014).

On February 24, 2014, counsel Pachak made his Petition for Writ of Certiorari. This Return follows.

OTHER PROCEEDINGS

FIRST PCR ACTION - Hughes v. State, 98-CP-09-101

The Petitioner, Herman Lee Hughes, Jr., # 206816, is challenging his 1995 murder conviction which was previously the subject of an earlier application for post-conviction relief in 1998. Supp. App.p. 1-7. In that action, *Hughes v. Moore*, et al, 1998 -CP-09-101, the Applicant was represented by court-appointed counsel, John H. Blume, of the Cornell Law School and initially Pamela A. Wilkins of the Center for Capital Litigation. The matter was assigned exclusively to then Circuit Judge Paula Thomas because it was a death penalty post conviction relief action. The Respondents were represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General. The Respondents made a return and motion to make more definite and certain dated July 21, 1998. Supp. App.p. 8-26. Subsequently, other amended applications were filed. Supp. App.p. 37-61, 177-196. An evidentiary hearing was convened in Horry County from October 11-13, 1999. Supp. App.p. 197-871. Evidence was presented in the form of testimony, deposition of Jeffrey Bloom (Supp. App.p. 61-176) and affidavits. Id.

On May 17, 2000, the Applicants made their Post-Hearing Memorandum of Law In Support of the Third Amended Application For Post-Conviction Relief. App.p. 871-1004. The Respondents made a Memorandum Of Law In Opposition to the Application for Post-Conviction Relief on May 27, 2000. Supp.App. 1005-1177.

In the third amended application, dated October 7, 1999 (Supp.App. p. 177-197), Hughes made the following claims pertinent to his 2007 PCR application:

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

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

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

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

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

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

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

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

(1) Counsel failed to secure necessary records and testimony to demonstrate Applicant's mental

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

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

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

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

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

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

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

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

(1) Counsel failed to challenge for cause (*or use a peremptory challenge*) a number of jurors who were acquainted with the families of the victims and who had actually spoken with them about the crimes and about their loss. See Morgan v. Illinois, 504 U.S.

719 (1992)(defendant has right to impartial jury).(*Involves juror William Barron and Brenda Wise as stated in October 10, 1999 Letter from Counsel Wilkins*)

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

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

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

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

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

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

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

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

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

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

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

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

A. Up to 15.

Q. Okay....

ROA 823.

The solicitor knew or should have known that the witness was not facing up to fifteen years for the offense of misprision of a felony. Misprision of a felony is a common law offense, adopted in South Carolina pursuant to S.C. Code § 14-1-50. See State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980). As codified by federal statute § 18 U.S.C. 4 (1994), the offense is a misdemeanor not punishable by more than three years in prison. Although, under state law, the offense may give rise to a prison term of up to ten years, see State v. Needs,

333 S.C. 134, 508 S.E.2d 857 (1998)(noting that defendant's sentence, originally eighteen months imprisonment, was adjusted to a ten year term), the witness's claim that he was facing "up to fifteen" as a result of the guilty plea is clearly inaccurate, see Transcript of Record (Guilty Plea), State v. Henry Daniel Owens, Jr., (court asking Owens, "[d]o you understand that for misprision of a felony I could put you in jail for ten years"; Owens responding, "[y]es, sir").

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

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

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

Denial of the 1998 PCR Proceedings – December 8, 2000

On December 8, 2000, the Honorable Paula Thomas entered a one-hundred and eighty-nine (189) page order denying state post-conviction relief in its entirety. Supp. App.p. 1351-1539. Subsequently, the Applicant, through appointed counsel, had filed various motions to alter or amend and motions to stay pending resolution of constitutional questions involving mental retardation as well as juvenile execution matters. Supp. App.p. 1540-2373. On May 9, 2001, Judge Thomas issued an Order Staying the Proceedings pending the outcome of McCarver v. North Carolina , a case pending in the United States Supreme Court concerning whether

murders committed by persons under the age of 18 could be sentenced to death. This same issue was later taken up by the decision in Roper v. Simmons, 125 S.Ct. 1183 (2005).

May 9, 2005 PCR Order Granting Resentencing

On May 9, 2005, Judge Thomas entered an Order which granted a new sentencing proceeding due to the intervening decision in Roper v. Simmons, 125 S.Ct. 1183 (2005) involving the constitutional prohibition of the execution of offenders under the age of eighteen which abrogated and reversed its prior holding in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Supp.App. p. 2396-2397. Neither party appealed the May 5, 2005 order on the motion to alter or amend. The Petitioner, through counsel Blume advised the court that this resolved all matters. **No appeal was taken from these orders by the State or the Petitioner..**

Resentencing October 10, 2006

On October 10, 2006, the Applicant appeared before the Honorable Howard P. King. The Applicant was represented by John Blume. Judge King sentence Hughes to a life sentence on murder. No appeal was taken from the sentencing proceeding. **No PCR action has been filed concerning this resentencing proceeding.**

A. PRIOR PROCEDURAL HISTORY

Hughes is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Calhoun County. On May 26, 1994, the Grand Jury of the Court of General Sessions for Calhoun County indicted the Petitioner, Herman Lee Hughes, Jr., for murder (involving the March 18, 1994 death of Kenneth Presley), assault and battery with intent to kill (involving the March 18, 1994 shooting in the chest and face of Kelly Hoffman), armed robbery (involving the March 18, 1994 robbery of the Blue Diamond

Casino), and grand larceny of a vehicle (94-GS-09-0154, 0155, 0156). He was represented by retained counsel, Phillip F. Newsom, of the Richland County Bar. The prosecution was initially handled by First Circuit Solicitor Walter M. Bailey, Jr.

The prosecution had previously filed petitions in the Family Court of Calhoun County on March 21, 1994 and March 24, 1994 which requested the actions be transferred to the Court of General Sessions so that Hughes could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered a written order waiving jurisdiction to the Court of General Sessions.
On October 31, 1994 the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

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

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

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

The Direct Appeal before the Supreme Court of South Carolina.

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

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

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

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

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

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

ARGUMENT ON CERTIORARI

I. **If merely stating in a response to a conditional order conclusory terms like "involuntarily waived" in contrast with "never waived" without any supporting facts is sufficient under Austin - King – Odom to sufficiently set forth a showing for an evidentiary hearing on either "either: (1) the applicant requested and was denied an opportunity to seek PCR appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived," then Petitioner is entitled to a remand for an evidentiary hearing where testimony can be taken from the Petitioner and prior PCR counsel Blume on why an appeal from the 1998 PCR proceeding was not done in 2005, the advice, if any given to Petitioner concerning an appeal and counsel Blume's reasons for why an appeal was not taken and Petitioner's reasons for why an appeal was not taken.**

II. **Alternately, if the Court is of the opinion that it is a condition precedent for an Austin -type appeal to make a factual claim in the PCR application itself that as a ground for the PCR application that the applicant requested PCR counsel Blume to appeal and he refused – which has not been factually alleged in these proceedings – then certiorari should be denied, particularly where this 1998 proceeding was before Bray v. State had been decided.**

In his petition, as directed by the Court of Appeals, the Petitioner limits his argument to whether there should be a remand to determine if the Petitioner knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief action, Hughes v. State, 98-CP-09-101. This matter remained pending from the filing on June 19, 1998 until the Honorable Paula Thomas entered an order granting post-conviction relief in the form of a new sentencing proceeding on May 9, 2005 based upon Roper v. Simmons, 125 S.Ct. 1183 (2005). App.p. 2396-97. In his current Petition for Writ of Certiorari before this Court, Hughes

acknowledges that there was no appeal from either the December 8, 2000 order denying certiorari (Supp. App.p. 1351-1539) or the May 9, 2005 order that which granted post-conviction sentencing phase relief on the March 18, 1994 crime.

1. The Petitioner did not asked for belated consideration of his 1998 PCR proceeding in the 2007 Application for Post-conviction relief.

The Petitioner in the Petition for Writ of Certiorari asserts that in his response to the Conditional Order of Dismissal he claimed his case "should not be deemed successive because he never waived his right to challenge his convictions." Petition, p. 5. He asserts that in that response "he asked to be allowed to pursue an appeal of his prior PCR case." Id. He cites to App.p. 117 which was his response to the Conditional Order of Dismissal.

The response to the Conditional Order is revealing when taken into account of the actual application. In the application, Hughes *pro se* , only raised the following grounds for relief:

I. Ineffective Assistance of Counsel:

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

App.p.3- 4 (*grounds 2 and 3 are on the back side of the page 3 in application which was inadvertently not included in App. 3- 4*). Importantly, at no time in his application does the Applicant request an appeal from the earlier state post-conviction relief proceeding. App.p. 1- In fact, to the contrary, the Applicant , in his application denied that any application for post-conviction relief was even filed prior to the 2007 application. App.p. 3. In fact, he specifically

claimed that the ground of "ineffective assistance of counsel" was not previously presented to any state or federal court and that "Post-conviction relief is the only way to present this ground." App.p. 4, ¶16. (*backside of App.p. 4 which was inadvertently not included in Appendix*). The Petitioner stated clearly the relief that he was seeking "new trial or new sentencing proceeding", not an appeal from the earlier PCR action! App.p. 5, ¶ 19.

2. The State's Return and Motion to Dismiss addressed that the three specific claims had been heard and decided in the 1998 PCR action.

In the State's "Respondent's Return and Motion to Dismiss As a Successive Application," Respondent compared the three allegations raised in the 2007 PCR action and noted that there were essentially raised and denied in the 1998 proceedings from the third application for post-conviction relief as allegations 9(a), 9(b), 9(d), 9(e), 9(s) and 9(t). App.p. 9-25. Respondent urged below that grounds one through three in the 2007 application were subject to dismissal under S.C. Code Ann. §17-27-90 and Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) because "the grounds presented in the 2007 application appear to have been adequately raised and adjudicated in the 1998 proceedings." App.p. 39. The Respondent next went through each of the 2007 allegations and how they were adequately raised and ruled upon in the 1998 proceedings before Judge Thomas. App.p. 40-41.

In particular, Respondent addressed 2007 ground one "Counsel Failed to strike jurors who had personal knowledge of the case I was on trial for." App.p. 41-57. As noted therein, Hughes failed to specify with any particularity in the 2007 application which particular jurors he is referring to concerning this omission by counsel Newsom. However, a similar issue was raised and rejected by Judge Thomas in the 1998 proceeding in her December 8, 2000 Order of

Dismissal. In that action, with the assistance of counsel Blume and Wilkins, and subject to a full evidentiary hearing, Hughes claimed that counsel should have struck William Barron and Brenda Wise based upon their acquaintance with the Applicant and the victim's family as allegation 9(a) in the third application. In denying relief in the December 8, 2000 Order, Judge Thomas addressed the issue in full at pages 74-92. These are found in the Supplemental Record. Supp. App.p. 1425-1443.

Concerning the second 2007 ground of ineffective assistance of counsel, Hughes contended that his counsel failed to impeach unnamed witness or witnesses "for perjury." Like the above issue, similar issues were raised as allegations 9(e), 9(s) and 9(t) concerning state witnesses Henry Owens and Kelly Hoffman and denied by Judge Thomas in the 1998 proceedings within her December 8, 2000 Order of Dismissal at pages 92-103. See Supp. App.p. 1443-1454. Respondent submitted that the previous showing and denial required dismissal of the similar claims with the 2007 application as successive. Respondents submitted that this determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that trial counsel was ineffective for failing to have witnesses impeached. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and res judicata). App.p. 57-73.

Concerning the third ground, Hughes contended that he received ineffective assistance of counsel because he claims that his trial counsel was ineffective in failing "to have petitioner evaluated for psychological -evaluation before allowing petitioner to be tried as an adult." App.p. 4(A). Respondent submitted that this issue was adequately presented in the 1998 PCR proceedings as allegations 9(a) and 9(b) and adjudicated in Judge Thomas's 2000 Order of

Dismissal. Order, p. 36-64. Supp. App.p. 1387-1415. Respondent submitted that this determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel was a conclusive showing that the claim that counsel was ineffective for failing to request an evaluation as part of the transfer process prior to be transferred as an adult. Since there can be no viable "sufficient reason" under Section 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*). App.p. 73-97.

3. The Petitioner Never Asserted that He Requested a PCR Appeal or That His Counsel Failed to Advise of His Right To a PCR Appeal.

After the Conditional Order of Dismissal was entered on October 18, 2007, Hughes pro se made a one page response – acknowledging the existence of the first PCR action and stating the following conclusory comments:

> The issues raised by the Applicant were ruled upon by a prior judge, but **each issue was inadequately raised. Furthermore the Applicant's right to appeal these issues to a higher court was involuntarily waived.** Upon the prior PCR judge's ruling on the issues in this case, the Applicant's case was placed on hold, for a ruling from the United States Supreme Court, regarding children being put to death in this country. Upon a favorable ruling, the Applicant was removed from death row and resentenced. What the Applicant places emphasis on here is that **he never waived his right to continue challenging his conviction. Therefore the Applicant should have a rehearing on the issues presented, and for this Court to rule whether or not the Applicant should be allowed to pursue an appeal from the prior PCR ruling or from a ruling** of this Court. All the Applicant seeks is his full bite one full bite at the apple.

App.p. 117.

In summary, Hughes stated the following conflicting matters:

1. "Each issue was inadequately raised" – ***but Hughes does not say how.***

2. "Applicant's right to appeal these issues to a higher court was **involuntarily waived" – *but he does not state how it was waived or involuntarily waived*.**

3. "he never waived his right to continue challenging his conviction" – ***but he earlier claimed his right to an appeal was involuntarily waived.***

4. "Applicant should have a rehearing on the issues presented" – ***but does not state why he should be entitled to any rehearing in the Court of Common Pleas on any of these issues.***

5. "this Court to rule whether or not the Applicant should be allowed to pursue an appeal from the prior PCR ruling or from a ruling of this Court."

App.p. 117.

In Bray v. State, 366 S.C. 137, 139-140, 620 S.E.2d 743, 744 - 745 (September 26,2005), issued after Judge Thomas's May 9, 2005 PCR order granting partial post-conviction relief the Supreme Court held that appointed PCR counsel is required to advise an applicant of the right to appellate review of the denial of PCR. Prior to Bray, the Court had never specifically required PCR counsel to advise a PCR applicant of the right to appellate review of the denial of PCR. One year before, in Sutton v. State, 361 S.C. 644, 606 S.E.2d 779 (2004), the Supreme Court held that neither trial nor appellate counsel are required to advise a client of the right to file a PCR application or the time limits for filing. However, in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the Court held that an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues, despite counsel's belief the appeal is frivolous, to safeguard the right to appeal. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Further, Rule 71.1(g), SCRCP, expressly provides that, if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal,

continue representation until relieved, and assist an indigent applicant in obtaining representation by the Office of Appellate Defense.

Here, the record shows that he was represented by counsel John Blume of Cornell Law School and Pam Wilkins who represented him in the 1998 PCR action with court appointment through the conclusion the PCR action on May 9, 2005. It further shows that at the time of his re-sentencing before Judge King on October 10, 2006 that John Blume appeared on his behalf and signed the sentencing sheet.

What the record also shows is that Petitioner Hughes claims that his right to appeal the 1998 PCR order was "involuntarily waived." He fails to state how it was "involuntary" or how Hughes waived it. What we do know is that May 2005 counsel was under no duty prior to Bray to advise Hughes of a right to appeal. Further, Hughes has never claimed that he asked counsel Blume to appeal his PCR denial on the guilt related issues and that PCR counsel either failed to do so or refused to do so.

This case is distinguishable from Austin v. State because in Austin, the applicant filed a second PCR application alleging only that his PCR counsel was ineffective in failing to seek appellate review of his of PCR relief. In Hughes's second PCR application, no claim is raised against PCR counsel Blume or any acts or omissions on his part concerning an appeal. To the contrary, it is silent as to the existence of PCR counsel in either that application or response.

In Austin, the Supreme Court framed the manner that Austin claims should be raised:

> Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which has occurred, **we find his allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance.**[FN1] *We therefore* ***remand for an evidentiary hearing on the issue of whether in fact the petitioner requested and***

> ***was denied an opportunity to seek appellate review.*** If the circuit court finds this to be true, this Court shall review whether the petitioner was prejudiced by the failure to obtain review of a meritorious issue. In deciding this question, we shall use an analysis akin to that of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding and we shall review the appeal based on the normal "any evidence" standard. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Austin, supra. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002) (applicant raised Austin PCR claim that his first PCR attorney had rendered ineffective assistance of counsel in failing to seek review of his 1992 PCR order); King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (same). Cf. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) (petitioner was entitled to an evidentiary hearing on issue of whether he knowingly and intelligently waived his right to appellate counsel after his first PCR application was summarily dismissed).

In Odom, the Court established the following:

> An Austin appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review. See Aice, 305 S.C. at 448, 409 S.E.2d at 392; Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997) (permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR). In Austin, the defendant never received a full procedural "bite at the apple" because he was prevented from seeking any review of the denial of his PCR application. Aice, 305 S.C. at 452, 409 S.E.2d at 395. As a method of effectuating the purpose of Rule 71.1(g) SCRCP and enforcing Austin's entitlement to a PCR proceeding, this Court held Austin could attack his PCR counsel as ineffective by a petition for a writ of certiorari. Id.
>
> A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. See King, 308 S.C. at 348, 417 S.E.2d at 868. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and this Court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Id.; see King, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to Austin v. State); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).

Odom v. State, supra.

CONCLUSION

If merely stating in a response to a conditional order conclusory terms like "*involuntarily waived*" in contrast with "never waived" without any supporting facts is sufficient under Austin - King – Odom to sufficiently set forth a showing for an evidentiary hearing on either "either: (1) the applicant requested and was denied an opportunity to seek PCR appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived," then Petitioner is entitled to a remand for an evidentiary hearing where testimony can be taken from the Petitioner and prior PCR counsel Blume on why an appeal from the 1998 PCR proceeding was not done in 2005, the advice, if any given to Petitioner concerning an appeal and counsel Blume's reasons for why an appeal was not taken and Petitioner's reasons for why an appeal was not taken.

Alternately, if the Court is of the opinion that it is a condition precedent for an Austin - type appeal to make a factual claim in the PCR application itself that as a ground for the PCR application that the applicant requested PCR counsel Blume to appeal and he refused – which has not been factually alleged in these proceedings – then certiorari should be denied, particularly where this 1998 proceeding was before Bray v. State had been decided.

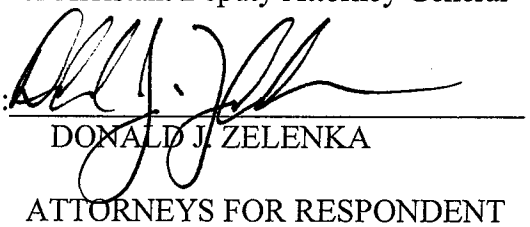
For the above reasons, Respondent has made Return to the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

By: 
DONALD J. ZELENKA

May 28, 2014

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the **RETURN OF PETITION** in the foregoing action by depositing one (1) copy in the U.S.Mail, postage prepaid to:

Appellate Defender Robert Pachak
South Carolina Office of Indigent Defense
P. O. Box 11589
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This 28th day of May, 2014.

DONALD J. ZELENKA
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(803) 734-6305

The South Carolina Court of Appeals

Herman Lee Hughes, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-167667

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

J.

FOR THE COURT

Columbia, South Carolina

cc: Robert M. Pachak, Esquire
Donald J. Zelenka, Esquire

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

BRIEF OF PETITIONER

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ISSUE PRESENTED

Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395, should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?

STATEMENT

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

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

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

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

Petitioner filed his current pro se application for post-conviction relief on June 26, 2007. Respondent filed a return and motion to dismiss the application as being successive on August 27, 2007. The Honorable Diane S. Goodstein issued a conditional order of dismissal on September 27,

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

On October 29, 2010, a Johnson petition was submitted on petitioner's behalf addressing the following question: Whether petitioner's case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first post-conviction relief application? On June 11, 2013, this Court issued the following request:

> The Court is requesting that you provide a supplemental appendix pursuant to the South Carolina Appellate Court Rules (SCACR). The Supplemental Appendix is to include the following documents:
>
> (1) Initial PCR application dated June 22, 1998 & all subsequent amended applications.
> (2) The PCR hearing transcript, October 11 – 13, 1999, Hughes v. Moore, 98-CP-09-101.
> (3) The December 8, 2000, order in Hughes v. Moore, 98-CP-09-101.
> (4) Post-PCR motions to alter or amend and motions to stay.
> (5) The May 9, 2005 order, which amended the 12/8/2000 order
> (6) The October 10, 2006, sentencing hearing transcript.
> (7) Deposition of Jeffrey Bloom.

On August 21, 2013, petitioner complied with the above request and submitted a five-volume supplemental appendix. On February 11, 2014, the Court issued an order denying counsel's motion to be relieved and directed the parties to address the question now presented which is the issue that was originally raised by appellate counsel. The petition for writ of certiorari was filed on February 24, 2014. On December 12, 2014, this court issued an order granting the petition and directing the parties to submit briefs.

This brief of petitioner follows.

ARGUMENT

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

In Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989), the court held that a second application for post-conviction relief was not successive where the first application was dismissed at the request of the applicant and the State consented and the order dismissing the application did not do so with prejudice. The applicant was entitled to one bite at the apple. In Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982), the court held that a successive application was allowed when the applicant's first application was dismissed without the assistance of counsel and without a hearing. In Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the court held that a second application for post-conviction relief was not successive when an applicant was alleging that PCR counsel was ineffective in failing to appeal the denial of the first PCR application. In King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), a procedure was set forth for the review of the denial of PCR applications based on an applicant's failure to properly waive the right to appellate review of a prior denial. And, in Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), the court held that the one-year statute of limitations did not apply to a petitioner's appeal from the summary denial of an application for post-conviction relief based on the denial of the right to appeal.

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

In petitioner's reply to the conditional order of dismissal petitioner argued that his case should not be deemed successive because he never waived his right to challenge his convictions. He asked to be allowed to pursue an appeal of his prior PCR case. (App. p. 117)

The issue of whether a PCR applicant knowingly and intelligently waived the right to appeal the denial of his first application for post-conviction relief requires a remand for an evidentiary hearing as was held in Austin v. State, supra.

CONCLUSION

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

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 12th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Calhoun County

Diane Schafer Goodstein, Circuit Court Judge

HERMAN LEE HUGHES, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-167667

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Donald J. Zelenka, Esquire, this12th day of January, 2015.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of January, 2015.

Beverly Robinson Brown (L.S.)
Notary Public for South Carolina
My Commission Expires: December 9, 2024.

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge
Case No. 2007-CP-09-00103

APPELLATE CASE NUMBER 2010-167667

HERMAN LEE HUGHES, JR., ... PETITIONER,

v.

STATE OF SOUTH CAROLINA, ...RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON CERTIORARI PURSUANT TO FEBRUARY 11, 2014 ORDER

"Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?"

RESPONDENT'S STATEMENT OF THE CASE

This matter comes before this Court by an appeal from a denial of a successive application for post-conviction relief brought by former death row inmate Herman Lee Hughes, Jr. The Petitioner filed a second application for post-conviction relief on June 26, 2007. Hughes v. State of South Carolina, 2007-CP-09-000103. App.p. 1. In the 2007 application, Hughes, *pro se*, raised the following claims:

I. Ineffective Assistance of Counsel:

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

App.p. 4.

On August 27, 2007, the Respondent State of South Carolina made a motion to dismiss asserting that the application was a successive application. App.p. 8-98. Respondent asserted that Hughes was challenging his 1995 convictions claiming his retained counsel, Phil Newsom, was ineffective in three specifications. The Respondent submitted that the entire application must be dismissed as successive under S.C. Code Ann. § 17-27-90 (1985) to his 1998 application for

post-conviction relief which challenged the same convictions which was dismissed on December 8, 2000, as amended May 9, 2005 by the Honorable Paula Thomas after a hearing on the merits. See Hughes v. Moore, 98-CP-09-101, Order, December 8, 2000. The State contended the motion was well founded and conditionally dismissed where the claims sought to be raised in this 2007 action were raised and ruled upon in the prior action and no showing can be made that they were inadequately raised in the earlier action when a full evidentiary hearing, depositions and post-hearing briefing were done prior to the adjudication.

On October 18, 2007, the Honorable Diane Goodstein, presiding circuit court judge issued her order conditionally dismissing the application as a successive application. App.p. 99-115. On November 20, 2007, the Petitioner, *pro se* made a response to the Conditional Order of Dismissal. App.p. 117. In this response, he stated:

> The issues raised by the Applicant were ruled upon by a prior judge, but each issue was inadequately raised. Furthermore the Applicant's right to appeal these issues to a higher court was involuntarily waived. Upon the prior PCR judge's ruling on the issues in this case, the Applicant's case was placed on hold, for a ruling from the United States Supreme Court, regarding children being put to death in this country. Upon a favorable ruling, the Applicant was removed from death row and resentenced. What the Applicant places emphasis on here is that he never waived his right to continue challenging his conviction. Therefore the Applicant should have a rehearing on the issues presented, and for this Court to rule whether or not the Applicant should be allowed to pursue an appeal from the prior PCR ruling or from a ruling of this Court. All the Applicant seeks is his full bite one full bite at the apple.

App.p. 117.

On January 2, 2008, Judge Goodstein after reviewing the response from the Petitioner, found that a sufficient reason had not been shown why the conditional order should not be final. App.p. 119-120.

The Petitioner made a notice of appeal on July 16, 2010. In his explanation pursuant to Rule 243(c), SCACR, the Petitioner, *pro se,* contended:

1. Whether the lower courts determination that this PCR action is impermissive;
2. Whether the issues raised in the present and original pleadings now present a novel claim of Eighth and Fourteenth Amendment via Roper v. Simmons and Graham v. Florida;
3. Whether in fact that petitioner was denied the effective assistance of counsel on opportunity to seek appellate review from his 2005 re-sentence via White v. State;
4. Whether the statute of limitations should apply to this novel claim.

Hughes v. State, Explanation, July 15, 2010.

On October 29, 2010, appointed appellate counsel, Robert M. Pachak, made a Johnson Petition for Writ of Certiorari asserting as the sole arguable ground:

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

Johnson Petition for Writ of Certiorari, p. 2.

On February 11, 2014, the South Carolina Court of Appeals entered its order denying the motion to be relieved as counsel pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201, 210 (1988) and directing that the following issue be presented in another certiorari petition:

> "Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (should this case be remanded for a hearing to determine whether Petitioner knowingly and voluntarily waived his right to appeal the denial of his first post-conviction relief claim?"

Hughes v. State, Appellate Case No. 2010-167667, Order (S.C.Ct. App. February 11, 2014).

On February 24, 2014, counsel Pachak made his Petition for Writ of Certiorari. On May 28, 2014, the Respondent made its Return to the Petition for Writ of Certiorari.

On December 12, 2012, the South Carolina Court of Appeals issued its order granting certiorari and setting a briefing schedule. On January 12, 2015, Petitioner made its Brief of Petitioner through Appellate Defender Robert M. Pachak.

This Briefing by Respondent follows.

OTHER PROCEEDINGS

FIRST PCR ACTION - Hughes v. Moore, 98-CP-09-101

The Petitioner, Herman Lee Hughes, Jr., # 206816, is challenging his 1995 murder conviction which was previously the subject of an earlier application for post-conviction relief in 1998. Supp. App.p. 1-7. In that action, *Hughes v. Moore*, et al, 1998 -CP-09-101, the Applicant was represented by court-appointed counsel, John H. Blume, of the Cornell Law School and initially Pamela A. Wilkins of the Center for Capital Litigation. The matter was assigned exclusively to then Circuit Judge Paula Thomas because it was a death penalty post conviction relief action. The Respondents were represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General. The Respondents made a return and motion to make more definite and certain dated July 21, 1998. Supp. App.p. 8-26. Subsequently, other amended applications were filed. Supp. App.p. 37-61, 177-196. An evidentiary hearing was convened in Horry County from October 11-13, 1999. Supp. App.p. 197-871. Evidence was presented in the form of testimony, deposition of Jeffrey Bloom (Supp. App.p. 61-176) and affidavits. Id.

On May 17, 2000, the Applicants made their Post-Hearing Memorandum of Law In Support of the Third Amended Application For Post-Conviction Relief. App.p. 871-1004. The

Respondents made a Memorandum Of Law In Opposition to the Application for Post-Conviction Relief on May 27, 2000. Supp.App. 1005-1177.

In the third amended application, dated October 7, 1999 (Supp.App. p. 177-197), Hughes made the following claims pertinent to his 2007 PCR application:

> 9(a) Applicant's family court waiver hearing did not comport with minimum standards of procedural and substantive due process of law, in violation of South Carolina law and the Fourteenth Amendment of the United States Constitution.
>
> 10(a) Although South Carolina law in 1994 required a "full investigation" prior to a decision to transfer a juvenile from family court to General Sessions Court, the State arbitrarily failed to comply with this statutory obligation. Hicks v. Oklahoma. Additionally, the hearing itself did not satisfy minimum standards of due process as delineated in Kent v. United States, 381 U.S. 902 (1965). The defects in the waiver hearing include, but are not limited to, the following:
>
> > (1) The Family Court lacked information concerning Applicant's mental retardation/borderline intellectual functioning and other cognitive limitations.
> >
> > (2) The Family Court heard no evidence about Applicant's potential for rehabilitation within the juvenile system, yet concluded (without any evidentiary basis) that the Applicant could not be rehabilitated within the juvenile justice system.
> >
> > (3) The Family Court heard incomplete and inaccurate information concerning the facts of the offenses and the Applicant's degree of culpability.
> >
> > (4) The Family Court based its decision to transfer the Applicant to General Sessions Court based on impermissible considerations, such as the desire to "send a message" to other juveniles.
>
> 9(b) Applicant was denied the effective assistance of counsel at the family court hearing determining whether he would be

waived to General Sessions Court, in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

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

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

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

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

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

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

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

> (1) Counsel failed to adequately prepare and present evidence impeaching the credibility of Henry Daniel Owens, Jr. Steinkuehler v. Meschner,

> 176 F.3d 441 (8th Cir. 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, 466 U.S. 668. . . .

. . .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 Ann. § 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).

Denial of the 1998 PCR Proceedings – December 8, 2000

On December 8, 2000, the Honorable Paula Thomas entered a one-hundred and eighty-nine (189) page order denying state post-conviction relief in its entirety. Supp. App.p. 1351-1539. Subsequently, the Applicant, through appointed counsel, had filed various motions to alter

or amend and motions to stay pending resolution of constitutional questions involving mental retardation as well as juvenile execution matters. Supp. App.p. 1540-2373.

On May 9, 2001, Judge Thomas issued an Order Staying the Proceedings pending the outcome of McCarver v. North Carolina , a case pending in the United States Supreme Court concerning whether murders committed by persons under the age of 18 could be sentenced to death. During the stay, this same issue was resolved in Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), which concluded a person who commits murder while under the age of eighteen cannot be sentenced to death.

May 9, 2005 PCR Order Granting Resentencing

On May 9, 2005, Judge Thomas entered an Order which granted a new sentencing proceeding due to the intervening decision in Roper v. Simmons, 125 S.Ct. 1183 (2005) involving the constitutional prohibition of the execution of offenders under the age of eighteen which abrogated and reversed its prior holding in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Supp.App. p. 2396-2397. Neither party appealed the May 5, 2005 order on the motion to alter or amend. The Petitioner, through counsel Blume advised the court that this resolved all matters. **No appeal was taken from these orders by the State or the Petitioner.**

Resentencing October 10, 2006

On October 10, 2006, the Applicant appeared before the Honorable Howard P. King. The Applicant was represented by John Blume. Judge King sentence Hughes to a life sentence on the 1994 murder. No appeal was taken from the re-sentencing proceeding. According to South Carolina Department of Correction records, Hughes is currently eligible for parole consideration on or about August 1, 2014.

No PCR action has been filed concerning this 2006 resentencing proceeding.

A. PRIOR PROCEDURAL HISTORY

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

The prosecution had previously filed petitions in the Family Court of Calhoun County on March 21, 1994 and March 24, 1994 which requested the actions be transferred to the Court of General Sessions so that Hughes could be tried as an adult. A waiver hearing was held on April 8, 1994 before the Honorable Maxey G. Watson, Family Court Judge. On April 28, 1994 Judge Watson entered a written order waiving jurisdiction to the Court of General Sessions.
On October 31, 1994 the Solicitor served his notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment.

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

The guilt phase began on September 7, 1996. The Petitioner was present and represented by retained counsel Newsom. Hughes was found guilty of all four (4) charges. On September 11, 1995, the sentencing hearing began. After deliberations, the jury found the existence of all three (3) submitted statutory aggravating circumstances and sentenced Hughes to death. R. pp. 1710-1711. After the jurors were polled, Judge Cottingham found as an affirmative fact the death sentence was appropriate. R. p. 1713. After providing Hughes the opportunity to express why the sentence should not be pronounced, Hughes was sentenced to death for murder, twenty-five (25) years consecutive for armed robbery, twenty-five (25) years consecutive for assault and battery with intent to kill, and five (5) years concurrent for grand larceny. R. p. 1714.

The Direct Appeal before the Supreme Court of South Carolina.

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

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

Final Brief of Appellant, p. 3. After briefing of this issue, the Supreme Court of South Carolina entered its order affirming the judgment of the trial court, over dissent, on October 27, 1997. The Supreme Court held that a witness may not be called by either the state or the defense solely for the sake of having the witness invoke his or her Fifth Amendment privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from the assertion; prospectively modifying State v. Perry, 279 S.C. 539, 309 S.E.2d 9 (1983). State v. Hughes, 328 S.C. 146, 493 S.E.2d 821, 823-24 (1997). 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. Hughes, 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. S. Carolina, 523 U.S. 1097, 118 S. Ct. 1674, 140 L. Ed. 2d 798 (U.S.S.C. 1998).

ARGUMENT ON CERTIORARI

I. **If merely stating in a response to a conditional order conclusory terms like "involuntarily waived" in contrast with "never waived" without any supporting facts is sufficient under Austin - King – Odom to sufficiently set forth a showing for an evidentiary hearing on either "either: (1) the applicant requested and was denied an opportunity to seek PCR appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived," then Petitioner is entitled to a remand for an evidentiary hearing where testimony can be taken from the Petitioner and prior PCR counsel Blume on why an appeal from the 1998 PCR proceeding was not done in 2005, the advice, if any given to Petitioner concerning an appeal and counsel Blume's reasons for why an appeal was not taken and Petitioner's reasons for why an appeal was not taken.**

II. **Alternately, if the Court is of the opinion that it is a condition precedent for an Austin -type appeal to make a factual claim in the PCR application itself that as a ground for the PCR application that the applicant requested PCR counsel Blume to appeal and he refused – *which has not been factually alleged in these proceedings* – then certiorari should be denied, particularly where this 1998 proceeding was before Bray v. State had been decided.**

In his petition, as directed by the Court of Appeals, the Petitioner limits his argument to whether there should be a remand to determine if the Petitioner knowingly and intelligently waived his right to aRoper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) peal the denial of his first post-conviction relief action, Hughes v. State, 98-CP-09-101. This 1998 matter remained pending from the filing on June 19, 1998 until the Honorable Paula Thomas entered an order granting post-conviction relief in the form of a new sentencing proceeding on May 9, 2005 based upon Roper v. Simmons, 125 S.Ct. 1183 (2005). App.p. 2396-97. In his current Petition for Writ of Certiorari before this Court, Hughes acknowledges that there was no appeal from either the December 8, 2000 order denying certiorari (Supp.

App.p. 1351-1539) or the May 9, 2005 order that which granted post-conviction sentencing phase relief on the March 18, 1994 crime.

1. The Petitioner did not asked for belated consideration of his 1998 PCR proceeding in the 2007 Application for Post-conviction relief.

The Petitioner in the Petition for Writ of Certiorari asserts that in his response to the Conditional Order of Dismissal he claimed his case "should not be deemed successive because he never waived his right to challenge his convictions." Petition, p. 5. He asserts that in that response "he asked to be allowed to pursue an appeal of his prior PCR case." Id. He cites to App.p. 117 which was his response to the Conditional Order of Dismissal.

The response to the Conditional Order is revealing when taken in context with the actual 2007 PCR application. In that application, Hughes *pro se*, only raised the following grounds for relief:

I. Ineffective Assistance of Counsel:

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

App.p.3- 4 (*grounds 2 and 3 are on the back side of the page 3 in application which was inadvertently not included in App. 3- 4*). Importantly, at no time in his 2007 application does the Applicant request an appeal from the earlier state post-conviction relief proceeding. App.p. 1- 4. In fact, the suggestion is to the contrary! The Applicant denied that any application for post-conviction relief was even filed prior to the 2007 application. App.p. 3. Furthermore, he

specifically asserted that the ground of "ineffective assistance of counsel" was not previously presented to any state or federal court and that "[P]ost-conviction relief is the only way to present this ground." App.p. 4, ¶16. (*backside of App.p. 4 which was inadvertently not included in Appendix*). The Petitioner stated clearly the relief that he was seeking "new trial or new sentencing proceeding", not an appeal from the earlier PCR action! App.p. 5, ¶ 19.

2. The State's Return and Motion to Dismiss addressed that the three specific claims had been heard and decided in the 1998 PCR action.

In the State's "Respondent's Return and Motion to Dismiss As a Successive Application," Respondent compared the three allegations raised in the 2007 PCR action and noted that there were essentially raised and denied in the 1998 proceedings from the third amended application for post-conviction relief as allegations 9(a), 9(b), 9(d), 9(e), 9(s) and 9(t). App.p. 9-25. Respondent urged below that grounds one through three in the 2007 application were subject to dismissal under S.C. Code Ann. § 17-27-90 and Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) because "the grounds presented in the 2007 application appear to have been adequately raised and adjudicated in the 1998 proceedings." App.p. 39. The Respondent next went through each of the 2007 allegations and how they were adequately raised and ruled upon in the 1998 proceedings before Judge Thomas. App.p. 40-41.

In particular, Respondent addressed 2007 ground one "[C]ounsel Failed to strike jurors who had personal knowledge of the case I was on trial for." App.p. 41-57. As noted therein, Hughes failed to specify with any particularity in the 2007 application which particular jurors he was referring concerning this alleged omission by counsel Newsom. However, a similar juror issue was raised and rejected by Judge Thomas in the 1998 proceeding in her December 8, 2000 Order of Dismissal. In the 1998 action, with the assistance of appointed counsel John Blume and

Pamela Wilkins, and subject to a full evidentiary hearing, Hughes claimed that counsel should have struck potential jurors William Barron and Brenda Wise based upon their acquaintance with the Applicant and the victim's family in allegation 9(a) in the third application. In denying relief in the December 8, 2000 Order, Judge Thomas addressed the issue in full at pages 74-92. These are found in the Supplemental Record. Supp. App.p. 1425-1443.

Concerning the second 2007 ground of ineffective assistance of counsel, Hughes contended that his counsel failed to impeach unnamed witness or witnesses "for perjury." Like the above issue, similar issues were raised as allegations 9(e), 9(s) and 9(t) concerning state witnesses Henry Owens and Kelly Hoffman and denied by Judge Thomas in the 1998 proceedings. Judge Thomas denied relief within her December 8, 2000 Order of Dismissal at pages 92-103. See Supp. App.p. 1443-1454. Respondent submitted to the lower court that the previous showing and denial required dismissal of the similar claims with the 2007 application as "successive." Respondent asserted that this earlier determination by Judge Thomas, after a full hearing when the Applicant was represented by two appointed counsel was a conclusive finding on the claim that trial counsel was ineffective for failing to have witnesses impeached. Since there can be no viable "sufficient reason" under S.C. Code Ann. § 17-27-90 and Aice shown, this ground must be dismissed as successive (and res judicata). App.p. 57-73.

Concerning the third ground, Hughes contended that he received ineffective assistance of counsel because he claims that his trial counsel was ineffective in failing "to have petitioner evaluated for psychological -evaluation before allowing petitioner to be tried as an adult." App.p. 4(A). Respondent submitted that this issue was adequately presented in the 1998 PCR proceedings as allegations 9(a) and 9(b) and adjudicated in Judge Thomas's 2000 Order of Dismissal. Order, p. 36-64. Supp. App.p. 1387-1415. Respondent submitted that this

determination by Judge Thomas, after a full hearing where the Applicant was represented by two appointed counsel, was a conclusive showing that the claim that counsel was ineffective for failing to request an evaluation as part of the transfer process prior to be transferred as an adult. Respondent moved that since there can be no viable "sufficient reason" under S.C. Code Ann. § 17-27-90 and Aice shown, this ground must be dismissed as successive (and *res judicata*). App.p. 73-97.

3. The Petitioner Never Asserted that He Requested a PCR Appeal or That His Counsel Failed to Advise Petitioner of His Right To a PCR Appeal.

After the Conditional Order of Dismissal was entered on October 18, 2007, Hughes, *pro se* made a one page response which acknowledging the existence of the first PCR action and stating the following conclusory comments:

> The issues raised by the Applicant were ruled upon by a prior judge, but **each issue was inadequately raised. Furthermore the Applicant's right to appeal these issues to a higher court was involuntarily waived.** Upon the prior PCR judge's ruling on the issues in this case, the Applicant's case was placed on hold, for a ruling from the United States Supreme Court, regarding children being put to death in this country. Upon a favorable ruling, the Applicant was removed from death row and resentenced. What the Applicant places emphasis on here is that **he never waived his right to continue challenging his conviction. Therefore the Applicant should have a rehearing on the issues presented, and for this Court to rule whether or not the Applicant should be allowed to pursue an appeal from the prior PCR ruling or from a ruling** of this Court. All the Applicant seeks is his full bite one full bite at the apple.

App.p. 117.

In summary, Hughes stated the following conflicting matters in his response:

1. "Each issue was inadequately raised" – ***but Hughes does not say how.***

2. "Applicant's right to appeal these issues to a higher court was **involuntarily waived" – *but he does not state how it was waived or involuntarily waived*** .

3. "he never waived his right to continue challenging his conviction" – ***but he earlier claimed his right to an appeal was involuntarily waived.***

4. "Applicant should have a rehearing on the issues presented" – ***but does not state why he should be entitled to any rehearing in the Court of Common Pleas on any of these issues.***

5. "this Court to rule whether or not the Applicant should be allowed to pursue an appeal from the prior PCR ruling or from a ruling of this Court."

App.p. 117.

In Bray v. State, 366 S.C. 137, 139-140, 620 S.E.2d 743, 744 - 745 (2005), issued on Spetmber 26, 2005, after Judge Thomas's May 9, 2005 PCR order granting partial post-conviction relief, the Supreme Court held that appointed PCR counsel is required to advise an applicant of the right to appellate review of the denial of PCR. Prior to Bray, the Court had never specifically required PCR counsel to advise a PCR applicant of the right to appellate review of the denial of PCR. One year before, in Sutton v. State, 361 S.C. 644, 606 S.E.2d 779 (2004) abrogated by Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005), the Supreme Court held that neither trial nor appellate counsel are required to advise a client of the right to file a PCR application or the time limits for filing. However, in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), the Court held that an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues, despite counsel's belief the appeal is frivolous, to safeguard the right to appeal. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Further, Rule 71.1(g), SCRCP, expressly provides that, if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal, continue representation until relieved, and assist an indigent applicant in obtaining representation by the Office of Appellate Defense.

Here, the record shows that he was represented by counsel John Blume of Cornell Law School and Pam Wilkins who represented him in the 1998 PCR action with court appointment through the conclusion the PCR action on May 9, 2005. It further shows that at the time of his re-sentencing before Judge King on October 10, 2006 that John Blume appeared on his behalf and signed the sentencing sheet.

What the record also shows is that Petitioner Hughes claims that his right to appeal the 1998 PCR order was "involuntarily waived." He fails to state how it was "involuntary" or how Hughes waived it. What we do know is that May 2005 counsel was under no duty prior to Bray to advise Hughes of a right to appeal. Further, Hughes has never claimed that he asked counsel Blume to appeal his PCR denial on the guilt related issues and that PCR counsel either failed to do so or refused to do so.

This case is distinguishable from Austin, 305 S.C. 453 because in Austin, the applicant filed a second PCR application alleging only that his PCR counsel was ineffective in failing to seek appellate review of his of PCR relief. In Hughes's second PCR application, no claim is raised against PCR counsel Blume or any acts or omissions on his part concerning an appeal. To the contrary, it is silent as to the existence of PCR counsel in either that application or response.

In Austin, the Supreme Court framed the manner that Austin claims should be raised:

> Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy to correct the unfairness which has occurred, **we find his allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance.**[FN1] *We therefore* ***remand for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.*** If the circuit court finds this to be true, this Court shall review whether the petitioner was prejudiced by the failure to obtain review of a meritorious issue. In deciding this question, we shall

> use an analysis akin to that of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding and we shall review the appeal based on the normal "any evidence" standard. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Austin, 305 S.C. 453 See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002)(applicant raised Austin PCR claim that his first PCR attorney had rendered ineffective assistance of counsel in failing to seek review of his 1992 PCR order); King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992)(same). Cf. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999)(petitioner was entitled to an evidentiary hearing on issue of whether he knowingly and intelligently waived his right to appellate counsel after his first PCR application was summarily dismissed).

In Odom, the Court established the following:

> An Austin appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review. See Aice, 305 S.C. at 448, 409 S.E.2d at 392; (1997)Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997)(permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR). In Austin, the defendant never received a full procedural "bite at the apple" because he was prevented from seeking any review of the denial of his PCR application. Aice, 305 S.C. at 452, 409 S.E.2d at 395. As a method of effectuating the purpose of Rule 71.1(g) SCRCP and enforcing Austin's entitlement to a PCR proceeding, this Court held Austin could attack his PCR counsel as ineffective by a petition for a writ of certiorari. Id.
>
> A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. See King, 308 S.C. at 348, 417 S.E.2d at 868. If the PCR court finds an applicant was denied his right to appeal, the applicant can petition for certiorari and this Court will review whether the petitioner was prejudiced by the failure to obtain appellate review. Id. ; see King, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to Austin v. State); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).

Odom v. State, supra. Here, there was no assertion that the Petitioner had requested an appeal from his PCR counsel John Blume at any time. Further, in his *pro se* response to the

Conditional Order, Hughes makes a conclusory statement that his appeal was "involuntarily waived" but did not clarify what that meant.

CONCLUSION

If merely stating in a response to a conditional order conclusory terms like "*involuntarily waived*" in contrast with "never waived" without any supporting facts is sufficient under Austin - King – Odom to sufficiently set forth a showing for an evidentiary hearing on either "either: (1) the applicant requested and was denied an opportunity to seek PCR appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived," then Petitioner is entitled to a remand for an evidentiary hearing where testimony can be taken from the Petitioner and prior PCR counsel John Blume why an appeal from the 1998 PCR proceeding was not done in 2005, the advice, if any given to Petitioner concerning an appeal and counsel Blume's reasons for why an appeal was not taken and Petitioner's reasons for why an appeal was not taken.

Alternately, if the Court is of the opinion that it is a condition precedent for an Austin - type appeal to make a factual claim in the PCR application itself that as a ground for the PCR application that the applicant requested PCR counsel John Blume to appeal and he refused – *which has not been factually alleged in these proceedings* – then the appeal should be denied, particularly where this 1998 proceeding was before Bray v. State had been decided.

Respectfully submitted,

By: _____

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
ATTORNEY FOR RESPONDENT

February 11, 2015

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the **RETURN OF PETITION** in the foregoing action by depositing one (1) copy in the U. S. Mail, postage prepaid to:

Appellate Defender Robert Pachak
South Carolina Office of Indigent Defense
P. O. Box 11589
Columbia, S.C. 29211-1589

This 11th day of February, 2015.

DONALD J. ZELENKA
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Herman Lee Hughes, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-167667

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2016-UP-178
Heard March 9, 2016 – Filed April 13, 2016

REVERSED AND REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

PER CURIAM: Herman Lee Hughes, Jr. appeals the summary dismissal of his 2007 application for post-conviction relief (PCR), arguing this court should

remand the case to the PCR court for a hearing to determine whether he knowingly and voluntarily waived the right to appeal the denial of his 1998 PCR application. We reverse and remand.

On May 26, 1994, a Calhoun County grand jury indicted Hughes for murder, armed robbery, assault and battery with intent to kill (ABWIK), and grand larceny. After a hearing, the family court granted the State's petition to transfer the action and waived jurisdiction to the court of general sessions for Hughes—then only sixteen years of age—to be tried as an adult. Following trial, a jury convicted Hughes on all indicted charges, and the circuit court thereafter sentenced him to death for murder, twenty-five years consecutive for armed robbery, twenty-five years consecutive for ABWIK, and five years concurrent for grand larceny. Our supreme court then affirmed his convictions on direct appeal. *State v. Hughes*, 328 S.C. 146, 148, 493 S.E.2d 821, 821 (1997), *cert. denied*, 523 U.S. 1097 (1998).

Hughes filed his first PCR application in 1998, raising numerous grounds of alleged ineffective assistance of counsel. The PCR court denied his application in an order dated December 8, 2000. Nevertheless, the PCR court subsequently issued an order granting Hughes's request to stay the proceedings pending the outcome of a case before the U.S. Supreme Court concerning whether a person who commits murder while under the age of eighteen may be sentenced to death. During the stay, the Court resolved the issue in *Roper v. Simmons*, 543 U.S. 551, 568 (2005), holding a person under the age of eighteen who is convicted of murder may not be sentenced to death. In light of *Roper*, the PCR court vacated Hughes's death sentence and granted a new sentencing proceeding. After a hearing, the circuit court resentenced Hughes to life in prison on the murder charge.

In 2007, Hughes filed his second PCR application, raising the following claims for ineffective assistance of counsel: (1) trial counsel failed to strike jurors who had personal knowledge of the case for which he was on trial, (2) trial counsel failed to impeach witness testimony for perjury, and (3) trial counsel failed to have him psychologically evaluated prior to him being tried as an adult.

Thereafter, the State filed a motion to dismiss, arguing the 2007 PCR application was successive to the 1998 PCR application challenging the same convictions. The second PCR court agreed and issued a conditional order of dismissal based upon its finding that Hughes's 2007 application was successive. In his response to the conditional order of dismissal, Hughes argued the following:

> The issues raised by the applicant were ruled upon by a prior judge. But each issue was inadequately raised. Furthermore the applicant's right to appeal these issues to a higher court was involuntarily waived. Upon the prior PCR judge's ruling on the issues in this case, the applicant's case was placed on hold, for a ruling from the United States Supreme Court, regarding children being put to death in this country. Upon a favorable ruling, the applicant was removed from death row and resentenced. What the applicant places emphasis on here is that he never waived his right to continue challenging his conviction. Therefore the applicant should have a rehearing on the issues presented, and for this court to rule on whether or not the applicant should be allowed to pursue an appeal from the prior PCR ruling or from a new ruling of this court. All the applicant seeks is his full one bite at the apple.

The second PCR court found Hughes failed to make a sufficient showing as to why the conditional order should not be final and dismissed his 2007 PCR application.

On July 16, 2010, Hughes filed a notice of appeal, pro se, and offered an explanation—pursuant to Rule 243(c), SCACR—as to why the second PCR court erred in finding his application successive. Appointed counsel subsequently filed a petition for a writ of certiorari on Hughes's behalf, pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), asserting the sole arguable ground was "[w]hether [Hughes]'s case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first [PCR] action." This court denied counsel's motion to be relieved and directed the parties to address the issue raised in the *Johnson* petition. Subsequently, this court granted Hughes's petition for a writ of certiorari to review the second PCR court's decision in an order dated December 12, 2014.

Section 17-27-70 of the South Carolina Code (2014) sets forth the procedure for summary dismissal of a PCR application as follows:

> (b) When a [PCR] court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to [PCR] and no purpose would be served by any further proceedings, it may indicate to

> the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.
>
> (c) The [PCR] court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

If a PCR applicant alleges specific instances of ineffective assistance of counsel and the record before the PCR court does not conclusively refute those allegations, then a question of fact arises that can only be resolved by a hearing. *Delaney v. State*, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977) (per curiam). "Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." *Pelzer v. State*, 378 S.C. 516, 519, 662 S.E.2d 618, 619 (Ct. App. 2008). "When considering the State's motion for summary dismissal of an application for PCR, a [court] must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant." *Wilson v. State*, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). "Likewise, this court must view the facts in the same fashion when reviewing the appropriateness of a dismissal." *Pelzer*, 378 S.C. at 519, 662 S.E.2d at 619.

Our courts have consistently held a PCR applicant is "entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). In other words, an "applicant is entitled to one full bite at the apple." *Brannon v. State*, 345 S.C. 437, 440 n.1, 548 S.E.2d 866, 867 n.1 (2001). South Carolina law "forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief [the applicant] asserts were not raised[] or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991).

"Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.'" *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) (quoting *Odom*, 337 S.C. at 261, 523 S.E.2d at 755). "A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings." *Odom*, 337 S.C. at 261, 523 S.E.2d at 755. "[T]o be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Id.* "[A]s long as it was possible to raise [an] argument in [the] first PCR application, an applicant may not raise it in a successive application." *Aice*, 305 S.C. at 450, 409 S.E.2d at 394.

Our courts have "allowed successive PCR applications where the applicant has been denied complete access to the appellate process." *Odom*, 337 S.C. at 261, 523 S.E.2d at 755. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." *Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100 (1985)). "A PCR applicant is entitled to an *Austin* appeal if the PCR [court] affirmatively finds either[] (1) the applicant requested and was denied an opportunity to seek appellate review[,] or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." *Odom*, 337 S.C. at 262, 523 S.E.2d at 756.

"[T]o determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Narciso v. State*, 397 S.C. 24, 33, 723 S.E.2d 369, 373 (2012). "A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by [a] colloquy between [the] court and defendant, between [the] court and defendant's counsel, or both." *Brannon*, 345 S.C. at 439, 548 S.E.2d at 867.

We find the second PCR court erred in summarily dismissing Hughes's 2007 PCR application without holding an evidentiary hearing to determine whether he voluntarily waived the right to appeal the first PCR court's order. Viewing the facts in a light most favorable to Hughes, we find his response to the conditional order sufficiently raised an issue of fact that could entitle him to relief. *See Pelzer*, 378 S.C. at 519, 662 S.E.2d at 619 (stating an appellate court reviewing the PCR court's summary dismissal of an application "must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant"); *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (stating an "applicant is

entitled to an *Austin* appeal if the PCR [court] affirmatively finds either[] (1) the applicant requested and was denied an opportunity to seek appellate review[,] or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived"). Further, the record does not indicate whether Hughes waived his right to appeal the dismissal of his first PCR application. *See Brannon*, 345 S.C. at 439, 548 S.E.2d at 867 (stating "[a] defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record"). Because Hughes raised an issue of fact for which he may be entitled to relief and the record does not indicate whether he waived the right to appeal, we find the PCR court erred in summarily dismissing his 2007 PCR application.

Accordingly, we reverse the second PCR court's summary dismissal of Hughes's PCR application and remand solely for a hearing to determine whether he knowingly and voluntarily waived his right to appeal the first PCR court's order.

REVERSED AND REMANDED.

WILLIAMS, LOCKEMY, and MCDONALD, JJ., concur.

STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS

COUNTY OF CALHOUN 2007-CP-09-00103

Herman Hughes,)

) TRANSCRIPT OF RECORD

-vs-)

) May 20, 2021

State of South Carolina)

) Calhoun County, South Carolina

)(Via Virtual Courtroom)

B E F O R E:

The Honorable Kristi F. Curtis, Judge

A P P E A R A N C E S:

Jonathan D. Waller, Esquire
Attorney for the Applicant

Megan Harrigan Jameson, Esquire
Attorney for the Respondent

Reported By:

Yvestre Torres, OCR
Circuit Court Reporter for the
First Judicial Circuit

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THE COURT: Good morning, everyone.

MR. BLUME: Good morning, Your Honor.

THE COURT: I think we are just waiting for the institution now. Mr. Hughes, I'm Judge Curtis. Can you see me okay?

MR. HUGHES: Yes, ma'am.

THE COURT: And you can hear me all right?

MR. HUGHES: Yes, ma'am.

THE COURT: Okay. I'm going to turn it over to start with, with your attorney and with the State's attorney. A lot of times, I have to mute whoever is not the speaker because we get feedback when there's multiple microphones open, so it becomes necessary for me to mute you during the course of this.

I will give you an opportunity, if you have any questions or something that you need to add. And, of course, if your attorney is going to call you as a witness, we will hear from you at the appropriate time.

MR. HUGHES: All right.

THE COURT: Okay, Ms. Jameson, if you want to start us off, ma'am.

MS. JAMESON: Thank you. May it please the Court. Megan Jameson on behalf of the state of South Carolina. This is a post-conviction relief matter

for Herman Lee Hughes, Jr., Docket No. 2007-CP-09-103.

This case is back before the circuit court on remand from the Court of Appeals for specifics or determination as to whether Mr. Hughes knowingly, voluntarily, and intelligently waived the right to appeal the denial of his first post-conviction relief action to entitle him to a belated appellate review, pursuant to Austin v. State.

For a brief procedural background for the Court and the record, on March 18, 1994, Mr. Hughes and an accomplice went to the Blue Diamond Casino in Calhoun County to commit an armed robbery. And during the course of this robbery, Mr. Hughes shot Kenneth Presley and Kelly Hoffman numerous times at close range.

Ms. Hoffman survived the shooting, but Mr. Presley died as a result of multiple fatal gunshot wounds. And, thereafter, Mr. Hughes was indicted by the Calhoun County grand jury for murder, armed robbery, assault and battery with intent to kill, and grand larceny.

Upon the State's motion, and after a hearing, the family court waived Mr. Hughes, who was 16 years old at the time of the crime, waived jurisdiction to the court of general sessions.

Thereafter, the State served Mr. Hughes with the intention to seek death upon guilt based on several aggravating factors.

Mr. Hughes proceeded to a jury trial. He was represented by Phillip Newsom [ph.]. The jury convicted Mr. Hughes, as indicted, on all counts and recommended a death sentence for a murder conviction. And the circuit court imposed a death sentence for murder, a consecutive 25-year sentence for armed robbery, and a 25-year consecutive sentence for assault and battery with intent to kill, and then a final five-year concurrent sentence for grand larceny, and his conviction from the sentences were affirmed on direct appeal.

Mr. Hughes then sought post-conviction relief with the filing of a PCR application in 1998, raising several -- ineffective assistance of counsel. He was represented by counsel John Blume, Pamela Wilkins [sp.], and Sheri Johnson. He filed several amended applications, and the matter was assigned to then circuit court Judge Paula Thomas. A hearing was convened in October of 1999.

Thereafter, both sides submitted memorandums outlining their respective positions on the case. Judge Thomas issued preliminary rulings denying relief

in August of 2000, and instructed the State to prepare a proposed order. After the submission of that order, Applicant submitted written objections, and there was a subsequent hearing in November of 2000 on those objections to the proposed order. Then in December of 2000, Judge Thomas issued a 188-page order denying relief on all grounds.

On December 27th of 2000, Mr. Hughes, through Counsel Blume, filed a motion to alter or amend, along with a memorandum and several appendices. The State made a return in opposition to the motion to alter or amend. A proposed order was ultimately submitted to Judge Thomas denying the motion to alter or amend in March of 2001 that was not signed.

Thereafter, on March 28, 2001, Mr. Hughes filed a motion to stay the proceeding, including that motion to alter or amend based on the outcome of McCarver v. North Carolina, a matter pending in the United State Supreme Court to determine whether it was unconstitutional to sentence someone who is intellectually disabled to death.

Based on the arguments that Mr. Hughes had presented regarding intellectual disability at that first PCR hearing, the State opposed this

motion to stay, but by order signed May 4, 2001 Judge Thomas stayed the action. It was stayed for several years.

And on March 15th of 2005, Mr. Hughes, again through counsel, filed a motion for partial summary judgment and to alter or amend the judgment, asserting the recent Supreme Court precedent of Roper v. Simmons determined it was unconstitutional to sentence a juvenile to death, and seeking vacation of Mr. Hughes' death sentence.

The State agreed to a resentencing in light of Roper, and argued the remaining claims regarding Mr. Hughes' sentence were now moot as to motion to alter or amend. By order dated May 9, 2005, Judge Thomas vacated Mr. Hughes' death sentence and remanded the matter back to the court of general sessions for resentencing.

In October of 2006, Mr. Hughes was sentenced to life imprisonment for murder, with all remaining sentences intact, and to be served consecutive to that life sentence. On June 26, 2007, Mr. Hughes filed a subsequent PCR action, that action we're on remand for the Court for, asserting various claims of ineffective assistance of trial counsel Newsom, and State moved to summarily dismiss this application

as successive to his initial action.

And Judge Goodstein, in her capacity as the chief administrative judge at that time, issued a conditional order of dismissal, provisionally dismissing the action, but giving Mr. Hughes an opportunity to respond. Mr. Hughes responded, asserting for the first time that he was denied his right to appeal his initial post-conviction relief action. Judge Goodstein, thereafter, issued a final order of dismissal in January of 2008, dismissing the action as successive.

Mr. Hughes appealed that summary dismissal, and following oral argument and brief, the Court of Appeals remanded the matter back to the circuit court for determination as to whether Mr. Hughes knowingly and voluntarily waived his right to appeal the denial of his initial PCR action. And that's the hearing we are here for today in front of Your Honor.

I did want to put on the record prior to the term, the State provided the Court with a judge's packet, in accordance with normal PCR procedures, to make sure it was clear on the record what is before Your Honor. That packet included a record from Mr. Hughes' direct appeal, including the record

on appeal with the full trial transcript. And then the appendix and supplemental appendix were Mr. Hughes' recent PCR appeal, which included a complete copy of all records from his initial 1998 PCR action, and all the records from this current PCR action. At this time, I can answer any questions the Court would have.

THE COURT: Thank you for that. This is kind of a long and tortured history, so I appreciate the procedural posture, and I do have in front of me the decision reversing and sending it back for the hearing that we're having today. So, Mr. Waller, I'm going to un-mute you, sir, and turn it over to you.

MR. WALLER: Thank you, Your Honor. May it please the Court. Judge, I think that was a very accurate procedural history. The only thing I would add is that in 2010, it appears Mr. Hughes attempted to file a pro se notice of appeal of the 1998 PCR that was, obviously, not timely when he tried to file it. I think we are limited based on the Court of Appeal's order. We are limited to the issue of whether he knowingly waived his right to appeal the first PCR.

I have spoken with Mr. Hughes, and he understands where we are and what we're here to try

to determine. And so, with the Court's permission, I would call Herman Hughes.

THE COURT: Okay, Mr. Hughes, I have un-muted your microphone, sir. Can I get you to raise your right hand, please.

MR. HERMAN LEE HUGHES, JR. was called as a witness, being duly sworn, was examined and testified as follows:

THE COURT: Okay. If you would please answer any questions your attorney has for you.

DIRECT EXAMINATION

BY MR. WALLER:

Q. Good morning, Mr. Hughes. How are you today?

A. I can't hear.

Q. What?

A. I can't hear what he's saying.

Q. I said, good morning, Mr. Hughes. How are you today? Can you hear me?

A. Good morning.

Q. All right. I'm going to try to speak up to make sure you can hear me. Mr. Hughes, we're not going to talk about your original case, the criminal case where you were convicted. I want to kind of go back to the PCR that you filed, the post-conviction relief application that you filed in 1998. Do you remember

that?

A. Yes.

Q. Okay. Who was your attorney in that case?

A. John Blume.

Q. Okay. Did anybody else help him?

A. Huh?

Q. Did anybody else help him with your case, Ms. Johnson maybe?

A. I don't exactly remember who that was.

Q. Okay. Now that case was pending for some time; is that right? Is that your memory?

A. Yeah.

Q. Okay. And it was ultimately denied by the judge; is that right?

A. Yeah.

Q. Okay. But then the order denying your relief was put on hold or stayed because there was a case in the United States Supreme Court about the death penalty for juveniles. Do you remember that?

A. Yeah.

Q. Okay. And so ultimately your death penalty sentence was vacated, and you were resentenced to life in prison. Is that your understanding?

A. Yeah.

Q. Okay. There was still other issues you had

raised in your 1998 PCR application; is that right?

A. Yeah.

Q. Okay. Did you and Mr. Blume ever discuss your right to appeal the denial of those remaining allegations?

A. You said did we ever discuss an appeal?

Q. Yes, sir.

A. No, not to my knowledge.

Q. Okay. Did you ever tell him you didn't want to appeal the order denying your application?

A. No.

Q. Okay. Did you ever sign any waiver of your appeal, or sign anything saying you didn't want to appeal that decision?

A. I don't remember signing anything.

Q. Okay. And, obviously, you were in the department of corrections the entire time, so you weren't out with access to a law library or anything like that; is that right?

A. Right.

Q. Okay. In 2007, you filed another PCR case; is that correct?

A. Yeah.

Q. And did you at one point try to file an appeal on your own?

A. Yeah.

Q. Okay. Was that dismissed?

A. Huh?

Q. Was that dismissed?

A. Yeah.

Q. Because it was filed too late; is that right?

A. I don't exactly remember.

Q. Okay. All right. Did you want to appeal the first denial of your PCR from back in 2000?

A. Yeah.

MR. WALLER: Mr. Hughes, I don't have any further questions for you. Please answer any questions Ms. Jameson may have.

MR. HUGHES: Okay.

MR. WALLER: Yes, sir.

CROSS-EXAMINATION

BY MS. JAMESON:

Q. Good morning, Mr. Hughes.

A. Good morning.

Q. You were resentenced in October of 2006, correct?

A. Somewhere around that time.

Q. Did you understand at that time that your original PCR action was still pending?

A. I didn't know.

Q. And I believe you discussed this with Mr. Waller,

but there was a little bit of feedback. You did not discuss an appeal with Mr. Blume at that time?

A. I don't know.

Q. I'm sorry. You don't recall?

A. I don't ---

Q. But you did want to appeal the remaining claims, other than your sentence, from your original PCR action?

A. Yes.

Q. And when you originally filed your second PCR action in 2006, why didn't you raise that as a claim?

A. Why didn't I raise that as a claim?

Q. Why didn't you raise as one of your claims that you wanted to appeal the denial of your first PCR at that time?

A. I really -- I was just filing something. I really didn't know exactly what I was doing.

MS. JAMESON: Thank you. No further questions.

THE COURT: Anything further on redirect, Mr. Waller?

MR. WALLER: Nothing further, Your Honor.

THE COURT: Okay. Before you call your next witness, let me just ask. Ms. Jameson, when is it that you contend he should have appealed on Judge Thomas' -- her 188-page order?

MS. JAMESON: Well, Your Honor, the interesting thing is there was never a resolution on that motion to alter or amend. So if you look at the end of the supplemental appendix from the 2010 PCR action, it resolves any of the claims regarding penalty, but is silent as to any of the claims regarding guilt or innocence. And so it's unclear whether the 59 was abandoned or the procedure with that, and I'm hoping we can elicit some testimony on that.

THE COURT: Thank you. Mr. Waller, go right ahead.

MR. WALLER: Thank you, Your Honor. No further witnesses from the Applicant.

THE COURT: Okay. Ms. Jameson, I'll turn it over to you, ma'am.

MS. JAMESON: Thank you. The State would call Sheri Johnson.

THE COURT: Okay. Ms. Johnson, good morning. I've just un-muted you. If I can get you to raise your right hand for me, please.

MS. SHERI JOHNSON was called as a witness, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. JAMESON:

Q. Good morning, Ms. Johnson. Where do you

currently practice law?

A. I am a professor at the Cornell Law School.

Q. Do you have ---

A. --- in Ithaca, New York.

Q. Do you have a specialized focus or area that you focus your practice or your coursework on?

A. I teach constitutional law, and I teach the death penalty clinic.

Q. How did you become involved in Mr. Hughes' case?

A. John Blume was then my co-counsel in another case and also a colleague, although, I think he wasn't a permanent colleague at that time. He asked me if I would -- if I could speak to David Wippman, who was an expert on international law, related to whether there was a consensus about the permissibility of executing juveniles.

I did -- initially, I did speak to Mr. Wippman, who because he thought it was a conflict with his contractual obligations with the United States government, said he would not. And then I spoke to another colleague of ours, Professor Muna Ndulo.

Q. So would it be fair to say that your role in Mr. Hughes' PCR action was limited to that constitutional issue regarding the death penalty for juveniles?

A. Well, it's not precisely a constitutional issue; it's an issue of international law. But, yes, my role in that case was totally confined to that issue. I probably did read the PCR application in general, but I didn't have anything to do with it, other than with that one question.

Q. So did you have any involvement after the hearing?

A. I know that John Blume kept me apprised of what happened. I may well have written the written briefing on that one issue, but other than that, no.

Q. Did you ever have any conversations with Mr. Hughes about appellate rights, if the application was denied?

A. No. I would have had maybe one or two conversations with Mr. Hughes at all, and those would have been -- those would have preceded the decision. So, I definitely didn't talk to him about it afterwards, and I have no recollection that I spoke to him about it beforehand, and I can't imagine that I would have.

MS. JAMESON: Thank you. No further questions.

THE COURT: Mr. Waller.

MR. WALLER: I don't have any questions for Ms. Johnson, Your Honor.

THE COURT: Okay. Ms. Johnson, thank you for joining us. I don't know, Ms. Jameson, if you need her to stay a part of this proceeding.

MS. JAMESON: No, I don't anticipate we'll need her for anything additional. Thank you for your time, Ms. Johnson.

THE COURT: Ms. Johnson, you're certainly welcome to stay. But if you need to go elsewhere, then you just go ahead and sign off whenever you choose.

THE WITNESS: Thank you, Your Honor. I'm going to interview a dean candidate, so I'll leave now.

THE COURT: All right. Thank you, again. Ms. Jameson.

MS. JAMESON: Your Honor, the State would call John Blume.

THE COURT: Okay, Mr. Blume, I've un-muted you, sir.

MR. JOHN BLUME was called as a witness, being duly sworn, was examined and testified as follows:

THE COURT: Thank you.

MS. JAMESON: Thank you. May it please the Court.

DIRECT EXAMINATION

BY MS. JAMESON:

Q. Mr. Blume, where do you currently practice law?

A. I'm currently a professor at Cornell Law School.

Q. And where do you focus your coursework, what practice area?

A. Criminal procedure and capital punishment.

Q. And you're the director of the Death Penalty Project in the Capital Punishment Clinic at Cornell Law, correct?

A. That's true, yes.

Q. Is it fair to say your primary focus would be on capital cases or death penalty cases over the past few decades?

A. Yes.

Q. And you've published numerous articles on post-conviction relief, specifically in South Carolina, correct?

A. Yes.

Q. And you are aware that an Applicant has a right to appeal the denial of post-conviction relief in South Carolina, correct?

A. Yes.

Q. And even if appellate counsel or PCR counsel believed there's no issue or arguable merit, there is still a duty to file an appeal, unless your client knowingly and voluntarily waives that right, correct?

A. Yes.

Q. How many PCR actions have you handled in South Carolina?

A. Oh, geez ---

Q. A rough estimate is fine.

A. Probably 30 capital cases.

Q. And primarily all of those have been capital cases, Mr. Blume?

A. Primarily, yes.

Q. When did you become involved in Mr. Hughes' case?

A. You know, it went into post-conviction, I think I was interested in the case because Herman was a juvenile at the time, and I was interested in the issue with the death penalty for juveniles. And so I worked very closely then with an organization. It's now called Justice 360. It was then called the Death Penalty Resource Center. I started in 1988. So even after I came to Cornell, I was involved. So, I think I probably sought Herman's case out to represent him in his PCR action.

Q. Was this case part of your clinic at Cornell Law?

A. It was. I mean, it was a combination of -- Pam Wilkins, who you mentioned earlier, was a staff attorney at Justice 360 at the time, so she was involved in the case. So, I was primarily kind of -- Pamela

was new. So, I was working with her to kind of train her in post-conviction relief actions. But we also -- in all the cases that I was involved, virtually all of them, there would have been some student involvement from the class.

Q. But you were lead counsel for Mr. Hughes in the post-conviction relief action, correct?

A. Yes.

Q. Okay. This case was previously listed as one of the example clinic cases on your website, correct?

A. I think you mentioned that. I haven't actually gone and looked at the website, but if you've seen it -- I mean, I haven't gone to the website recently, but, yes, I mean, it could have easily been listed.

Q. Is there any reason why there aren't any cases, including this case, listed anymore on the website?

A. I'm sorry. Is there any reason what?

Q. Is there any reason why this case, and the rest of the cases, have been removed from the website?

A. There was a total redo of the website. You know, people that are above me, they wanted some kind of different view. I don't -- you know, I'm not the person. I don't control this kind of stuff at the law school, but they totally redid the website. They wanted a more modern look, less content that you

had to change. So it could have all happened in that capacity.

Q. You filed several amended applications on Mr. Hughes' behalf, correct?

A. Yes, as I recall, yes.

Q. Do you still have your file in this case?

A. I don't believe so. I definitely wouldn't have it here. It would have been at Justice 360, but I'm pretty sure that we got rid of a bunch of files about a decade ago, and I'm pretty sure Herman's was one of those. I considered it to be a resolved case at that point.

Q. So when you say you considered it to be a resolved case, we discussed before the pending motion to alter or amend. What was your opinion as to the status of that motion?

A. You know, I don't really have any recollection of this. I mean, I didn't realize actually -- I didn't remember until you -- I don't remember whether you said it in an e-mail exchange that we had, or I heard it here today, that Judge Thomas never ruled on the Rule 59(e) motion on the remaining guilt phase claims. I didn't recall that. I mean, I'm not saying it didn't happen. I'm just saying I don't remember that currently. So anything I could say about all this -- about that

would be speculation.

Q. And the case was stayed for approximately five years after the filing of the motion to alter or amend before the death sentence was vacated, correct?

A. Yeah, initially filed a motion to stay in McCarver v. North Carolina when the Supreme Court granted cert to already consider the appropriateness of the death penalty for people with what we then called mental retardation. McCarver got mooted out because North Carolina passed a statute under state law saying you couldn't execute people with mental retardation. And then the court substituted Atkins v. Virginia for McCarver. So then the stay was continued on in light of Atkins.

Then after Atkins, we filed an action in another case asking the South Carolina Supreme Court to create a procedure for hearing capital case where intellectual disability was at issue. There's been a lot of evidence presented at the PCR hearing about Herman was a person with intellectual disability. His IQ was in the 60s. He's been in Special Ed, you know, most of his life.

And so -- but anyway, so the case continued to get stayed while the state supreme court decided Ellis Franklin's case, Franklin v. Maynard is what that ultimately became. And then in the interim,

the court granted cert in a case called Roper v. Simmons and held you couldn't execute juveniles. And so then the stay continued while that issue was litigated, and then after that, we filed a motion for summary judgment.

Q. And the State consented to resentencing in light of Roper and that the remaining claims regarding the death sentence be moot, correct?

A. Correct, yes.

Q. Did you ever take any action to resolve the remaining claims in your alter or amend on the guilt or innocence phase?

A. You know, I really -- I really don't remember, you know, this. I just -- I do remember, obviously, that the death sentence was set aside. I do remember we were going to court for the resentencing. I can't remember who the judge was, I don't think it was Judge Thomas, who actually resentenced him to life imprisonment.

But I just really don't have any memory of talking to Mr. Hughes about the Rule 59(e) motion, or about any possible appeal from that. I mean, I think technically, maybe I'm wrong about this, but since the Rule 59(e) motion had not been ruled upon at that time, there was nothing to appeal.

So, I don't know whether I thought she was going to rule on this some time, and then there would be an appeal. I don't know whether I didn't think about it. I don't know, you know, if I did talk to Herman about it. I really just have no memory.

Q. And I believe you just testified you were present and represented him at that resentencing in 2006, correct?

A. Yes.

Q. And you don't have any recollection of discussing either an appeal of the resentencing, or an appeal of the remaining claims in the first PCR action with him at that time?

A. Well, there wouldn't have been any appeal from the resentencing. I mean, he got what -- you know, he got a life sentence, which is a life sentence, of course, but a life sentence, you know, at the time of the offense. So that was -- there was really nothing to appeal in the sentencing. But no, I don't remember talking to Herman, you know, about this -- about these things.

You know, Herman is a -- I would have had to talk to him in a very simple manner about this. But I don't have any recollection of doing -- of talking to him about his appeal, right to appeal, you know, whether

he wanted to appeal. All I can do is speculate really.

Q. Is that something you typically do in your capital post-conviction relief cases, discuss the appellate rights?

A. Yeah. I am not, you know, in the habit of letting people's appeals lapse. So, I mean -- so I speculate that way. I would say maybe -- but there are two wild cards in here on the speculation side. One is the fact that Judge Thomas never ruled on the Rule 59(e) motion. So there really wasn't, you know, an order to appeal on the guilt phase claims.

So, I don't know whether that is why I did it. I don't know whether I just somehow -- the other thing that's kind of a wild card in this is, I mean, he had nothing to lose by appealing. He had gotten the most severe sentence you could get, you know. You had no -- there was no downside risk to him, you know, in appealing.

But, you know, just at this point, frankly, I'm speculating. I don't really have any memory of actually sitting down and talking to Herman about this, saying, hey, you know, here are the issues, do you want to appeal them, or, you know, let's wait and see what Judge Thomas does on this? Maybe she'll rule for him, and then I'll file a notice of appeal.

I don't really know. I mean, I'm totally speculating at this point.

Q. Is this the only capital post-conviction relief case you handled where you didn't file a notice of appeal?

A. No, I think there have been other cases where we might have -- where we won on sentencing and lost on guilt, and we agreed with the State not to -- that neither side would appeal, basically, that we were satisfied with the sentencing phase of the relief. They were satisfied with the guilt phase being affirmed. And, so, I think there's been a case or two like that. But, I mean, it's routine to appeal, even if you win, you know. Both sides often appeal. So, I mean, the overwhelming majority of cases do get appealed, yes.

MS. JAMESON: I have no further questions for Mr. Blume at this time. Thank you.

THE COURT: Okay. Mr. Waller.

MR. WALLER: Just briefly, Your Honor.

CROSS-EXAMINATION

BY MR. WALLER:

Q. Mr. Blume, is this -- the capital cases, obviously, those are all very different. Was this one a little bit unique in that Mr. Hughes was not only a juvenile, which was obviously an issue at the time,

but that there was multiple Supreme Court cases that came up during the pendency of this case?

A. Yeah, I know. It was unusual in that regard. I mean, it was kind of in this -- that era where the Supreme Court of the United States created these two categorical exceptions for the death penalty, and so Herman kind of fell into both. We litigated issues regarding his intellectual disability, and we also had a claim that he was -- death penalty was unconstitutional since he was a juvenile.

So we had those two issues already pending in his PCR. And while it was going on, the Supreme Court decided to hear the case. And, so -- yeah, I mean, it went on for, like, you know, the history of this, it went on for five or six years after the PCR hearing, being stayed by his ongoing legal developments.

Q. In the approximately 30 South Carolina PCR cases that you earlier testified that you've handled, is it common for a case to be stayed for five years or so?

A. No, it's not common.

Q. Okay. Other than reacting to direction by our courts, was there any more work that you did during those five years on the case?

A. No. I mean, I think there was, you know,

a briefing filed when something would happen. Obviously, we filed a motion for summary judgment after Roper v. Simmons came down. But I don't recall doing anything other than that.

Q. Okay. That was just reacting to direction from the courts?

A. To the best of my recollection, yes.

Q. Okay. And this -- you might not recall, but if you do, the 59(e) motion that you filed, was that filed for preservation, or was it filed as a reconsideration?

A. Well -- I mean, the answer sometimes is both, right? I mean, there's -- the state supreme court create some unusual rules on 59(e), if you don't follow 59(e), some things can be abandoned. I know in this fight, in this case, I remember that there had been hearing on -- I thought parts of the order were unfair in their representation of the record.

And, so, I think as was indicated, we had a hearing in which we kind of went back and forth over the order with Judge Thomas and opposing counsel about that. And, so, then I think the Rule 59(e) motion was filed after that.

Q. Okay. What is your practice -- I believe you testified that you think Mr. Hughes' file was destroyed approximately a decade ago. What is your practice

for file retention?

A. You know, we -- I'm not sure that I actually had "a practice." We normally hold on to things for a pretty long time, but we have had over 35 years, a lot of stuff have built up, and so that was the only time we really ever purged files. But I'm pretty sure -- I mean, I can have somebody go look for something in Herman's case, but I don't think we have it anymore. It is a warehouse.

Q. But if the file was destroyed, was it because you considered the case closed, or your portion of the case closed?

A. Yeah, I do consider the case closed, yes.

Q. Okay.

MR. WALLER: I have nothing further. Thank you, Mr. Blume.

THE COURT: Ms. Jameson, anything further?

MS. JAMESON: Nothing on redirect, Your Honor. Thank you.

THE COURT: Okay. Thank you, Mr. Blume.

THE WITNESS: Yes, thank you. Herman, good to see you.

MS. JAMESON: The State does not have any additional witnesses to call, Your Honor.

THE COURT: Okay. Anything in reply,

Mr. Waller?

MR. WALLER: Nothing by way of testimony, Your Honor, just a brief argument at the appropriate time.

THE COURT: Yes. I'm glad to hear from both of you.

MR. WALLER: Thank you, Your Honor. May it please the Court. Judge, I think the appellate court order -- excuse me -- Court of Appeals order, you know, limited us to this specific issue. I believe the testimony from Mr. Hughes was they never discussed appealing that original PCR's denial. He certainly wanted to. I think that's evidenced by both his testimony as well as his attempts to file on his own.

As your heard Mr. Blume testify, Mr. Hughes does have some intellectual disabilities. He obviously is not an attorney and was appointed counsel in his first PCR, so his knowledge of what his rights are regarding appeal, really the PCR process in general, are limited, and that's why he was appointed counsel.

As to the issue of the 59(e) motion, the vast majority, and I believe Ms. Jameson is in agreement with this, the vast majority of the issues raised were regarding sentencing. Those are certainly moot at this point because they were regarding the death penalty

sentence.

Judge, I would just -- there were a few other issues that certainly the Court can review. I would characterize them as preservation issues. It was a 188-page order. Judge, certainly there's plenty to discuss in there, and plenty for an appellate court to review. But, Judge, I would just say that the State proceeded in dealing with Mr. Hughes' 2007 PCR, that was deemed successive, but they still, you know, proceeded in defending the State against that action.

The Court of Appeals order from 2016 certainly takes the position that Mr. Hughes' 1980 -- excuse me -- 1998 PCR application was dealt with to finality. And, so, I believe that those two things are -- I apologize, Your Honor, there's a train going by. I think those two things are key pieces of evidence for this Court to determine that the issues in this case was ultimately ruled on and decided on.

I think that, you know, mistakes certainly do happen, even to an esteemed constitutional scholar, such as Mr. Blume, where this was a unique case that sat as stay for five years, and it just kind of -- the appeal issue got lost in the shuffle.

I certainly think Mr. Hughes is entitled

to that, and I certainly think that he should be allowed to file a belated appeal from the denial of his 1998 post-conviction relief application. Thank you.

THE COURT: Thank you. Ms. Jameson.

MS. JAMESON: Yes, Your Honor. May it please the Court. The uncontroverted testimony we have before the Court today is that Mr. Hughes wanted an appeal of his initial PCR action, and he did not make a waiver of that right. Mr. Blume, unfortunately, due to the passage of time, has no independent recollection to challenge that testimony. And, so, I would leave it in Your Honor's discretion as to that.

We're here on the limited issue of whether he's entitled to the belated appellate review, and whether he made a knowing and voluntary and intelligent waiver of the denial of the first PCR action.

And, briefly for the record, because Your Honor did question the State regarding the 59(e), I would agree with Mr. Waller that the vast majority of the issues did involve sentencing, and the remaining issues regarding guilt phase are thoroughly covered in that 188-page order.

So, I don't want to lock any of the future appellate lawyers into any sort of an argument, but it's a very thorough order, and it appeared

that the 59(e) is more asking for reconsideration, not that something was not preserved for appellate review.

THE COURT: Thank you. You know, my feeling is that, of course, everyone's focus at the time, and certainly his attorney's focus at the time, was on reversing the death penalty, and, I mean, rightly so.

So, you know, here we are together now, very learned attorneys, professors, and, you know, I don't think anyone has a clear answer of, you know, when should an appeal have been filed. I mean, with the Rule 59(e) sort of getting lost in the shuffle with the resentencing, there's no clear time that would start his 30 days to file a notice of appeal running.

So, I have no problem with the fact that he did not knowingly and intelligently waive his right to appeal that very thorough order of Judge Thomas from the original PCR. I guess the question in my mind is whether I can basically just grant him the right to a belated appeal, and, you know, that the time for him to appeal would begin to run from the date that I sign an order to that effect.

So, I guess I want to know procedurally if that's what y'all think would be the appropriate

thing. Basically, I would say that there is no -- we're not waiting any longer, I guess, on an order ruling on the 59(e). I would just do an order basically saying he's entitled to a belated appeal, and, you know, he's got to file it within so long of my order.

MR. WALLER: Judge, that's the procedure that we believe would be correct. I think we are here today to answer the question from the Court of Appeals. So, I think from our position that the issues remaining in 59(e) are that's over and done with. So, I would agree with Your Honor as far as the 30 days would start upon the issuance of your order allowing Mr. Hughes to file that belated appeal.

THE COURT: Ms. Jameson.

MS. JAMESON: I believe that would be consistent with the opinion from the Court of Appeals on remand to make that determination. The order on remand is noticeably silent as to the 59(e). And it's my understanding that did come up at oral argument, but it is not mentioned anywhere in this opinion. And, so, I believe Your Honor's suggested course of action would be consistent with the opinion on remand.

THE COURT: Okay. Mr. Waller, do you want to prepare a proposed opinion -- proposed order for

me to sign?

MR. WALLER: Certainly, Your Honor, I will.

THE COURT: If you would please e-mail that to Ms. Jameson, let her take a look at it, and then you're going to have to just e-mail it to me, and I will sign and file it.

MR. WALLER: Okay.

THE COURT: Now are you going to file the notice of intent to appeal on his behalf, Mr. Waller?

MR. WALLER: I will, Your Honor. Yes, ma'am.

THE COURT: And I think, Mr. Waller, you're going to give me another order today that I can print out and sign with respect to something we did earlier -- oh, appointing an attorney for the witness in a prior PCR.

MR. WALLER: Yes, Your Honor, from yesterday. I will get that to you today so that you will have it when you go back in Orangeburg tomorrow.

THE COURT: Very good. All right. Mr. Hughes, do you have any questions for me, sir?

MR. HUGHES: No, ma'am.

THE COURT: Anything else that y'all need

me to address today?

MS. JAMESON: No, Your Honor. Thank you for accommodating us virtually. We really appreciate it to get this case resolved. Thank you.

THE COURT: No problem at all. And I will see you all in Orangeburg tomorrow morning.

MR. WALLER: Thank you, Your Honor.

MS. JAMESON: Thank you.

THE COURT: All right. Thanks so much. All right. Thank you all.

(End of Transcript of Record)

CERTIFICATE OF REPORTER

State of South Carolina)
County of Calhoun)

I, the undersigned, Yvestre Torres, Circuit Court Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Calhoun County, South Carolina, on the 20th of May, 2021.

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

May 28, 2021

Yvestre Torres
Circuit Court Reporter

STATE OF SOUTH CAROLINA
CALHOUN COUNTY

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

FILED
2021 NOV -4 A 10:32
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

Herman Hughes, #206816,
Applicant,

vs.

State of South Carolina,
Respondent.

C/A No: 2007-CP-09-00103

ORDER GRANTING RIGHT TO SEEK BELATED APPELLATE REVIEW PURSUANT TO AUSTIN V. STATE[1]

This matter comes before the Court by way of an application for post-conviction relief filed on June 26, 2007, by Applicant Herman Hughes, seeking, amongst other things, belated appellate review of the denial of his initial 1998 post-conviction relief action. In response, Respondent made its Return and Motion to Dismiss as a Successive Application on August 27, 2007. On October 18, 2007, the Honorable Diane S. Goodstein issued a Conditional Order of Dismissal as a Successive Application. Applicant filed a pro se Reply on November 20, 2007. The court found "a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final" and issued its Final Order of Dismissal on January 10, 2008.

On July 16, 2010, Hughes filed a pro se notice of appeal, and offered an explanation— pursuant to Rule 243(c), SCACR— as to why the second PCR court erred in finding his application successive. Appointed counsel subsequently filed a petition for a writ of certiorari on Hughes' behalf, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), asserting the sole arguable ground was "[w]hether

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)

[Hughes' case should be remanded to determine if he knowingly and intelligently waived his right to appeal the denial of his first [PCR] action." The Court of Appeals denied counsel's motion to be relieved and directed the parties to address the issue raised in the Johnson petition. Subsequently, the Court of Appeals granted Hughes' petition for a writ of certiorari to review the second PCR court's decision in an order dated December 12, 2014. By Unpublished Opinion filed April 13, 2016, the Court of Appeals reversed the second PCR court's decision to summarily dismiss Applicant's 2007 PCR Application.

This court conducted an evidentiary hearing on the matter via WebEx on May 5, 2021. The sole issue before the Court was whether Applicant was entitled to seek belated appellate review of the denial of his 1998 post-conviction relief action pursuant to Austin v. State. Applicant, John H. Blume, Esquire, and Sheri Johnson, Esquire (Counsel), testified at the hearing. Also before the Court were the Calhoun County Clerk of Court's records of the underlying charges, Applicant's records from the South Carolina Department of Corrections (SCDC), the transcript from Applicant's conviction, the records and transcript from the evidentiary hearing of Applicant's 1998 PCR, and the records of this PCR action.

This Court determines Applicant has established he is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding. Specific findings of fact and conclusions of law are set forth below as required pursuant to S.C. Code Ann. § 17-27-80.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the May 1994 term of the Calhoun County Grand Jury for murder, assault and battery with intent to kill, armed robbery, and grand larceny of a vehicle (1994-GS-09-0154, 0155, 0156). Applicant was sixteen years old at the time of the crime. He was represented by Phillip F. Newsom, of the Richland County Bar. First Circuit Solicitor Walter M. Bailey, Jr. initially prosecuted the case.

The prosecution filed petitions in the Family Court of Calhoun County on March 21, 1994, and on March 24, 1994, requested the actions be transferred to the Court of General Sessions so that Applicant 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 the trial judge. The case was called for trial on September 5, 1995. After conducting a competency hearing, the court found Applicant competent to stand trial by a written order issued on September 7, 1995. Jury selection concluded on September 7, 1996. The guilt

phase began on September 7, 1996 where counsel for Applicant conceded his guilt. On September 11, 1995, the sentencing hearing began.

After deliberations, the jury found the existence of all three statutory aggravating circumstances and sentenced Hughes to death. After the jurors were polled, Judge Cottingham found as an affirmative fact the death sentence was appropriate. 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.

Applicant timely appealed his conviction to the South Carolina Supreme Court. The Court affirmed Applicant's conviction on October 27, 1997. Applicant's Petition for Rehearing was denied on November 20, 1997.

Applicant filed a Petition for Writ of Certiorari to the United States Supreme Court on February 24, 1998. On April 27, 1998, the United States Supreme Court denied the Petition for Writ of Certiorari. Hughes v. South Carolina, 523 U.S. 1097 (1998).

FIRST PCR APPLICATION: 1998-CP-09-101

Applicant, through Counsel, filed his initial PCR Application on June 22, 1998 alleging multiple reasons as to why he believed he was being held in custody unlawfully. The matter was assigned exclusively to the Honorable Paula Thomas

because it was a death penalty post-conviction relief action. The Respondents were represented in this matter by Donald J. Zelenka, Assistant Deputy Attorney General, and Jeffrey A. Jacobs, Assistant Attorney General. 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.

On December 8, 2000, Judge Thomas entered a one-hundred and eighty-nine (189) page order denying post-conviction relief in its entirety. Subsequently, Applicant, through appointed counsel, filed various motions to alter or amend along with a motion to stay further proceedings pending the outcome in McCarver v. North Carolina, which was then pending before the United States Supreme Court. The court in McCarver granted cert to address the constitutionality of executing a defendant with mental disabilities. Judge Thomas stayed the proceedings by order dated May 4, 2001. On May 9, 2005, Judge Thomas granted Applicant a new sentencing hearing based on the U.S. Supreme Court's decision in Roper v. Simmons, 125 S.Ct. 1183 (2005), prohibiting the execution of offenders under the age of eighteen. Applicant, through counsel Blume, advised the court that this Order resolved all matters. Neither party appealed Judge Thomas' order.

On October 10, 2006, Applicant appeared before the Honorable Howard P. King. Applicant was represented by John Blume. Judge King sentenced Applicant to a life sentence on murder. No appeal was taken from the sentencing proceeding. Applicant subsequently filed the above-captioned Post Conviction Relief action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court determines Applicant has established that he is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding. Specific findings of fact and conclusions of law are set forth below as required pursuant to S.C. Code Ann. § 17-27-80.

Applicant alleges he was denied the right to seek an appeal following the dismissal of his 1998 post-conviction relief application. Pursuant to section 17-27-100 of the South Carolina Code, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. See also Rule 243, SCACR ("A final decision entered under the Post-Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari."). When an applicant is denied his right to seek such review of his initial PCR application due to ineffective assistance of PCR counsel, the Supreme Court has directed the circuit court to hold "an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review." Austin V. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). If the Court so finds, Applicant has the right to petition the Supreme Court for review of the denial of his initial application. Id.

At the hearing, Applicant testified that Counsel Blume was appointed to represent him in his initial PCR action. Applicant testified that the initial PCR case was quite some time ago and that his specific recollection of the events that took

place in the case were not as clear now as they would have been closer in time to the 1998 case. He testified that he was able to communicate with Mr. Blume over the telephone and by letter. Applicant further testified that he did not recall having communicated with, or meeting, any other counsel than Mr. Blume in connection with his 1998 PCR. Applicant testified that there was a significant gap between the evidentiary hearing of his PCR case and his resentencing. Applicant testified that he does not recall having any conversations with Mr. Blume regarding his right to appellate review of the denial of his 1998 PCR case nor does he recall signing any waiver of such rights.

Following Applicant's testimony, Sheri Johnson, Esquire, testified. Ms. Johnson testified that she had very limited involvement in Applicant's case and was only involved in a consulting capacity through her position as a professor of Constitutional law at Cornell University, and her prior general experience with death penalty cases. She testified that she never met with Applicant, appeared on his behalf, nor conducted any research on the specific issues of Applicant's case. Ms. Johnson testified that she had no conversations with Applicant regarding his right to appellate review of the denial of his PCR and that she was unaware of the status of Applicant's case when the time to file a notice of appeal ran.

Following Ms. Johnson's testimony, John H. Blume, Esquire, testified on behalf of Applicant. Mr. Blume testified that represented Applicant through his role with a pro bono death penalty defense foundation. He testified that during the course of his representation of Applicant, Mr. Blume relocated to Ithaca, New York,

as a faculty member of Cornell University. Mr. Blume testified that he continued to represent Applicant, and others, and was able to communicate with Applicant via telephone and by letter. Mr. Blume testified that after Judge Thomas issued the Order of Dismissal, further proceedings were was stayed pending the outcome of Roper v. Simmons, 543 U.S. 551 (2005). Mr. Blume testified that this particular case was unique amongst his capital cases in that his client was a juvenile when the crime was committed and the fact that there was a lengthy delay in the matter's ultimate resolution, pending the outcome of a case pending before the United States Supreme Court, which ultimately led to the vacation of Applicant's death sentence.

Mr. Blume testified that it is his standard practice to file a notice of appeal following a negative outcome in a case, but he has since learned that he failed to file such a notice in Applicant's case. Mr. Blume testified that he has no specific recollection of speaking with Applicant regarding his right to appeal the Order of Dismissal. Mr. Blume further testified that while moving offices in the years following Applicant's PCR case, his old or closed files, including Applicant's, were destroyed as a space saving measure. Mr. Blume testified that he was therefore unable to review his file in advance of the evidentiary hearing or attempt to locate any notes or waiver of appellate rights, but that he does not have any recollection of discussing an appeal with Applicant.

After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of allegations in Applicant's post-conviction relief application, both parties consented to this court's grant of a belated appeal of

Applicant's first post-conviction relief application (1998-CP-09-101) pursuant to Austin. The parties agree that there is no evidence in the record that Applicant voluntarily waived his right to seek an appeal of the post-conviction relief court's denial and dismissal of Applicant's first application for post-conviction relief. Based on the documents submitted from the previous PCR file, it appears to the parties and this Court that Applicant did not freely and voluntarily waive the right to appeal his first application for post-conviction relief, and PCR counsel failed to file a timely Notice of Appeal of the application.

Based upon the foregoing, this Court grants Applicant's request to seek belated appellate review of his first PCR (1998-CP-09-101) pursuant to Austin. Applicant's current PCR counsel is instructed to file a Notice of Appeal with the South Carolina Supreme Court pursuant to Rule 243, SCACR.

This Court also finds that all allegations raised in the 1998 PCR matter's Motion Pursuant to Rule 59(e), SCRCP, have been waived, rendered moot, or previously ruled upon, and that there are no outstanding issues to be resolved in that motion which would hinder this Court's ability to issue a ruling in the 2007 PCR. Mr. Blume testified that Rule 59(e) motions, both generally and specific to this case, serve the mixed purpose of issue preservation and requesting reconsideration of the Court's ruling, the latter not influencing the finality of the 1998 PCR Court's ruling. Further, the State proceeded to appear and respond to the 2007 Application and its subsequent procedural and appellate stages, without raising concern that undecided issues remain from Applicant's 59(e) motion. Finally, the South Carolina

Court of Appeals, in its Unpublished Opinion reversing the second PCR Court and remanding the matter back to this court, held that the 59(e) motion was denied. For the foregoing reasons, this Court finds no impediment to rule on the issue at hand.

IT IS THEREFORE ORDERED:

1. Applicant remain in the custody of the South Carolina Department of Corrections; and
2. Applicant is granted the right to seek a belated appellate review of his initial post-conviction relief action (C/A No. 1998-CP-09-101) pursuant to Austin.

AND IT IS SO ORDERED this 21st day of October, 2021.

Kristi F. Curtis
Presiding Judge
First Judicial Circuit

Sumter, South Carolina.