

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001271

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	5
ARGUMENTS	

1.

The PCR court, in flagrant disregard of this Court’s remand Order and Petitioner’s Lindsey’s rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General’s proposed orders of dismissal under circumstances that show the PCR judge failed to consider Lindsey’s grounds for PCR and did not even read the proposed order before signing it. 6

Introduction.....	6
The First PCR Order and this Court’s Remand.....	6
The PCR Court and the State Ignore this Court’s	
Instructions Post-Remand.....	10
The PCR Court’s Hearings on Petitioner Lindsey’s Motions	12
Discussion.....	16
Exhibit A Table of Identical Errors	25

2.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial especially where counsel did not hire a social work expert who could testify regarding petitioner’s miserable upbringing, where counsel hired an inexperienced forensic psychiatrist one month before trial, and then failed to prepare her to testify to petitioner’s considerable prejudice 28

Introduction.....	28
Relevant Facts	30

Testimony at the PCR Hearing Regarding Lack of Preparation	32
Failure to Preserve Evidence and	
Present Testimony from Rod Tullis	37
Failure to Interview and Prepare Witnesses and	
Family Members	40
Failure to Hire Social Work Expert	43
Decision to Hire Inexperienced Forensic Psychiatrist and	
Failure to Prepare Her	46
The Order of Dismissal.....	57
Discussion.....	60
Deficient Performance.....	60
Prejudice	77
Conclusion	105

3.

Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community.....107

Relevant Facts	107
James Sligh	109
PCR Evidence.....	110
James Aiken.....	110
Order of Dismissal	112
Discussion.....	112

CONCLUSION.....	121
------------------------	------------

TABLE OF AUTHORITIES

Cases

<u>Abdul-Kamir v. Quarterman</u> , 550 U.S. 233 (2007)	81
<u>Anderson v. Bessemer City</u> , 470 U.S. 564 (1985).....	8
<u>Andrus v. Texas</u> , ___ U.S. ___, 140 S.Ct. 1875 (2020)	102, 103
<u>Ard v. Catoe</u> , 372 S.C. 318, 642 S.E.2d 590 (2007).....	61, 64
<u>Barefoot v. Estelle</u> , 463 U.S. 880 (1983).....	117
<u>Blystone v. Horn</u> , 664 F.3d 397 (3rd Cir. 2011).....	62
<u>Bobby v. Van Hook</u> , 558 U.S. 4 (2009).....	61, 62, 65
<u>Bowman v. State</u> , 422 S.C. 19, 809 S.E.2d 232 (2018).....	115, 116
<u>Burr v. Jackson</u> , 19 F.4th 395 (4th Cir. 2021)	23, 24
<u>Childs v. State</u> , 357 S.E.2d 48 (Ga. 1987)	75
<u>Commonwealth v. Williams</u> , 732 A.2d 1167 (Pa. 1999).....	8, 9
<u>Council v. State</u> , 380 S.C. 159, 670 S.E.2d 356 (2008).....	Passim
<u>Detrich v. Ryan</u> , 677 F.3d 958 (9th Cir. 2012).....	63
<u>Dobyne v. State</u> , 805 So.2d 733 (Ala. Crim. App. 2000)	8, 9
<u>Ellis v. Procter & Gamble Dist. Co.</u> , 315 S.C. 283, 433 S.E.2d 856 (1993)	17, 18
<u>Fishburne v. State</u> , 427 S.C. 505, 832 S.E.2d 584 (2019)	20
<u>Foust v. Houk</u> , 655 F.3d 524 (6th Cir. 2011).....	62
<u>Gray v. Branker</u> , 529 F.3d 220 (4th Cir. 2008).....	62
<u>Hall v. Catoe</u> , 360 S.C. 353, 601 S.E.2d 335 (2004)	8, 9
<u>Harden v. State</u> , 276 S.C. 249, 277 S.E.2d 692 (1981).....	61, 63
<u>Hooks v. Workman</u> , 689 F.3d 1148 (10th Cir. 2012).....	63

<u>Jefferson v. GDCP Warden</u> , 941 F.3d 452 (11th Cir. 2019)	5, 21, 22, 23
<u>Jefferson v. Upton</u> , 560 U.S. 284 (2010)	8, 26
<u>Jones v. State</u> , 332 S.C. 329, 504 S.E.2d 822 (1998)	119
<u>Jurek v. Texas</u> , 428 U.S. 262 (1976).....	117
<u>Kelly v. South Carolina</u> , 534 U.S. 246 (2002).....	116, 117
<u>Marshall v. Jerrico, Inc.</u> , 446 U.S. 238 (1980).....	17
<u>McKnight v. State</u> , 378 S.C. 33, 661 S.E.2d 354 (2008).....	71
<u>Ortiz v. United States</u> , 664 F.3d 1151 (8th Cir. 2011).....	63
<u>Padilla v. Kentucky</u> , 559 U.S. 356 (2010)	65
<u>Patel v. Patel</u> , 359 S.C. 515, 599 S.E.2d 114 (2004)	18
<u>Porter v. McCollum</u> , 558 U.S. 30 (2009).....	67, 68
<u>Pruitt v. State</u> , 310 S.C. 254, 423 S.E.2d 127 (1992)	8, 26
<u>Reese v. State</u> , 425 S.C. 108, 820 S.E.2d 376 (2018).....	20
<u>Rompilla v. Beard</u> , 545 U.S. 374, n.7 (2005)	61, 62
<u>Rosemond v. Catoe</u> , 383 S.C. 320, 680 S.E.2d 5 (2009).....	104, 105
<u>Sears v. Upton</u> , 561 U.S. 945 (2010)	67, 77, 78
<u>Skipper v. South Carolina</u> , 476 U.S. 1 (1986)	114, 117
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018)	5
<u>State v. Barnes</u> , 407 S.C. 27, 753 S.E.2d 545 (2014)	24
<u>State v. Bowman</u> , 366 S.C. 485, 623 S.E.2d 378 (2005).....	109
<u>State v. Burkhardt</u> , 371 S.C. 482, 540 S.E.2d 450 (2007)	109
<u>State v. Hughey</u> , 339 S.C. 439, 529 S.E.2d 721 (2000).....	104, 105
<u>State v. Johnson</u> , 338 S.C. 114, 525 S.E.2d 519 (2000)	76

<u>State v. Jones</u> , 343 S.C. 562, 541 S.E.2d 813 (2001)	21
<u>State v. Jones</u> , 383 S.C. 535, 681 S.E.2d 580 (2009)	21
<u>State v. King</u> , 158 S.C. 251, 155 S.E. 409 (1930)	104
<u>State v. Lindsey</u> , 372 S.C. 185, 642 S.E.2d 557 (2007)	29, 118
<u>State v. Matthews</u> , 291 S.C. 339, 353 S.E.2d 444 (1986).....	114
<u>State v. McClure</u> , 342 S.C. 403, 537 S.E.2d 273 (2000)	77, 104, 119
<u>State v. Patterson</u> , 290 S.C. 523, 351 S.E.2d 853 (1986)	114
<u>State v. Plath</u> , 281 S.C. 1, 313 S.E.2d 619 (1984)	109
<u>State v. Riddle</u> , 291 S.C. 232, 353 S.E.2d 138 (1987).....	114
<u>State v. Shafer</u> , 352 S.C. 191, 573 S.E.2d 796 (2002).....	118
<u>State v. Shuler</u> , 353 S.C. 176, 577 S.E.2d 438, (2003).....	80, 118
<u>State v. Torrence</u> , 305 S.C. 45, 406 S.E.2d 315 (1991).....	75
<u>Stephens v. Secretary, Fla. Dep’t Corr.</u> , 678 F.3d 1219 (11th Cir. 2012)	63
<u>Stevens v. McBride</u> , 489 F.3d 883 (7th Cir. 2007).....	63
<u>Stone v. State</u> , 419 S.C. 370, 798 S.E.2d 561 (2017)	64
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	Passim
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003).....	Passim
<u>Williams v. Taylor</u> , 529 U.S. 362 (2000)	61, 62, 66, 67
<u>Winkler v. State</u> , 418 S.C. 643, 795 S.E.2d 686 (2016)	64
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)	24
Statutes	
S.C. Code Ann. § 16-3-20(C)(a)(3)	30
S.C. Code Ann. § 16-3-20(C)(b)(2) & (7)	80, 81

S.C. Code Ann. § 16-3-20(C)(b)(2) and (7).....	106
--	-----

S.C. Code Ann. § 17-27-80 (2003)	3, 9
--	------

Constitutional Provisions

S.C. Const. Art. I, § 3.....	17
------------------------------	----

U.S. Const. amends. V, XIV	17
----------------------------------	----

Rules

Rule 12(e), SCRCF	2
-------------------------	---

S.C. R. Evid. 703	81
-------------------------	----

ISSUES PRESENTED

1.

Whether the PCR court, in flagrant disregard of this Court's remand Order and Petitioner Lindsey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General's proposed orders of dismissal under circumstances that show the PCR court failed to consider Lindsey's grounds for PCR and did not even read the proposed order before signing it?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial especially where counsel did not hire a social work expert who could testify regarding petitioner's miserable upbringing, where counsel hired an inexperienced forensic psychiatrist one month before trial, and then failed to prepare her to testify to petitioner's considerable prejudice?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community?

STATEMENT OF THE CASE

Petitioner was indicted by the Spartanburg grand jury for the offense of murder. App. 3756. The state served its notice of intent to seek the death penalty.

Petitioner's case came for trial on May 17, 2004, before the Honorable John C. Few and a jury. App. 1. Michael Bartosh, Doug Brannon, and Karen Quimby represented petitioner. The solicitors were Trey Gowdy, Barry Barnette, and Donnie Willingham. App. 1.

The jury found petitioner guilty of murder. App 1718, l. 20-1719, l. 1. At the conclusion of the penalty phase, the jury recommended a sentence of death. App. 2169, ll. 8-22. Judge Few then sentenced petitioner to death. App. 2174, ll. 1-14.

Petitioner filed an application for post-conviction relief on August 14, 2007. App. 2192-2198. Petitioner alleged, inter alia, that he received ineffective assistance of counsel in violation of his Sixth Amendment rights where defense counsel failed to offer available and compelling evidence in mitigation. App. 2194; 2198. The state filed a return in response to the application of post-conviction relief and a Rule 12(e), SCRCP request for specificity dated September 24, 2007. App. 2199-2209.

Thereafter petitioner filed an amended application for post-conviction relief dated August 6, 2009. App. 2210-2216. The state then filed a return to petitioner's amended application for post-conviction relief dated June 17, 2010. App. 2217-2267.

An evidentiary hearing in petitioner's case was convened on July 19, 2010, in the Spartanburg County Court of Common Pleas. Richard Vieth, David Collins, and Teresa Norris represented petitioner. Donald Zelenka and Alfonso Simon represented the office of the attorney general. App. 2285.

Judge Burch filed an order of dismissal on August 12, 2011. App. 3536-3627. Post-conviction counsel then filed a motion to reconsider, alter, or amend the order on September 19, 2011. App. 3728-3737. The state then filed its respondent's memorandum in opposition to petitioner's motion to reconsider, alter, or amend dated November 18, 2011. App. 3738-3750. Judge Burch issued an order denying the motion to reconsider, alter, or amend on December 22, 2011. App. 3751.

Petitioner filed a petition for writ of certiorari with this Court in 2012, asserting, inter alia, that the PCR court signing a verbatim proposed order submitted by the attorney general violated state and federal due process. It was noted that on May 2, 2011, the PCR court had requested a proposed order from the state. App. 3537. The court did not request a proposed order from petitioner at the same time. App. 3537. On August 10, 2011, Judge Burch signed the state's proposed order of dismissal. Except for striking through the month on signature page, the PCR court made no changes to the state's proposed order. App. 3527.

On September 30, 2014, instead of granting certiorari, this Court unanimously vacated the PCR court's order and remanded this case to the lower court. This Court stated, "[I]n light of the Court's concern with the frequency and severity of drafting errors in the order of dismissal, and this Court's admonishments to PCR judges [Pruitt] and [Hall], we vacate the order of dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt and Hall and with S.C. Code Ann. § 17-27-80 (2003) to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." Supp. App. II. 1.

After the matter was remanded and based on the PCR court's request for a Microsoft Word version of the state's proposed order, petitioner filed a "petition for extraordinary relief" with this

Court. Supp. App. II. 7. Petitioner argued that the request by the PCR judge for the electronic copy of the attorney general's proposed order showed its intent to violate Hall, Pruitt, and this Court's remand order, and to simply cut-and-paste a new order from what the attorney general provided the PCR court. Supp. App. II. 11-12. Petitioner requested a new PCR hearing before a new judge. Supp. App. II. 12. This Court denied the petition for extraordinary relief. Supp. App. II. 89.

An Amended Order of Dismissal was issued on October 2, 2015. Supp. App. II at 97. On February 26, 2016, petitioner filed a renewed petition for extraordinary relief in this Court. Supp. App. II at 284. Three days later, petitioner also filed a "Motion for a Stay, for a New PCR Hearing Before a Different Circuit Judge, and, Alternatively, to Alter or Amend the Judgment Pursuant to Rule 59(e). Supp. App. II at 316-17. On March 25, 2016, this Court denied the Renewed Petition. Supp. App. II at 386.

The PCR judge held hearings on petitioner's motions on September 22, 2016, and again on February 20, 2019. Supp. App. II at 389, 493. On July 10, 2019, the PCR court issued its Order Denying Motion to Recuse and Order Denying Motion to Alter or Amend Pursuant to Rule 59. Supp. App. II at 607. Petitioner then filed a petition for writ of certiorari with this Court. The state filed its return to that petition for a writ of certiorari. This Court granted certiorari in its order dated June 28, 2022.

This brief of petitioner follows.

STANDARD OF REVIEW

The deferential standard of review used in PCR cases does not apply to petitioner's case. See Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018) (defining standard of review in PCR cases). This Court should review petitioner's case *de novo* as to both findings of fact and conclusions of law. See Jefferson v. GDCP Warden, 941 F.3d 452 (11th Cir. 2019) and Argument 1, *infra* pages 6-27. The unfortunate circumstances described in Issue 1 of this brief require a *de novo* review by this Court. Id.

ARGUMENT

1.

The PCR court, in flagrant disregard of this Court's remand Order and Petitioner's Lindsey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General's proposed orders of dismissal under circumstances that show the PCR judge failed to consider Lindsey's grounds for PCR and did not even read the proposed order before signing it.

Introduction

Petitioner Marion Lindsey's death penalty PCR case is before this Court for the second time. Eight years ago, after examining the compelling evidence leading to the dispiriting conclusion that the PCR judge did not review the state's proposed order before signing it, this Court attempted to correct what was an embarrassment to the reputation of our state's bar and its lower court judiciary. In an extraordinary step, this Court remanded the case back to the PCR judge to draft his own order and comply with constitutional requirements. Instead of taking advantage of the lifeline offered by this Court, the PCR judge, with the express encouragement of the Attorney General, "doubled down" on the original severe constitutional errors and has again left its mess at this Court's doorstep.

The First PCR Order and this Court's Remand

In Petitioner Lindsey's petition for certiorari filed in 2012, he asserted that the PCR court's signing of a verbatim proposed order submitted by the Attorney General under circumstances that sadly indicated the judge had not read the order before signing it violated state and federal due process. Testimony in this PCR concluded on July 21, 2010. App. 2285. On May 2, 2011, the PCR court requested a proposed order from the state. App. 3537. The court did not request a

proposed order from petitioner at the same time. App. 3537. On August 10, 2011, Judge Burch signed the state's proposed Order of Dismissal. Except for striking through the month on the signature page, the PCR court made no changes to the state's proposed order. App. 3727.

Unlike other cases in which the adoption of proposed orders by a PCR judge were approved, here the vast number of typographical errors in the Attorney General's proposed order that went uncorrected in the signed order cast grave doubt on whether the judge even read the order at all. Petitioner cited examples of the identical errors in his original petition, including:

1. Eight (8) sentence fragments (See, e.g., App. 3569 ("A violent tempered criminal involved in the drug trade."));
2. Thirty-six (36) spelling errors (See, e.g., App. 3550 ("the" spelled "th"));
3. Eight (8) incorrect subject/verb agreements (See, e.g., App. 3596 ("This was not neglect by counsel, but reflect a conscious decision on counsel Bartosh's part on this issue."));
4. Nine (9) incorrect tense agreements (See, e.g., App. 3645 ("she [sic] received information from him that he worked at Burger King where his brothers work but lost that job, then worked for United Cloth in Spartanburg."));
5. Four (4) references to the document as a "pleading" or "argument" (See, e.g., App. 3555 ("within this pleading");
6. Forty-eight (48) capitalization or punctuation errors (See, e.g., App. 3650 (sentence begins without a capital letter: "she described...."))).

The best example of the errors that polluted the first order were found on page 153. App. 3688. That single page contained a sentence fragment, tense agreement errors, and the substitution of the word "shit" for "shift." App. 3688.

Petitioner argued that the action (and inaction) of the PCR court deprived him of due process and a full and fair hearing before an impartial tribunal. Petitioner cited precedent from the United States Supreme Court, this Court, and other state courts criticizing the practice of wholesale adoption of proposed orders in capital PCRs. Jefferson v. Upton, 560 U.S. 284 (2010); Anderson v. Bessemer City, 470 U.S. 564 (1985); Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); Commonwealth v. Williams, 732 A.2d 1167 (Pa. 1999); Dobyne v. State, 805 So.2d 733 (Ala. Crim. App. 2000). See 2012 Pet. Cert. at 105-110.

In Jefferson, the United States Supreme Court dealt with the state PCR court's verbatim adoption of an *ex parte* proposed order. Jefferson, 560 U.S. at 292-93. The proposed order in petitioner's case was not *ex parte*, but does not change the critical portion of the analysis. The Supreme Court remanded the case, stating, "Although we have stated that a court's 'verbatim adoption of findings of fact prepared by the prevailing parties' should be treated as findings of the court, we have also criticized that practice." *Id.* (quoting Anderson, 470 U.S. at 572).

This Court also recognized the inherent problems with proposed orders and, on two occasions prior to the execution of the Order in petitioner's case, warned PCR judges against wholesale adoption of proposed orders. In Pruitt v. State, the Court stated:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992). Despite the Court's admonishment in Pruitt, the practice continued. This Court again addressed this issue in Hall v. Catoe, stating:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). In Hall, the Court found that the evidence indicated that the PCR judge “spent an adequate amount of time reviewing the order before adopting it.” Id.

Other state courts also expressly disapprove of the verbatim adoption of proposed orders in capital cases. “We cannot . . . in this post-conviction case involving a review of the propriety of a death sentence, condone the wholesale adoption by the post-conviction court of an advocate's brief.” Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999); see also Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and *quoting Anderson*).

In its return to petitioner’s 2012 petition, the Attorney General improvidently challenged petitioner’s assertion about the vast number of identical errors. Return, p. 110. Petitioner therefore included in his reply an exhibit with a catalogue of 155 identical errors (hereinafter, the “Catalogue of Errors”). After the reply and Catalogue of Errors were filed, this Court then considered whether to grant certiorari.

On September 30, 2014, instead of granting certiorari, this Court took the extraordinary step of vacating the PCR court’s Order and remanding the case. Supp. App. II. at 1. This Court stated, “In light of the Court’s concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court’s admonishments to PCR judges in [Pruitt] and [Hall], we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt and Hall and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law.” Supp. App. II at 1. This Court’s remand Order was unanimous. Supp. App. II at 1.

The PCR Court and the State Ignore this Court's Instructions Post-Remand

Relying on this Court's strong language and citation to Pruitt and Hall, counsel for petitioner sent a letter to the Attorney General stating, "It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties." Supp. App. II at 3. Counsel for petitioner copied PCR Judge Burch on the letter. Supp. App. II at 3. Nevertheless, on February 26, 2015, Judge Burch's law clerk emailed the parties asking for "Microsoft Word versions of the proposed orders submitted after the PCR hearing." Supp. App. II at 17.

Counsel for petitioner responded within an hour objecting to the submission of proposed orders, citing this Court's remand order. Supp App. II at 20. However, the Attorney General responded two minutes earlier. Supp. App. II at 23. The Attorney General attached the proposed order in electronic format. Supp. App. II at 23. Incredibly, the Attorney General also attached the Catalogue of Errors prepared by petitioner's counsel. Supp. App. II at 23. The Attorney General wrote Judge Burch, "I do not recall making any other corrections to the best of my recollection *to other typographical errors which were pointed out* to the Supreme Court in Mr. Dudek and Mr. Alexander's Reply to the Return to the Petition for Writ of Certiorari *which I am also attaching for your information.*" Supp. App. II at 23 (emphasis added). The Attorney General gave the PCR judge a list (compiled by defense counsel) of errors to fix.

Petitioner filed a "Petition for Extraordinary Relief" in this Court the same day. Supp. App. II at 7. Petitioner argued that the request for the electronic copy of the Attorney General's proposed order showed its intent to violate Hall, Pruitt, and the remand order and simply cut and paste a new order. Supp. App. II at 11-12. Petitioner requested a new PCR hearing before a new judge. Supp. App. II at 12. This Court denied the Petition for Extraordinary Relief. Supp. App. II at 89.

Petitioner's prediction in the Petition for Extraordinary Relief came true. The PCR court filed an Amended Order Denying Post-Conviction Relief which differed only slightly from the original Order. Supp. App. II at 97-283. The primary difference between the original Order and the Amended Order was only the correction of the errors pointed out by petitioner in the Catalogue of Errors. Supp. App. II at 97-283. It contained no substantive changes from the state's proposed order. It contained no new factual findings. It contained no new legal conclusions. It cited no new cases. Almost every sentence had exactly the same wording. The most significant change between the state's proposed order and the Amended Order was that the Amended Order *italicized* case names instead of underlining them.

Petitioner's line-by-line comparison of the Amended Order and original Order did reveal a few other minor stylistic and typographical corrections, including:

- a. Italicizing instead of underlining case names in citations;
- b. Decreasing the point size of the footnotes;
- c. Altering outline formats from bullet points or roman numerals to letters;
- d. Bolding some headings and un-bolding other headings;
- e. Altering spacing in headings.

The Amended Order corrected some typographical errors petitioner did not include in the Catalogue of Errors; however, many typographical errors petitioner did not catch were not fixed. For example, a sentence on page 109 (Supp. App. II at 205) of the Amended Order (and the original Order, App. 3648), reads: "She confirmed that she was not an expert in mental health area."

These "biggest" differences between the original Order and the Amended Order demonstrate the lack of any significant difference at all. Page 58 of the original Order (App. 3593) and page 56 of the Amended Order (Supp. App. II at 152) contain the most significant change between the two

documents that was not suggested in petitioner's Catalogue of Errors. The original Order states: "Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest at prior counsel's feet as current counsel now speculate." App. 3593 (emphasis added). The Amended Order's version is: "Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest on prior counsel's shoulders." Supp. App. II at 152 (emphasis added). The single biggest difference between the two documents is whether "shoulders" or "feet" should bear no blame.

Because his prediction came to pass, petitioner renewed his Petition for Extraordinary Relief in this Court. Supp. App. II at 284. Three days later, petitioner also filed a "Motion for a Stay, for a New PCR Hearing Before a Different Circuit Judge, and, Alternatively, to Alter or Amend the Judgment Pursuant to Rule 59(e)." Supp. App. II at 316-17. This Court requested petitioner to inform it of all pending matters in the case and on March 24, 2016, counsel wrote listing the Renewed Petition and the motion in circuit court. Supp. App. II at 383. The next day, this Court denied the Renewed Petition which left the circuit court a final chance to correct the constitutional flaws inherent in once again adopting the state's proposed order in full. Supp. App. II at 386.

The PCR Court's Hearings on Petitioner Lindsey's Motions

The PCR court held a hearing on petitioner's motions on September 22, 2016. Supp. App. II at 389. Petitioner first argued Judge Burch should vacate the Amended Order and recuse himself with the result being a new PCR hearing before a different circuit judge. Supp. App. II at 392, ll. 14-18. Judge Burch denied the motion to recuse. Supp. App. II at 408, ll. 4-7.

Petitioner stated the facts showing the PCR court failed to read the first order and did not comply with this Court's remand Order or due process. Supp. App. II at 392, l. 19-395, l. 7. The

court violated due process by wholly substituting “the judgment of the Attorney General, an advocate, for the judgment of the Court and deprives Marion Lindsey of his right to a hearing and a decision from a neutral arbitrator.” Supp. App. II at 396, ll. 6-13. Petitioner argued it was now impossible for the PCR court to draft its own order because of the passage of time. Supp. App. II at 395, l. 3-397, l. 9. Petitioner further argued that if the Amended Order were left in place and not reversed on this ground alone, it would be accorded no deference either at this Court or in federal habeas review. Supp. App. II at 394, ll. 6-23.

During the Attorney General’s argument in response, he mentioned petitioner’s letter stating the interpretation of this Court’s remand Order that it forbade solicitation or submission of proposed orders after the remand. Supp. App. II at 396, l. 20-400, l. 5. Judge Burch then stated, “I vehemently disagree with Appellate Defense in making, in making that statement. No where have I read that.” Supp. App. II at 400, ll. 6-9.

The Attorney General failed to point to any substantive difference between the proposed order, the original Order, and the Amended Order. Supp. App. II at 402, l. 1-405, l. 18. Instead, the Attorney General argued, “The order did include some—*it wasn’t an exact replica* of the word document which we submitted to you and it was essentially done after a significant period of time.” Supp. App. II at 402, ll. 1-5 (emphasis added). The state acknowledged Hall’s directive concerning proposed orders, but then argued that because the “significant period of time” between the remand and the issuance of the Amended Order was sufficient for the PCR court’s review, Hall and Pruitt’s requirements “were satisfied for the purposes of the remand.” Supp. App. II at 402, l. 6-403, l. 7. The Attorney General also argued that a presumption should exist that a judge has reviewed a proposed order before signing it, but did not cite any specific evidence or example showing meaningful review. Supp. App. II at 404, l. 10-405, l. 18. Petitioner replied, “I don’t know of any

other way to interpret the Supreme Court's remand order when it's read together with Hall and Pruitt is that it intended the Court to draft its own order. The amended order in place is identical, in all material respects, to the original order, and I don't believe that the Supreme Court sent this case back in a death penalty case merely as a proofreading exercise." Supp. App. II. at 406, ll. 1-11.

The PCR judge stated, "When I received that first set of proposed orders from both sides, I'm known as a speed reader." Supp. App. II at 407, ll. 4-5. Judge Burch took "a couple of courses about speed reading" on the suggestion of Judge Kinard. Supp. App. II at 407, ll. 5-7. Judge Burch stated he "went through those orders probably too hastily and I didn't make any corrections because of that. I admit that. But the base order was exactly as I, as I saw the case that was presented to me." Supp. App. II at 407, ll. 4-11.

Regarding preparation of the Amended Order post-remand, Judge Burch stated that he and his law clerk spent numerous hours "going through all these documents." Supp. App. II at 407, ll. 12-14. The PCR judge then said he left some errors in the document on purpose:

And even after we loaded the final proposed order, and after all my changes and adjustments, after we loaded that, I even instructed [my law clerk] *to not make some corrections on purpose* to prove to everyone that could possibly be concerned on this case that I was involved in redrafting that order and there were many changes made.

As I said, I purposely asked him *to leave some errors in there so I could initial them* to prove that point, and I even took the extra step *to call the Clerk of the Supreme Court* to let them know over there that I had purposely done that to prove what I'm stating.

Supp. App. II at 407, ll. 14-24 (emphasis added).

After hearing arguments on the Rule 59(e) motion, Judge Burch took the matter under advisement. Supp. App. II at 415, ll. 11-13. The PCR court stated, "I'm not gonna put Appellate's

or Applicant's counsel in a precarious situation by asking for proposed orders. I think I can handle that on my own, but, once again, I certainly disagree with any proposition that trial judges can not ask for proposed orders." Supp. App. II at 415, ll. 13-17. The court said that without proposed orders, the judicial system "would lock down" because of a lack of resources. Supp. App. II at 415, ll. 17-21. Judge Burch then asked for "very brief briefs" from the parties. Supp. App. II at 415, ll. 22-23. Petitioner and the state filed supplemental memoranda. Supp. App. 431 and 442.

Almost two-and-a-half years passed between the above-described hearing and the next hearing, held February 20, 2019. Supp. App. II at 493. Petitioner briefly restated the failure to comply with due process and this Court's remand Order. Supp. App. II at 496, l. 14-497, l. 7. Judge Burch again stated his disagreement with petitioner "that we just simply copied something here." Supp. App. II at 497, ll. 8-15. The court explained that the delay was because his law clerk suffered a severe illness and that the court also became ill. Supp. App. II at 497, l. 15-498, l. 3.

The Attorney General restated its position and near the conclusion of his argument, stated, "Now you ask how we can bring this matter to completion. I would submit that to expedite the process, I know he may object, but to ask each side for a proposed order." Supp. App. II at 500, ll. 5-10.

Petitioner again argued that in addition to the original due process concerns regarding the proposed order, that it had been "almost nine years since the last PCR witness testified" and "over 16 years since the crime." Supp. App. II at 501, ll. 13-19. Petitioner argued that due process required a new PCR hearing. Supp. App. II at 501, ll. 6-19. Judge Burch stood by his prior ruling and reasoned that this Court had not "barred asking for proposed orders." Supp. App. II at 501, l. 20-502, l. 11.

Judge Burch then asked for “another brief and along with any proposed order you may want me to review.” Supp. App. II at 502, ll. 12-16. Petitioner objected to the submission of proposed orders. Supp. App. II at 502, ll. 17-23. Petitioner argued that any order regarding the recusal and due process deficiencies concerning the proposed order adoption “needs to come from Your Honor. I don’t believe it is proper for either party to submit a proposed order.” Supp. App. II at 502, ll. 21-22.

On March 26, 2019, the Attorney General submitted via email a Word version and a pdf version of a proposed order denying petitioner’s motions. Supp. App. II at 565. Judge Burch signed the Attorney General’s proposed order without making a single change except adding page numbers. Compare Supp. App. II at 567-606 with App. 607-40.

Discussion

If, after conducting a *de novo* review of the other two issues regarding trial counsel’s deficiencies, this Court determines that Lindsey is not entitled to a new sentencing hearing, due process requires a new PCR hearing. Preserving the reputation of our judiciary, most respectfully, requires a new PCR hearing. Enforcing the integrity of this Court’s Orders and jurisprudence requires a new PCR hearing. This Court did not remand petitioner’s case for proofreading or to whitewash the serious due process violations inherent in the wholesale adoption of the Attorney General’s proposed order. The PCR court refused the opportunity offered by this Court with the remand. The problems that caused the remand—over eight years later—are unchanged. The actions by the Attorney General and the PCR court have respectfully left this Court with no option but to grant Petitioner Marion Lindsey a new PCR hearing if a new sentencing hearing is not granted.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that no citizen shall be deprived “of life . . . without due process of law.” U.S. Const. amends. V, XIV. See also S.C. Const. Art. I, § 3. “The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” Marshall v. Jerico, Inc., 446 U.S. 238, 242 (1980). “The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.” Id. “At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done. . . .” Id. (internal quotations and citations omitted).

Signing a proposed order that will send a man to his death without reading it—or perhaps only “speed reading” it—violates these bedrock tenets of due process. Post-remand, the PCR court corrected the typographical errors found and catalogued by petitioner. It made minor stylistic changes. But in every material respect, the Amended Order is the same as the Attorney General’s first proposed order. The PCR court even—over objection from petitioner—refused to draft its own order denying petitioner’s Rule 59 motion and again adopted the Attorney General’s proposed order without making changes.

“[A] judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record.” Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993). In Ellis, after the court held a hearing, one of the parties submitted an *ex parte* memorandum. Id. at 284-85, 433 S.E.2d at 857. After the filing of the appeal, the other party learned of the *ex parte* submission and obtained a remand from this Court “for factual findings regarding the effect of the *ex parte* communication.” Id. The trial judge found that the memorandum had no effect on his ruling. Id. Despite the trial judge’s finding, this Court reversed.

Id. As part of its reasoning for reversal, the Court stated that one of the judge's findings was unsupported by the record. Id. The Ellis Court found "evidence of judicial prejudice," in part based on the unsupported factual finding could cause a reasonable person to question the trial judge's impartiality. Id. As petitioner argued below, "[i]f a judge's impartiality might be questioned when factual findings are not supported by the record, it certainly follows that a judge's impartiality might be questioned when he likely did not read his first order and ignored the Supreme Court's mandate in issuing a poorly camouflaged version of the first order as an Amended Order." Supp. App. II. 319.

In contrast to the judge's actions here and in Ellis stand the trial judge's actions in Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). In Patel, one of the parties got three state senators to send the judge letters regarding the case. Id. Reviewing the judge's actions, this Court wrote he "acted promptly to alleviate any perception of injustice" by writing to the senators explaining he could not consider their letters and informing all parties of the communication. Id. The judge in Patel was faced with a problem not of his own making, reacted quickly and properly, and this Court affirmed his actions. Id.

Here, the problem is of the PCR judge's own making (at the urging of the Attorney General). Unlike the judge in Patel, the PCR judge here "doubled down" on his initial improper actions by attempting to issue a barely disguised version of the original Order and then also adopting the Attorney General's Rule 59(e) proposed order *in toto*. Despite being given the opportunity by this Court to correct the due process violations, the PCR judge pressed on with the same exact mistakes that caused the 2014 remand.

The PCR court adopted the Attorney General's reasoning that the demands of Hall and Pruitt are satisfied if a significant period of time passes between the submission of the proposed

order and its signing. Supp. App. II at 609-17. If this reasoning were valid, there would have been no need for this Court to remand the case in 2014. Sixty-nine (69) days elapsed between the day the Attorney General submitted its proposed order in June 2011 and the day Judge Burch signed it in August 2011. Supp. App. at 6. App. 3727. Sixty-nine days is adequate time for review of a document; but the important question is whether the proposed order **was actually reviewed at all**.

This Court certainly did not remand because of a lack of time spent with the original proposed order. The Court's remand Order directed compliance with Pruitt and Hall. The operative part of Pruitt and Hall was not the time for review as suggested by the Attorney General and adopted by the PCR judge. The direction of Pruitt and Hall was that judges draft their own orders in PCR cases. This Court's recognition of that failure led to the 2014 remand. It is therefore illogical to argue that the lapse of time **which again produces no changes** can satisfy the remand's requirements. The PCR court's minor stylistic changes and correction of typos from the Catalogue of Errors will not fool this Court.

The wholesale adoption of the Attorney General's proposed Rule 59 order further shows the PCR court's disturbing refusal to comply with the remand Order. Once again, the PCR judge signed the Attorney General's proposed order verbatim with no material changes.¹ And once again, the evidence indicates that the PCR judge may not have even read this proposed order before signing it. Petitioner has identified fifty-nine (59) identical typographical errors in the proposed Rule 59 order and the Order signed by Judge Burch. A list of the identical errors is attached to this brief as "Exhibit A." This error rate (1.475 errors per page) is actually **higher** than the rate of the errors in the 2011 orders that caused the remand (0.82 errors per page). That the PCR court

¹ The only changes are the addition of page numbers and a horizontal line separating footnotes from the main text. No other changes were made.

would commit the exact same mistake indicates no ability or appetite to follow this Court's instructions.

Despite multiple admonitions from this Court, problems with drafting and adopting PCR orders persist. See Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019); Reese v. State, 425 S.C. 108, 820 S.E.2d 376 (2018). "Over the years, we have issued numerous opinions addressing a PCR court's failure to make adequate findings of fact and conclusions of law regarding duly raised issues." Fishburne at 512, 832 S.E.2d at 587. Fishburne recited the history of deficiencies in PCR orders, *citing* and *quoting* from Pruitt. Id. at 512-13, 832 S.E.2d at 587-88.

The Court remanded because the order omitted any reference to a critical issue. Id. Despite the procedural shortcoming of Fishburne's PCR lawyer's failure to file a Rule 59(e) motion, the Court remanded the case because of the importance of the constitutional guarantees of the Sixth Amendment. Id.

The Fishburne Opinion included instructions for how orders in PCR cases should be prepared by the parties and the court. Id. at 516, 832 S.E.2d at 589-90. The Court recognized that the prevailing party often drafts the proposed order (Fishburne was not a capital PCR). Id. Regarding the judge's role, the Court said, "Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised." Id. Fishburne concludes with the reminder that thirty years had elapsed since Pruitt and renewing the hope that problems with PCR orders would cease. Id.

In Fishburne, the remedy was a remand to the PCR court. In Petitioner Lindsey's case, this Court has already remanded the case, but the PCR judge ignored the grave constitutional concerns contained in the remand order and duplicated his original error. The persistence of the state and

the PCR court in defying this Court's instructions shows that reversal is the only option left to this Court.

The flagrant defiance of this Court by the PCR court is similar to the twin reversals in the death penalty cases of State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (hereinafter, "Jones I") and State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) (hereinafter, "Jones II"). In Jones I, this Court held that expert testimony about "barefoot insole impression" did not meet the reliability and scientific requirements for admission, and reversed. Jones I at 571-74, 541 S.E.2d at 818-19. Incredibly, during the retrial, despite this Court's reversal, the state sought and again obtained the admission of expert testimony about "barefoot insole impressions." Jones II, at 548-58, 681 S.E.2d at 586-92. Confronting the same issue again eight years later, this Court wrote, "Based on our decision in Jones I and the lack of any subsequent research developments which would validate 'barefoot insole impression' evidence, we find the trial judge erred in denying Jones's motion to suppress this evidence." Jones II at 550, 681 S.E.2d at 588. This Court again reversed Jones' conviction and death sentence. Just like in Jones II, this Court is again confronted with a lower court making the same error (at the state's urging) despite explicit instructions to the contrary and should reverse to ensure compliance with its decisions.

Even if this Court concludes that due process does not require reversal and a new PCR hearing, this Court should pay no deference to the lower court's findings and review petitioner's appellate issues *de novo*, as they will be reviewed in federal habeas should the lower court's Orders stand. See Jefferson v. GDCP Warden, 941 F.3d 452 (11th Cir. 2019) (hereinafter, "Jefferson II"). The Eleventh Circuit's decision in Jefferson follows from the Supreme Court's remand in Jefferson v. Upton, *infra*.

In the subsequent Jefferson habeas proceeding following the Supreme Court's remand, the federal district court allowed extensive discovery regarding whether the state habeas court's procedures were "consistent with due process." Jefferson II, 941 F.3d at 462-65. The state habeas judge was deceased. Id. at 463. But the district judge allowed the assistant attorney general and the state habeas judge's law clerk to be deposed. Id. at 462-63.

The law clerk could not recall the judge giving any instructions to the attorney general about how to draft the order. Id. at 463. The clerk did not "recall ever receiving or reviewing the proposed order or doing any research on it." Id. at 463-64. The judge never asked the law clerk to "review the order or to do any drafting with respect to the order." Id. at 464.

The Eleventh Circuit found that the state habeas judge "executed an order that, except for the concluding sentence, the date, and his signature on the final page, was identical to the proposed order drafted by the State." Id. In Petitioner Lindsey's case, the only differences were the date and signature.

The Eleventh Circuit also performed a textual analysis of the two orders. Id. at 464-65. The Court found that the state judge "did not correct many misspellings, grammatical errors, or any miscitations to cases." Id. at 464. The Eleventh Circuit then listed twenty-one (21) identical errors in the two documents. Id. at 464-65. Several examples of the errors were: "battery" misspelled as "batty"; "incorrect usage of "state's"; use of "institute" instead of "constitute." Id. In comparison to the **twenty-one (21)** identical errors in Jefferson II, petitioner's Catalogue of Errors identified **one hundred fifty-five (155) identical errors**. Supp. App. II at 358-62. One of the errors used "shit" instead of "shift." App. 3688. Supp. App. II at 361. The district judge in Jefferson II concluded that "the state habeas court had not afforded Jefferson a full, fair, and adequate hearing consistent with due process, and, thus, that the state habeas court's findings were

not entitled to a presumption of correctness.” Id. at 471. The Eleventh Circuit upheld both this finding by the district court and the reversal of Jefferson’s death sentence. Id. at 474, 487.

The Fourth Circuit recently explored Jefferson and the deference due a state court decision in the death penalty case of Burr v. Jackson, 19 F.4th 395 (4th Cir. 2021). The North Carolina post-conviction judge in Burr adopted the state’s proposed order “nearly verbatim” in a 1997 order denying relief. Burr, 19 F.4th at 405-06. The North Carolina Supreme Court remanded because of a new statutory requirement in North Carolina capital cases. Id. at 402. The state court judge issued a new order in 2000. Id.

The Fourth Circuit addressed whether AEDPA’s deferential standard of review would apply because of the adoption of the state’s proposed orders. Id. at 404-07. The court concluded that a deferential standard would apply because of the changes made by the state judge in the 2000 order after remand. Id. The Burr court “carefully compared” the orders and determined that the 2000 order showed “major and minor changes” made by the state judge. Id. The court concluded from this analysis that the 2000 order was no “rubber-stamp” of the state’s proposed order. Id. The Fourth Circuit discussed the criticism of proposed orders in capital cases, stating there were “serious problems” with the practice and that, “Those concerns are particularly pronounced when the state court adopts the State’s proposed order in a capital case, where the need for an adversarial process and a neutral arbiter is at its zenith.” Id. at 407.

The state post-conviction court in Burr showed its consideration of the case as a neutral arbiter through its own work in the post-remand order. The remand in Burr had nothing to do with the adoption of the proposed order and its problems. The judge, even without an explicit direction from the North Carolina Supreme Court regarding the adoption of a proposed order, took proper action and showed that the final ruling came from the court, not the state. Unlike the state judge

in Burr, the PCR judge had the benefit of explicit directions from this Court yet still failed to take seriously the constitutional concerns caused by his earlier adoption of the state's order without reading it.

This Court has the opportunity to remedy both the denial of due process to petitioner and to prevent an embarrassment to our state's judicial system like what happened to Georgia in Jefferson II. The Eighth Amendment requires heightened reliability requirement in death penalty cases and the PCR court's actions in this case undermine any ability to rely on its decisions. See State v. Barnes, 407 S.C. 27, 39, 753 S.E.2d 545, 551 (2014) (recognizing "the Supreme Court's mandate that these trials include heightened reliability.") (Toal, C.J., dissenting). See also Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). This Court's concerns that caused the 2014 remand remain uncorrected. This Court should review petitioner's claims *de novo* and grant a new sentencing hearing, or, in the alternative, reverse and grant Petitioner Lindsey a new PCR hearing.

EXHIBIT A

TABLE OF IDENTICAL ERRORS

Catalogue of Errors in the State's Proposed Order Denying Motion to Recuse and Order Denying Motion to Alter/Amend

ERROR NO.	PAGE NO. OF ERROR	TYPE OF ERROR	TEXT OF ERROR OR EXPLANATION OF ERROR
1	1	Word Omission	"before this [] pursuant to" - "Court" is omitted
2	1	Typographical/Citation	"310 S[.] E[.]2d 254" - commas used instead of periods
3	2	Singular Instead of Plural	"memorandum" instead of "memoranda"
4	2	Word Omission	"post-[]"; "hearing" is omitted, should be "post-hearing"
5	2	Subject-Verb Disagreement	"provide" instead of "provided"
6	2	Singular Instead of Plural	"memorandum" instead of "memoranda"
7	2	Incorrect Word Choice	"and" instead of "an"
8	3	Typographical/Citation	In footnote: Unmatched bracket - "Hall [v. Catoe"
9	3	Typographical/Citation	In footnote: Double comma - "(2004) [.,] and"
10	4	Incorrect Word Choice	"[If] fact, the Court" - "If" instead of "In"
11	5	Typographical	"In Hall, the Court" - "Hall" should be underlined
12	5	Grammatical	"...challenging [his] impartiality" - "his" refers back to petitioner when intention is to refer back to the Judge
13	5	Singular Instead of Plural	In footnote: "memorandum was received" - instead of memoranda were received
14	6	Capitalization	In footnote: "May 2, 2011, [T]he Court"
15	6	Typographical/Citation	Unmatched bracket - "423 S.E.2d 127 (1992),] and Hall"
16	7	Typographical/Citation	"[See] 560 U.S. at 292" - "See" should be underlined
17	7	Inconsistent Citation Style	" <i>See Jones</i> " italicized instead of underlined
18	9	Singular Instead of Plural	"order" instead of "orders"
19	9	Typographical/Citation	"267 Ga. 605, 607-608(3),"
20	10	Incorrect Word Choice	"no judge could never" instead of "no judge could ever"
21	11	Repeated Word	"counsel for Applicant counsel"
22	11	Typographical	"Sixth[.] Eighth[.]" - periods used instead of commas
23	12	Unknown Emphasis	"(emphasis added)" - when no emphasis in preceding sentence/paragraph
24	13	Word Omission	"addressed in [] Order" - "the" is omitted
25	17	Missing Apostrophe	"showing the tape[]s existence" - no apostrophe for possessive
26	17	Subject-Verb Disagreement	"Applicants reasserts" instead of "Applicant reasserts"
27	18	Typographical	"himself[.]" - unnecessary space before comma
28	21	Incorrect Word Choice	"Altering the judge" instead of "altering the judgment"
29	23	Typographical/Citation	"Id." should be underlined
30	23	Word Omission	"it [] clear" - "is" is omitted
31	23	Word Omission	"that [] Court" - "the" is omitted
32	23	Nonsensical Sentence	"To the contrary..." - Run-on, nonsensical sentence
33	24	Typographical	In footnote: "had feed" instead of "had fed" - Repeated error from original Order when quoting the original Order
34	24	Nonsensical sentence	In footnote: "he was running drugs" - incorrect word/verb usage make sentence unintelligible
35	25	Word Omission	"that [] probative" - "the" is omitted
36	25	Grammatical	In footnote: "questions it[] relevance" - missing " 's " for possessive
37	25	Grammatical/Tense	"violate" instead of "violated"
38	26	Nonsensical Sentence	"the Court addressed the limited ..."
39	26	Typographical	Block quotation mistakenly begins with a period

40	28	Grammatical	"record's" - improper use of apostrophe
41	28	Typographical	"pages 13-14[,] The proper" - comma instead of period
42	30	Word Usage	"because...and therefore" - improper word usage with clauses
43	30	Lack of possessive	"defense team[] consideration" - should be "team's"
44	31	Grammatical/Tense	"he not specifically retains" - should be "he [did] not specifically retain[]"
45	32	Typographical	"basis. They" - period instead of comma
46	32	Typographical/Citation	"[See] <u>Strickland</u> " - "See" should be underlined
47	32	Incorrect Word Choice	"harmless" instead of "harmful"
48	32	Grammatical	"prosecutor lay in wait" - unintelligible
49	33	Typographical/Citation	In footnote: "[See] <u>Morva</u> " - "See" should be underlined
50	33	Incorrect Use of Possessive	"experts' core opinion" - should be "expert's core opinion"
51	33	Lack of Possessive	"Lindsey[] own" - should be "Lindsey's"
52	36	Typographical/Citation	" <u>Belmontes</u> , 130" - unnecessary space after <u>Belmontes</u>
53	37	Incorrect Word Choice	"than" instead of "that"
54	37	Typographical/Citation	"Id." should be underlined
55	37	Typographical/Citation	"Id." should be underlined
56	38	Typographical/Citation	"In [Bowman]" - "Bowman" should be underlined
57	39	Singular Instead of Plural	"inmate" instead of "inmates"
58	39	Singular Instead of Plural	"incident" instead of "incidents"
59	40	Subject/Verb Disagreement	"Motion [is] not" - should be "are"

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial especially where counsel did not hire a social work expert who could testify regarding petitioner's miserable upbringing, where counsel hired an inexperienced forensic psychiatrist one month before trial, and then failed to prepare her to testify to petitioner's considerable prejudice.

Introduction

Trial counsel Michael Bartosh waited until one month before petitioner's capital trial to begin preparations. Two years elapsed between petitioner's arrest and his trial. In those two years, Bartosh failed to: (1) assemble his trial team; (2) hire and prepare a psychiatrist; (3) hire an investigator; (4) obtain petitioner's medical, school, and incarceration records; (5) hire a social worker who could investigate petitioner's miserable upbringing; and (6) interview and prepare witnesses. The ABA Guidelines for Death Penalty trials advise, and the Sixth, Eighth, and Fourteenth Amendment require, that all of these things should have been timely and thoroughly done.

With only a month to prepare, the best Bartosh could do was hire a psychiatrist, Dr. Margaret Melikian, who had little to no experience with capital cases and an investigator, Lenora Topp, who had never worked on a mitigation case. App. 2883, ll. 12-18; App. 2405, ll. 19-22. The investigator scrambled to get records and interview the few witnesses she could locate. App. 2429, ll. 10-25. The psychiatrist had trouble obtaining the records she needed from Bartosh. App. 2882, ll. 4-11. She did not have time to read the records she had. App. 2908, ll. 19-23. She only saw petitioner one time, for a total of two and a half hours. App. 2882, ll. 21-25.

Bartosh only spent thirty minutes over the telephone preparing the psychiatrist for trial. App. 2900, ll. 8-12. When she knew she could not be ready for trial, Bartosh left it to her—a non-lawyer—to convince the trial judge (now Justice Few) in a telephone conference that a continuance was necessary. App. 2892, l. 1 – 2894, l. 7. Bartosh did not even bother to participate in the telephone call with the trial judge. App. 2893, ll. 1-8. No continuance was formally requested, much less granted. Supp. App. II 181; App. 3622. Bartosh also failed to communicate key facts to the psychiatrist and as a result, she was utterly destroyed on cross-examination. Bartosh never obtained a social worker or a prison adaptability expert. He lost a key piece of mitigating evidence. He did not prepare his witnesses to ask for mercy or object when the trial judge restricted them from asking for mercy. App. 2078, ll. 15-20. The trial ended in a sentence of death. State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007), *cert. denied*, Lindsey v. South Carolina, 552 U.S. 917 (2007).

At the PCR hearing, petitioner presented a mountain of mitigating evidence that Bartosh should have used at trial, including a social work expert and a prison adaptability expert. Dr. Melikian and Lenora Topp testified about the woeful preparation. Dr. Melikian said she has never seen such poor preparation in the fifteen to twenty death penalty cases she has worked on *since* petitioner's trial. Dr. Melikian also testified that her opinions would have changed had she been better prepared and spent more time with petitioner. Petitioner's family members testified in great detail about their family's history of violence and mental illness. A social worker, Jan Vogelsang, testified about the patterns in petitioner's family that contributed to his depressed and dysfunctional mental state at the time of the crime. All of the information necessary to present a

full and complete case in mitigation was available to Bartosh. He simply failed to begin work in time to accomplish even a minimally adequate defense.²

Any of the evidence presented at the PCR hearing could have made a difference in this trial, particularly the testimony of Rob Tullis, petitioner's attorney before the crime, who would have testified as to the conflict between petitioner and his wife and petitioner's depressed state immediately before and after the shooting. The only statutory aggravating factor was simply that petitioner committed the crime in a public place, the parking lot of the local police station. S.C. Code Ann. § 16-3-20(C)(a)(3). This converted a domestic homicide into a capital offense. Whether this code section even applied to petitioner's case was argued on direct appeal. Had petitioner shot his wife at her house under the exact same circumstances, he would not have been death eligible. With a case that met only the bare minimum of qualifications under the statutory aggravator, a strong mitigation presentation would have tipped the scales in favor of a life sentence. Because of trial counsel's failure to present a full, competent, and coherent mitigation case, petitioner's constitutional rights were violated.

Relevant Facts

The crime in this case was committed on September 18, 2002. No evidence exists showing any preparation by Bartosh for petitioner's trial until nearly two years later when Doug Brannon was hired as second chair on March 5, 2004. App. 3588. No significant work was done until April 16, 2004, when Lenora Topp was hired as a mitigation investigator. App. 2944. The trial began one month later, on May 17, 2004. App. 1.

² Bartosh died after petitioner's trial and before the PCR hearing. The other members of the trial team testified that Bartosh was solely responsible for the sentencing phase and they played no role in it. App. 2310, ll. 1-13; App. 2521, ll. 14-17.

A timeline helps illustrate the complete lack of preparation by the defense team:

DATE

EVENT

September 18, 2002

Petitioner was arrested. Supp. App. II 98; App. 3537.

September 19, 2002...

...until...

NO EVIDENCE OF ANY PREPARATION

...March 4, 2004

March 5, 2004

Brannon was appointed as second chair.
Supp. App. II 148; App. 3588

April 6, 2004

Bartosh first called Dr. Margaret Melikian,
a forensic psychiatrist, about examining petitioner.
App. 2881, l. 24 – 2882, l. 4.

April 16, 2004

Mitigation investigation began when Topp
was hired and began collecting records and
interviewing witnesses. No investigation
was done nor were any records collected
prior to Topp's involvement. App. 2944;
App. 2393, ll. 8-18; App. 2429, ll. 10-20.

April 28, 2004

Dr. Melikian first received records from the
defense. App. 2882, ll. 5-14.

May 4, 2004

Dr. Melikian met petitioner for the first and
only time. The meeting lasted two and a half
hours. App. 2882, ll. 21-25.

May 15, 2004

Petitioner's mother was interviewed for the
first time by the defense. App. 2944; App.
2398, ll. 12-25.

May 17, 2004

The trial began. Supp. App. II 99; App. 3538.

Testimony at the PCR Hearing Regarding Lack of Preparation

The Lawyers

Doug Brannon was second chair. App. 2300, ll. 8-14. This was Brannon's first and only capital case. App. 2296, l. 24 – 2297, l. 1. Bartosh delegated the guilt phase to Brannon while Bartosh was solely responsible for sentencing. App. 2300, ll. 8-14; App. 2310, ll. 1-13. Brannon had no involvement in the mitigation investigation and was not given any records, memoranda, or any other information. App. 2312, ll. 9-14.

Karen Quimby worked as third chair. She started approximately one month before the trial. App. 2517, ll. 9-14. Up until March 2004, Quimby was working as third chair in another death penalty case. App. 2516, l. 22 – 2517, l. 14. She was also lead counsel in the capital trial of Frederick Antonio Evans in early November 2004. App. 2517, l. 20 – 2518, l. 10. She carried a caseload of approximately 500 cases. App. 2518, ll. 21-25. Quimby's "limited role" was to be a liaison between Bartosh and Lenora Topp, the mitigation investigator, and to organize the file. She had no knowledge concerning trial strategy. App. 2520, l. 4 – 2521, l. 17.

The Mitigation Investigator – Lenora Topp

Lenora Topp served as the mitigation investigator. She did not testify at trial. Topp had never been a mitigation investigator prior to this case. App. 2405, ll. 19-22. She only interviewed petitioner twice (both without Bartosh present). App. 2409, ll. 16-19; App. 2426, l. 25 – 2427, l. 6. Her major job was to gather records. App. 2319, l. 19. By the time of the PCR hearing in 2010, Topp was no longer an investigator and sold batteries online. App. 2390, ll. 21-24.

Topp's billing invoice was admitted as Applicant's Exhibit No. 2 at the PCR hearing. App. 2944-2945. It shows her first involvement was April 16, 2004, one month prior to trial. App.

2944; App. 2393, ll. 8-18. On her first day on the job, she had to get petitioner to sign a medical records release because defense counsel had yet to obtain one. App. 2944; App. 2394, ll. 5-18.

Before trial, Topp spent only forty hours working on the case. App. 2396, ll. 12-15. She “did not have sufficient time to do the work that was needed.” App. 2397, ll. 11-12. In other death penalty cases since Petitioner’s trial, Topp spent up to three years on mitigation investigations. App. 2397, ll. 13-16. Trial counsel never asked Topp to generate a genogram, family tree, or any other demonstrative exhibit routinely used in capital cases that could show the jury the Lindsey family’s background. App. 2397, ll. 19-23.

Topp conducted the defense team’s first interview with petitioner’s mother only two days before trial, on May 15, 2004. During this interview, Topp learned about petitioner’s childhood physician, Dr. Barry Henderson. Topp unsuccessfully attempted to obtain medical records from Dr. Henderson and could not determine whether he would be a good defense witness until after the trial. App. 2398, ll. 8-25; App. 2400, ll. 6-19. Dr. Henderson told Topp after the trial that he would have been glad to testify for petitioner. App. 2400, l. 24 – 2401, l. 6. Dr. Henderson died before the PCR hearing. App. 2402, ll. 21-24.

Topp testified that during any investigation, it is important for the investigator to have time to develop relationships with witnesses. App. 2399, ll. 1-5. It takes time for witnesses to trust her and give her information. Witnesses’ memories sometimes work slowly and they process questions and remember answers after the end of an interview. App. 2399, ll. 6-25.

Topp was still seeking records even during the course of the trial. App. 2403, l. 23 – 2404, l. 3. She did not obtain medical releases from petitioner’s aunts, Robin Pilgrim (a/k/a Robin Keith) and Bessie Smith, until during the trial (May 21, 2004 and May 24, 2004, respectively). App. 2404, ll. 4-16; App. 2951-2952. She never got any medical records related to Robin Pilgrim or

Smith. App. 2404, ll. 14-16. Bartosh never asked her to get any family records other than petitioner's. App. 2404, ll. 17-19.

Topp's quest for records prevented her from interviewing witnesses:

[B]ut as far as being asked to interview any of the family members or spend time, gosh, I was more involved in trying to get records and get them to them in time and they had no records at all as far as I know. No medical, no mental health, no social services. They had none. No school records.

So, I had to go to almost every location more than one time and pick up records or send, give them subpoenas and wait. And, so, as far as the rest of the, that normally would go with my work as a mitigator, there wasn't time to do it and they didn't ask me to do it. . . . So, I thought someone else was taking care of it. I could only follow the direction of the attorney at that point. There was no time to argue with them about what they needed to do. They had no time.

App. 2429, ll. 10-25. She "didn't do any, any witness interviews at all. It was trial. They were here coming and going." App. 2436, ll. 21-25.

Topp informed Bartosh about potential mental health problems in the Lindsey family. She suggested to Bartosh that he subpoena family members who were currently using mental health programs such as Bessie Smith, Steven Pilgrim, Paul Pilgrim, and Virginia Lindsey, but it was too late to do anything about it. App. 2439, ll. 5-24.

The Psychiatrist – Dr. Margaret Melikian

At the sentencing proceeding, Bartosh called Dr. Margaret Melikian as an expert in forensic psychiatry. Bartosh did not retain her until approximately a month before trial. App. 2882, ll. 3-11. She did not receive any medical records from Bartosh until April 28, 2004, about three weeks before trial. App. 2882, ll. 4-11. Dr. Melikian only had one visit with petitioner (May 4, 2004) that lasted a mere two-and-a-half hours. App. 2882, ll. 21-25. Dr. Melikian knew she could not be prepared for trial. Bartosh left it to her to persuade then-Judge Few during a conference call to

postpone the case. App. 2892, l. 1 – 2894, l. 7. **Bartosh did not even participate in the call.** App. 2893, ll. 1-8.

Because she was unprepared, Dr. Melikian was completely destroyed on cross-examination by the solicitor. The state discredited Dr. Melikian because she had not seen any documentation to corroborate what petitioner had told her. App. 2026, ll. 16-22. Most damaging, the state blindsided Dr. Melikian concerning whether petitioner was malingering. Petitioner described to Dr. Melikian an “imaginary friend” named “Jimmy.” Bartosh never told Dr. Melikian the important detail that the first mention of Jimmy was on the day petitioner was served with the state’s Notice of Intent to Seek the Death Penalty. App. 2017, l. 2 – 2018, l. 25. Once Dr. Melikian admitted she did not know this key fact, she crumbled and her testimony was damaging to petitioner’s defense. App. 2017, l. 2 – 2018, l. 25.

The Neuropsychologist – Dr. Tora Brawley

Bartosh failed to call Dr. Tora Brawley, a neuropsychologist, at trial. App. 2355, ll. 6-9. Dr. Brawley previously worked as a court appointed examiner in forensic cases at William S. Hall Institute. App. 2355, ll. 10-14. She testified at the PCR hearing that Bartosh first contacted her on April 12, 2004. App. 2356, ll. 6-7. He did not provide her with any of petitioner’s records. App. 2356, ll. 13-16. He only told Dr. Brawley that petitioner had a history of head trauma, including a gunshot wound³ and a car accident. Bartosh also mentioned that there was a question of whether or not petitioner was malingering. App. 2356, ll. 15-22. However, he never told Dr. Brawley that several of petitioner’s family members suffered from depression. App. 2380, ll. 4-7.

³ Petitioner suffered a self-inflicted gunshot wound to the head in 2002 after the shooting in this case. App. 2358, ll. 12-13.

During her only visit with petitioner on April 27, 2004, Dr. Brawley performed “an extended clinical interview and a battery of neuropsychological tests.” App. 2356, ll. 8-25. Petitioner told Dr. Brawley that, as a child, he had fallen on the steps and hit his head several times; he was run over by a car at age two and had surgery on his face; he had been in two or three motorcycle accidents; had a history of migraine headaches; and suffered a self-inflicted gunshot wound in 2002 (the shooting). App. 2358, ll. 6-14.

Dr. Brawley had no records to corroborate what petitioner told her. Concerning his educational background, petitioner incorrectly reported to Dr. Brawley that he had to repeat the first and seventh grade, finished the ninth grade, and quit the tenth grade. However, petitioner’s school records showed he failed the first grade, failed the eighth grade three times, was advanced to the ninth grade at the age of sixteen or seventeen, and then dropped out of school. App. 2805, l. 14; App. 2806, l. 20 – 2807, l. 1. Petitioner also said that he had speech therapy and learning classes because his speech was not good and he had problems spelling. App. 2358, ll. 15-23.

Petitioner told Dr. Brawley about a suicide attempt when he was twelve and another suicide attempt in 2001. App. 2359, ll. 2-6. When he was twelve, petitioner was hospitalized after taking an overdose of pills when his mother told him she did not love him. App. 2372, ll. 2-8. Petitioner’s 2001 suicide attempt was provoked by problems with his wife and petitioner’s cousin had to take a gun away from him. App. 2372, ll. 9-11. Petitioner also told Dr. Brawley about a third suicide attempt in August of 2002 when he planned to drive his truck off a cliff. App. 2372, ll. 12-15.

Dr. Brawley gave petitioner nineteen neuropsychological tests. App. 2373, ll. 4-18. Based on her examination and testing, Dr. Brawley found that petitioner’s brain did not function normally. She found he suffered from the following impairments: severely impaired speed of mental tracking; severely impaired verbal fluency; severely impaired confrontation naming; below

average immediate verbal memory; severely impaired verbal learning ability; and impaired ability to copy and recall a complex figure. App. 2360, l. 4 – 2362, l. 6. Dr. Brawley could not tell what caused these brain dysfunctions in petitioner because she had no medical records or school records to review and there were “multiple possibilities [of] damage to the brain.” App. 2362, ll. 10-18.

Dr. Brawley could not remember why Bartosh did not call her to testify. During a half hour consultation, Dr. Brawley verbally shared with Bartosh the results of her testing and interview. App. 2375, ll. 10-15; App. 2365, ll. 12-19. Bartosh did not ask for a written report. However, Dr. Melikian did ask for one. App. 2365, ll. 20-25. Dr. Brawley recommended to Dr. Melikian that medical and school records be obtained because she had not been provided them. She also recommended that interviews be conducted for collateral sources of information. App. 2366, ll. 1-17. Dr. Brawley eventually received some records after she had written her report and was told she was not going to testify. She did not look at them. App. 2366, ll. 18-24.

Failure to Preserve Evidence and Present Testimony from Rod Tullis

Rod Tullis practiced law in Spartanburg. He testified at the PCR hearing, but not at trial. Tullis began representing petitioner in the late 1990s. App. 2447, ll. 11-14. Over time, Tullis got to know both petitioner and his wife, Nell, very well. App. 2447, l. 21 – 2448, l. 5. Before the shooting, petitioner had spoken with Tullis regarding his domestic problems with Nell. App. 2448, l. 12 – 2449 l. 2. Petitioner’s biggest concern was access to his children. App. 2450, ll. 7-10. Petitioner and Tullis discussed Nell’s extramarital affair. He was concerned about how Nell’s new boyfriend would affect his relationship with his sons. App. 2451, ll. 12-21.

On the day of the shooting, Tullis left his office around noon. App. 2453, l. 24 – 2454, l. 3. Tullis heard about the shooting on the news and immediately went back to his office to prepare a notice of representation. He listened to his answering machine and heard a message from

petitioner that was recorded after Tullis left his office but before the shooting—very likely within an hour of the shooting. App. 2453, l. 3 – 2454, l. 3. Tullis described the message at the PCR hearing:

I heard Mr. Lindsey’s voice there where he was trying, he was calling my name and was asking for me to pick up the phone, and that he needed to talk to me, that – – he sounded very distressed, very distraught. He – it was a disturbing tape to listen to because of, of how he came off emotionally on this, on this tape. . . . He wasn’t angry or agitated at all. That was what was so frightening about it. That he was very distraught, very emotionally down and upset. Not manic at all.

App. 2453, l. 17 – 2454, l. 11. The tape was a “mini, micro cassette.” App. 2453, ll. 15-17.

After the shooting, petitioner’s mother gave Tullis several suicide notes petitioner wrote weeks before the shooting. App. 2456, ll. 5-18; App. 2479, ll. 9-14; App. 2991. Petitioner wrote his mother and brother that they “won’t have to worry anymore” about him and Nell that she should “always know I love you and the boys.” Petitioner wrote his son, “If I couldn’t be with y’all as a family I don’t want to be here anymore.” App. 2985. Tullis gave Bartosh his entire file, including the original answering machine microcassette and the suicide notes. App. 2456, ll. 5-18. At some point, Tullis also described the tape to the prosecution. App. 473, ll. 19-25. Brannon testified that by the time he became involved, the defense did not have this tape. App. 2350, ll. 12-16. Brannon never saw the suicide notes. App. 2307, ll. 5-18.

It now seems apparent that Bartosh lost the Tullis answering machine tape, which could have countered the state’s powerful audiotape of the actual shooting.⁴ Applicant’s Exhibit No. 26 was entered into evidence during Quimby’s testimony. It is not the Tullis tape. App. 2527, l. 24

⁴ Nell called 911 from the car in which she was riding before the shooting. App. 1501, l. 18 – 1503, l. 19. She remained on the line with 911 while the car drove to the Inman police station. App. 1501, l. 18 – 1503, l. 19. The shots can be heard on the tape as well as the screams of the children that were in the car. The state played the tape of the shooting for the jury. App. 1515, ll. 2-11; State’s Exhibit No. 21.

– 2528, l. 5. Quimby testified that she had no specific memory of listening to Exhibit No. 26 before the PCR hearing, but confirmed the handwritten sticky notes on Exhibit No. 26 are in her handwriting. App. 2527, l. 8. No transcript of Exhibit No. 26 exists in the record. Appellate counsel have listened to Exhibit No. 26 and neither it nor its contents match Tullis’ description of petitioner’s message. Exhibit No. 26 is a full size audiotape, not a microcassette. It contains six separate messages. Much of the tape is inaudible, but the voice is petitioner’s. Petitioner mentions several times “being holed up in a hotel.” A list of discovery items received by the defense includes an answering machine tape recovered from Nell’s mother, Carol Wright. In all likelihood, this is the same tape as Exhibit No. 26.

After petitioner was released from the hospital to the jail following the shooting, Tullis visited petitioner at the jail. App. 2456, l. 25 – 2457, l. 2. Tullis noticed petitioner’s head was bandaged and still bleeding. App. 2457, ll. 3-4. Petitioner told Tullis that he had been bashing his head against the concrete wall in his cell, had ripped out his stitches, and was attempting to kill himself. App. 2457, ll. 7-11. Tullis reported this to the jailers and they put petitioner on suicide watch. App. 2457, ll. 12-17. Tullis testified, “He was trying to die and he was not shy in telling me that he wanted to die and he was trying to die.” App. 2458, ll. 3-4. Petitioner’s demeanor grew worse in the weeks after the shooting. App. 2457, ll. 17-24. Tullis also noticed that petitioner lost weight. App. 2457, l. 25 – 2458, l. 4.

The defense did not subpoena Tullis to testify at trial. App. 2460, ll. 19-20. Tullis “was a bit surprised” that none of the attorneys for petitioner contacted him about testifying because “I was probably the best witness as to state of mind that there was since I was the one who had spent the most time with Marion Lindsey and was more involved with this and his family and his wife than anyone else in the courthouse....” App. 2462, ll. 9-13.

Failure to Interview and Prepare Witnesses and Family Members

The Paramedic – Vincent Bell

Vincent Bell was a paramedic with Spartanburg EMS. App. 2381, ll. 5-10. Bartosh did not call him to testify at trial. He testified at the PCR hearing. Bell responded to the Inman Police Department on the day of the shooting. He attended to petitioner at the scene. App. 2382, ll. 14-16. Petitioner did not originally cooperate with treatment and told the paramedics that he wanted to die and they should let him die. App. 2384, ll. 4-8. Bell testified regarding his conversation with petitioner:

Q. All right. What type of questions did you ask him that evening?

A. I asked him basically what happened. He initially said that he shot himself and then my partner, Susan, had asked him, you know, the same type of question, and he said he had shot himself, let me die, and then during that time he also turned around and said – I said, I asked him again what happened. He said I shot myself and then I shot my wife.

App. 2383, ll. 9-16. The jury never heard Bell's testimony that petitioner said he wanted to die.

The Burtons

Bill Burton testified both at trial and at the PCR hearing. App. 2588, l. 23 – 2589, l. 1. Growing up, Burton was a lifeguard at a pool and became friends with petitioner after teaching him how to swim. Burton said that prior to the trial, he tried to call Bartosh several times but was never able to speak with him. App. 2589, ll. 10-18. Burton never had a one-on-one discussion with Bartosh. App. 2589, ll. 21-23. Burton's sole preparation for trial was the same day as his testimony when he met with Bartosh along with a group of other witnesses. They were only told to say what they knew about petitioner. App. 2589, ll. 18-23. This was the entire extent of Bartosh's preparation of these witnesses. Burton explained it:

Q. How [were] the general questions posed to you and to what your role was, why were they calling you?

A. Say what you know about Marion was pretty much the scope of it. It was clear – I left that meeting with the general impression that the, the case was unorganized and I was very concerned about it, that I didn't understand the logic of– the, the direction that the defense was going, and I, I'm not an experienced person in this. But just as a layman, I wanted to understand what was the strategy and what were the facts and how could that best be used to defend the, to defend Marion and hopefully avoid the death sentence, but I didn't have a very good feeling about preparation.

App. 2590, l. 25 – 2591, l. 14.

Burton did not ask the jury for mercy during his testimony at trial. App. 2067, ll. 19-23. At the PCR hearing, Burton said he certainly would have asked for mercy had the question been posed to him. App. 2600, ll. 3-8.

Burton's mother, Patsy Burton, did not testify at trial but did testify at the PCR hearing. She was on the witness list for the trial, but was not aware of that fact until the PCR hearing. App. 2601, ll. 16-24. She testified that petitioner frequently came to her house to fish in their family's pond and she developed a relationship with him during that time. App. 2602, l. 22 – 2603, l. 24. Had she been called as a witness she "would certainly have asked for mercy." App. 2607, ll. 4-5.

Petitioner's Mother – Virginia Lindsey

Virginia Lindsey, petitioner's mother, testified both at trial and at the PCR hearing. She testified that the only pretrial meeting she had with the defense team was two weeks before the trial when Topp and Brannon visited her for one hour. App. 2648, l. 4 – 2649, l. 5. She stated that during the eighteen months that elapsed between the shooting and that visit, no one from the defense team ever contacted her. App. 2650, ll. 1 – 14. Ms. Lindsey testified about the preparation as follows:

Q. And then, based on that one hour meeting, you were then called to testify both at the [guilt] phase and at the sentencing phase, correct?

A. Yes.

Q. During that hour long meeting, did you feel like you had been prepared enough to testify during Marion's trial?

A. No, I didn't think I had been prepared enough cause it wasn't enough time. They didn't get me, ask me enough questions and stuff about it and nothing. I don't think it really was.

Q. Did you feel you had enough time to give them background information about Marion and your family and his history?

A. No, which they didn't ask me nothing about that. But I don't think I had enough time to give them all that stuff before the trial. Bartosh or either, either Lenora I didn't, Mrs. Topp.

App. 2649, ll. 7-23. The defense did not ask her to sign releases to obtain her medical or school records. App. 2650, ll. 15-19.

Petitioner's Family

Petitioner's aunt, Bessie Smith, testified at both the trial and the PCR hearing. The only conversation she had with the defense team was about a week before trial. This conversation lasted about thirty to forty minutes. App. 2700, ll. 10-20. She did not tell them much about petitioner's family history during that meeting. App. 2701, ll. 6 -9. Smith refused to answer personal questions about herself "because I wasn't the one on trial." App. 2701, ll. 10-16. She did not ask the jury for mercy at trial.

Steven Pilgrim, petitioner's uncle, testified at both the trial and the PCR hearing. The only time he met with the defense team was for about thirty minutes during a group meeting the day before the trial started. App. 2726, ll. 1-22. He was never asked to sign a medical records release, even though he had a history of mental illness. App. 2727, ll. 2-19. Pilgrim testified he was not prepared to take the stand and that the attorneys never asked him anything about the events leading up to the shooting or petitioner's personal history. App. 2728, ll. 6-17. Incredibly, the defense team told Pilgrim **not** to ask for mercy. App. 2728, l. 25 – 2729, l. 10. Pilgrim explained:

Q. One last little topic we need to talk about. Did they prepare you to or ask you if you wanted to address the jury and ask for mercy for Marion?

A. Yes, they did.

Q. All right. What was that conversation like? How did they prepare you to, to ask that of the jury?

A. They, they told me not to do that. They told me not to ask the jury for mercy.

Q. If you had been given the opportunity to ask that jury for mercy for Marion, would you have done so?

A. I would.

App. 2728, l. 25 – 2729, l. 10 (emphasis added).

Timothy Sims, petitioner's younger brother, did not testify at trial, but testified at the PCR hearing. No one from the defense team ever contacted him. App. 2755, ll. 10-13. Sims attended the entire trial. App. 2756, ll. 13-14. During the trial, he approached Brannon and asked to testify because he knew "more about Nell and Marion than anybody." App. 2756, l. 18 – 2757, l. 5. Sims was not called as a witness. He said at the PCR hearing that he would have asked the jury for mercy. App. 2757, ll. 19-21.

Failure to Hire Social Work Expert

The defense team failed to hire a social work expert who could investigate and congeal petitioner's history and his family's history for the jury. To show what should have been done during the trial, PCR counsel hired Jan Vogelsang and qualified as an expert in clinical social work "with expertise in bio-psychosocial assessments" at the PCR hearing. App. 2779, ll. 1-4. She is board certified in social work, licensed in South Carolina, and a member of several organizations and boards. App. 2767, l. 1 – 2768, l. 8.

Vogelsang explained that a “bio-psychosocial assessment is a clinical social work method of gathering extensive information on an individual in an effort to understand how they came to their current circumstances.” App. 2770, l. 25 – 2771, l. 3. The social worker conducts interviews, reviews documents both related to the subject and his family members, and consults with other professionals who have assessed the subject. App. 2771, ll. 3-9. Such investigations, which usually take between eight months to a year to complete, are important because “there are patterns of behavior that tend to run in families.” App. 2774, ll. 4-5; App. 2778, ll. 17-18.

Vogelsang conducted a biopsychosocial assessment which provided a comprehensive history of petitioner and his family. App. 2779, ll. 7-9. As part of her assessment, she interviewed petitioner, Virginia Lindsey, Bessie Smith, Steven Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim, Lenora Topp, Rod Tullis, Dr. Margaret Melikian, and Dr. Tora Brawley. App. 2779, ll. 14-18. She also reviewed Lenora Topp’s records; Virginia Lindsey’s medical records and criminal history; Bessie Smith’s mental health records and prior criminal history; Steven Pilgrim’s mental health records, medical records, and prior criminal history; Timothy Sims’ school records and Department of Corrections records; Robin Pilgrim’s medical and prison records; and voluminous records pertaining to petitioner himself. App. 2779, l. 22 – 2781, l. 11. She consulted with Dr. Melikian, Dr. Brawley, and read petitioner’s records from the William S. Hall Institute. App. 2781, ll. 12-14. She also visited parts of the community where petitioner was raised. App. 2781, ll. 18-19.

Based on information she compiled, Vogelsang testified about patterns of behavior she discovered in petitioner’s family. App. 2782, ll. 4-16. Vogelsang found patterns of abandonment; substance abuse; “mental, emotional, and behavioral impairments;” sexually inappropriate

behavior; and criminal domestic violence charges, assaults, and incarcerations. App. 2784, l. 24 – 2789, l. 3. She also saw a pattern of abandonment. App. 2789, ll. 1-3.

Vogelsang learned that petitioner's uncles used him as a courier in their drug dealing. App. 2882, ll. 4-21. With an absent mother, by the eighth grade, "Marion hit the streets." App. 2806, ll. 9-19. Vogelsang found a pattern of mental health problems in the family. Like petitioner, Virginia Lindsey, Robin Pilgrim, and Bessie Smith all attempted suicide. App. 2814, ll. 7-16. Steven Pilgrim began treatment in the 1990s for anxiety, depression, and panic attacks and "seems to be preoccupied with thoughts about somebody putting the root on him or putting something in his drink that will cause his penis to draw up inside him." App. 2817, ll. 10-19. Vogelsang learned that almost everyone in petitioner's family believes in magical roots. App. 2817, ll. 20-23. She testified that the idea of roots confused petitioner and further decreased his ability to solve problems during family conflicts. App. 2818, ll. 9-22.

The pattern of violence in petitioner's family was extreme. His uncle Willie "went to prison for fifteen years for beating a man to death." App. 2807, l. 25 – 2808, l. 1. His uncle Paul got into trouble with drugs and violent behavior. App. 2808, ll. 1-2. His aunt Robin ended up in prison. App. 2808, ll. 2-3. Petitioner lived under a "constant threat of harm." App. 2808, ll. 21-23. He watched his uncles burn his cat alive, beat their girlfriends, fight each other, and fight with other people in the community. App. 2808, l. 25 – 2809, l. 7. Petitioner saw his mother shoot at her boyfriend, Roger Sims. App. 2809, ll. 13-14. Many members of the family were charged with assault and battery with intent to kill and criminal domestic violence.⁵ App. 2809, ll. 10-13.

⁵ Vogelsang compiled a list of family members' arrests and convictions: Virginia Lindsey (criminal domestic violence); Willie Pilgrim (criminal domestic violence, assault and battery with intent to kill, assault and battery of a high and aggravated nature); Steve Pilgrim (criminal domestic violence, assault and battery with intent to kill); Paul Pilgrim ("shot three cousins"); Bessie Smith

One of the most important skills learned by children during their developing years is how to be resilient in the face of adversity. App. 2796, ll. 4-11. No one in petitioner's home helped him through these important developmental stages. App. 2796, ll. 12-14. This left petitioner as a child who had to guess at how to behave. App. 2796, ll. 15-19. Vogelsang opined that without learning resiliency as children, as adults they will be unable to make good decisions under stress. App. 2798, ll. 3-8. She described the lack of this skill in the Lindsey family: "It seemed to me one of the most significant behaviors in this family was that no one saw any options for resolving problems in relationships other than violent options. That seemed to be the only options anyone felt were available." App. 2799, ll. 16-20. She testified, "Marion was living, from the day he was born, he was living every day, every week, every evening, every month, every year with this family system in which he was witnessing a constant threat of harm." App. 2802, l. 23 – 2803, l. 1.

Vogelsang summarized her assessment by stating that petitioner had an accumulation of risk factors that led to his inability to deal with stressful situations. App. 2830, l. 12 – 2831, l. 13. She testified that most people can handle "one or two stressors in our lives" but that petitioner's multiple stressors and background affected his judgment and ability to control his impulses, placing him at higher risk of committing a serious act of violence. App. 2830, l. 22 – 2831, l. 13.

Decision to Hire Inexperienced Forensic Psychiatrist and Failure to Prepare Her

The defense team completely failed to prepare its forensic psychiatrist, Dr. Margaret Melikian, for trial. Bartosh did not contact Dr. Melikian until about six weeks before trial. App. 2882, ll. 3-11. This failure was compounded because of Dr. Melikian's inexperience. Petitioner's case was either her first or second death penalty trial. App. 2883, ll. 12-18. When Bartosh first

(criminal domestic violence); Robin Pilgrim (assault and battery with intent to kill, kidnapping, robbery). See also App. 2810, ll. 2-20.

called Dr. Melikian in April, she was concerned that she would not be able to prepare in time for the May trial. She testified at the PCR hearing that she only accepted the case because she did not know any better at the time. Dr. Melikian stated:

Due to my lack of experience at the time, I accepted the case thinking that, if all the mitigation was done, I could be prepared in that amount of time. Because of my lack of experience, I didn't really understand how much was gonna be involved in gathering information, and that mitigation had barely just begun at that time, and, and there really wasn't any way we could be prepared for trial.

App. 2884, ll. 13-19.

The Lack of Records

At the PCR hearing, Dr. Melikian testified regarding the importance to a forensic psychiatrist of reviewing records. Forensic psychiatrists rely heavily on records because they cannot take what their patient has to say at face value. App. 2887, l. 24 – 2888, l. 4. Forensic psychiatrists must corroborate the statements of their patients because they may be lying. App. 2888, ll. 10-13. As Dr. Melikian testified, “Relying solely on the defendant for a history is being out on the limb pretty far.” App. 2921, ll. 24-25.

The defense team's late start on the mitigation investigation severely hampered Dr. Melikian's preparations. Dr. Melikian had trouble getting complete records from the defense team and was unable to thoroughly review the documentation she received. On April 20, 2004, Dr. Melikian called Bartosh's office asking for medical records. Dr. Melikian received no records from Bartosh, so she called his office again on April 27, 2004. Dr. Melikian finally received some medical records from Bartosh on April 28, 2004. App. 2882, ll. 4-11. These records did not include petitioner's evaluation by the state's experts at William S. Hall Institute. App. 2885, ll. 1-14. She received an incomplete set of petitioner's school records on May 4, 2004. App. 2908, ll. 6-7. She received incomplete records from petitioner's psychiatric hospitalization for a suicide attempt

when he was a teenager and from petitioner's hospitalization when he was eighteen months old after his uncle ran over his head with a car. App. 2906, ll. 2-19.

Dr. Melikian never received the suicide notes petitioner wrote to his family before the shooting. App. 2905, ll. 21-22. She was never told about the message petitioner left on Tullis' answering machine the day of the shooting. App. 2905, ll. 18-25. The defense team did not give her any records concerning petitioner's self-inflicted head wounds at the Spartanburg County Detention Center. App. 2989, l. 17 – 2900, l. 1. She did not know about the interviews with petitioner's family that Lenora Topp had conducted. App. 2920, ll. 7-12. She never received the records from a neurologist, Dr. Absher, who had seen petitioner. App. 2907, ll. 3-4. She summarized the incompleteness of what she received:

Q. Okay. And given the records that you had at that time versus the records that you have seen with the PCR preparation, is there a difference?

A. Yes, the records I received at that time, the, the file, as, as I got it back from my office, was three or four inches thick. **I've seen six to seven times that amount of information in preparation for PCR.**

App. 2886, l. 24 – 2887, l. 5 (emphasis added). Dr. Melikian also testified about the short time period she had to review the records:

And I'd also like to make sure and clarify that even though I had, we didn't have complete records, I would not have had time to review the complete records had I had them. I was concerned that I didn't know the records that we did have.

App. 2908, ll. 18 – 23.

Dr. Melikian had no time to spend with petitioner before the trial. Before showing up for trial, Dr. Melikian only spent seven hours and forty-five minutes on the case. App. 2882, ll. 15-18. Of this time, two and a half hours were spent during her single visit with petitioner. App. 2882, ll. 21-25. She saw him on May 4, 2004. Dr. Melikian testified, "To see a defendant one

time only in a death penalty case I would, I would not do again. I cannot imagine doing that for any serious case.” App. 2923, ll. 16 – 18.

Trial Counsel Left it to Dr. Melikian to Call Judge Few to Get a Continuance

As the trial grew closer, Dr. Melikian began to grow very concerned about the lack of preparation. App. 2891, l. 20. On April 30, 2004, she called Bartosh’s office and told Quimby she needed a continuance and could not be prepared for trial. App. 2536, ll. 15-25. Quimby made a note for Bartosh about Dr. Melikian’s inability to be ready. App. 3028.

Apparently in response to Dr. Melikian’s mounting fears, Bartosh set up a conference call between Dr. Melikian and Judge Few on May 12, 2004. App. 2891, l. 20 – 2892, l. 1. Dr. Melikian spent forty-five minutes speaking with Judge Few about her concern that she could not be ready to testify and trying to persuade him to grant a continuance. App. 2892, l. 1 – 2894, l. 7.

No member of the defense team participated in Dr. Melikian’s call with Judge Few. App. 2893, ll. 1-8. Dr. Melikian described the circumstances of the call:

Q. Okay. And was the Public Defender, was Mr. Bartosh on, you say it was a conference call, was he somewhere? Was it a three way call or was it just you and the judge?

A. To my recollection it was—it’s down as a conference call. As I recall, I think I had a time I was suppose[d] to call the judge, but, to my recollection, it was just the judge and I on the phone.

Q. Okay. Did the Public Defender’s Office put that burden on you to try to get a continuance?

A. Yes.

Q. Did – was that—

A. Well, I—

Q. –a motion—

A. Let me clarify that. They didn't tell me to get a continuance. But they, as I recall, they wanted me to explain to the judge that I was not prepared to testify.

Q. Okay. Do you know, of your own knowledge, whether there was any formal motion for continuance made on the record because of your not being prepared?

A. I don't know.

Q. Okay. So, all you know for sure is that you talked to Judge Few, right before the trial, telling him that and asked for a continuance?

A. I had actually forgotten I had, had to have that call with the judge until this case and reviewing my records and looking back and saw that there was that phone call to the judge.

Q. Have you ever done that before?

A. No, have not.

Q. Have you ever done it since?

A. No, have not.

App. 2893, l. 1 – 2894, l. 7. Bartosh never formally asked or made a motion for a continuance.

App. 3622. None was granted.

Dr. Melikian's Disastrous Testimony at Trial

Dr. Melikian was the second witness called by the defense. None of petitioner's family members had testified when Dr. Melikian took the stand. Therefore, the jury knew nothing about petitioner's family history or background when she testified and had no frame of reference in which to place her testimony.

After her qualifications, the first thing the jury heard from Dr. Melikian was that she interviewed petitioner once, three weeks before the trial. Based on this one interview and a review of records supplied by Bartosh, she diagnosed petitioner as suffering from "major depressive disorder." App. 2002, l. 24 – 2003, l. 12.

Dr. Melikian was the first witness at trial to bring up the question of malingering. App. 2005, ll. 3-6. She testified that petitioner's records from the Hall Institute diagnosed him as malingering because he said he heard voices and because of his imaginary friend, "Jimmy." App. 2005 ll. 7-14. Dr. Melikian stated that she did not diagnose petitioner as malingering because the Hall Institute's objective testing and Dr. Brawley's testing did not show he was malingering.⁶ App. 2005, ll. 7-24. On direct, Dr. Melikian told the jury that petitioner said Jimmy first came to visit him when he was in the hospital after his "overdose." App. 2006, ll. 12-15. Relying only on what petitioner told her, she said Jimmy first showed up at this hospital because petitioner had a roommate who "looked very much like Charlie Manson." App. 2007, ll. 11-20.

When asked about petitioner's intellectual functioning, Dr. Melikian disagreed with the Hall Institute's diagnosis of "borderline intellectual functioning." App. 2009, ll. 2-18. She relied on an IQ test given by Dr. Brawley in which petitioner scored in the 80s. App. 2009, ll. 10-12. Petitioner's earlier IQ score at the Hall Institute was 76. App. 2009, ll. 8-9. Dr. Melikian made no comments or observations connecting petitioner's low IQ score on the Hall Institute test with his depression.

Dr. Melikian also said petitioner had cognitive deficits. This finding was based on the neuropsychological testing done by Dr. Brawley. App. 2004, ll. 15-19. Dr. Melikian opined that petitioner had a brain abnormality which explained "his low test scores and sudden neurological findings," but she could not pinpoint the source of the injury to the brain. App. 2010, ll. 9-20. She

⁶ On May 18, 2004, during the trial, Dr. Melikian learned that Dr. Brawley would not be testifying and she would be putting Dr. Brawley's information into the record herself. App. 2885, l. 22 – 2886, l. 4. Dr. Melikian "didn't feel comfortable doing that" so she requested a written report from Dr. Brawley on May 20, 2004 (three days after the start of the trial). App. 2886, ll. 2-3.

incorrectly asserted that petitioner had been seen by a behavioral neurologist, but did not explain the results of any testing. App. 2010, l. 23 – 2011, l. 4.

When asked about the events surrounding the shooting, Dr. Melikian related only what petitioner told her. She explained that petitioner had planned “to commit suicide by driving off [a] cliff.” App. 2013, ll. 1-2. Petitioner told her that he had lost approximately sixty-five pounds in three weeks. App. 2013, ll. 13-14. Dr. Melikian told the jury that petitioner’s plan on the day of the shooting was “to go to his mother in law’s home and blow his brains out . . . in front of the house.” App. 2013, ll. 18-22. However, when he saw his wife’s cousin drive away, “he just snapped.” App. 2013, ll. 22-25.

Dr. Melikian’s performance on cross-examination was a disaster. Her inexperience led her to immediately concede that she should have written a report:

Q. And you did not prepare a report in this case?

A. That is correct.

Q. You understand if you had prepared a report, that would have to given?

A. Yes.

Q. And it would have been beneficial to proving your testimony?

A. I would think so, yes.

Q. That was not done?

A. Right.

Q. And why not?

A. I was not asked to prepare a report in this case.

App. 2015, l. 22 – 2016, l. 8 (emphasis added). She then admitted that, during the trial, she avoided Dr. Pam Crawford who was the director of forensic psychiatry at the Hall Institute and who trained Dr. Melikian. App. 2016, ll. 9-18.

The most devastating portion of the cross-examination involved “Jimmy.” The solicitor asked Dr. Melikian if she knew the first time Jimmy appeared. App. 2016, ll. 23-24. Dr. Melikian stated, “by Mr. Lindsey’s report, Jimmy came in to exist[ence] when he was 15 and in the hospital.” App. 2016, l. 25 – 2017, l. 1. The solicitor blindsided her with the fact that the first recorded mention of Jimmy coincided with the day petitioner was served with the state’s notice of intent to seek the death penalty:

Q. Now, other than what he told you – we’re going to get to the stuff he told you later. Other than what he told you, when was the first documented evidence of there ever being any Jimmy?

A. There was mention of the Jimmy on intake to Spartanburg Mental Health. I am not sure if there was mention of Jimmy when he was hospitalized with the gunshot wound.

Q. Okay. Did you rely on the report of Freeman Smith, Dr. Smith, during your evaluation?

A. I did look at the information, yes.

Q. I think that is probably the first time that he mentions Jimmy. Do you disagree with that?

A. I believe so. Can I look at those notes?

Q. Sure, you can.

A (Reviewing.) I don’t see Ms. Howard’s notes who was on the stand earlier. She had, Ms. Howard saw him initially and referred him to Dr. Freeman.

Q. Uh-huh. (affirmative).

A. And she was concerned because he did mention auditory hallucinations with her at that time. I don’t know whether he used the name Jimmy or not. But that was part of her referral to Dr. Freeman.

Q. And that has effective 10/10/02?

A. That is when Dr. Freeman saw him.

Q. Okay. No mention of Jimmy in particular until 10/10/02?

A. Correct.

Q. Would, you don't think he is malingering?

A. No, I do not.

Q. Would it be any significance to you, Doctor, **to know that that is the date that the State served the notice of intent to seek the death penalty on him?**

A. Well, **that would be interesting to know. And had I had that information, I would've asked him about that during the evaluation?**

Q. I'm going to show you the notice to seek the death penalty. I'll have you look at it.

A. (Reviewing.)

Q. It is dated what day?

A. That is dated October 10, 2002.

Q. I went to show you an affidavit of service.

A. (Reviewing.)

Q. It shows it was served what day?

A. October 10, 2002.

Q. **So the same day that he came up with Jimmy or the first time we have documented in the records about a Jimmy, correct?**

A. **That is correct.**

App. 2017, l. 2 – 2018, l. 25 (emphasis added). Following this exchange the solicitor again asked about malingering which Dr. Melikian defined as “the conscious [feigning] of symptoms for a secondary gain.” App. 2019, ll. 6-8. The solicitor asked whether a secondary gain “would be to

avoid responsibility.” App. 2019, ll. 9-10. Dr. Melikian responded “That could be one of them, yes.” App. 2019, l. 11. Once again the solicitor blasted Dr. Melikian on this issue:

Q. Would blaming Jimmy help avoid his responsibility?

A. Blaming Jimmy might avoid responsibility. It may be a coping mechanism of Mr. Lindsey’s in dealing with what he had done.

Q. That is exactly what he tried to do on 10/10/02, wasn’t it? The highlighted part.

A. Yes.

Q. He tried to say it was Jimmy’s fault, not his?

A. That is correct.

Q. That is avoiding responsibility, right?

A. Correct.

Q. But he is not malingering?

App. 2019, l. 17 – 2020, l. 4.

The solicitor asked Dr. Melikian about petitioner’s interview (that Bartosh did not attend) with Dr. Pratap Narayan, the Department of Mental Health psychiatrist, and whether petitioner “pulled a chair right next to him and started carrying on a conversation with [Jimmy]?” To which Dr. Melikian replied “yes.” App. 2020, l. 24 – 2021, l. 1. The solicitor then again asked if she thought he was malingering. App. 2021, l. 2. The solicitor repeated the question of whether petitioner was malingering five more times during cross-examination when asking her about Jimmy, hammering this point home each time with the jury. App. 2021, l. 17; App. 2029, l. 7; App. 2031, l. 6; App. 2037, l. 25; App. 2039, l. 9.

Dr. Melikian also was forced to admit that she lacked important records and had not interviewed important witnesses in formulating her opinions. She admitted she had not seen the records from petitioner’s incarceration following his conviction for assault and battery with intent

to kill in 1996. App. 2026, ll. 16-22. She was unable to refute the assistant solicitor's assertion that the medical records from the Department of Corrections did not show any symptoms of depression. App. 2026, l. 23 – 2028, l. 13. Dr. Melikian could not counter the solicitor's assertion that petitioner's suicide attempt at the age of fifteen was only an attempt to get attention because she did not know anything about the circumstances regarding the incident. App. 2030, l. 11 – 2031, l. 7.

She admitted she only had "some" of his school records. App. 2031, ll. 18-19. She admitted she did not have petitioner's employment application for BMW dated September 12, 2002, even though it would have been helpful. App. 2036, ll. 9-15. She was further asked whether she had been given a copy of the defense's case file and replied, "I'm not sure how complete a case file." App. 2036, ll. 21-24. Dr. Melikian had not spoken with Dr. Crawford, Dr. Narayan, Celeste Nesbitt, Officer Benny Godfrey, or Latresse Smith. App. 2036, l. 16 – 2038, l. 22. She essentially admitted that the only person she had spoken with was petitioner. Assistant Solicitor Willingham asked her, "Now, a lot of what you testified to is based on what he told you?" She responded, "That is correct." App. 2039, ll. 4-8. The solicitor asked her again on recross:

Q. But you never talked to a single soul that saw him on that day?

A. I reviewed notes. I did not speak to anyone other than Ms. Howard who takes care of him at the detention center.

Q. Well, that was not the answer to my question. The question was you had not talked to anyone, not one single soul that saw him on the day that he murdered his wife?

A. That is correct.

App. 2043, ll. 11-20. At this point Dr. Melikian was excused. App. 2043, ll. 23-24.

The Order of Dismissal

In the order of dismissal, the PCR court summarily dispatched petitioner's argument that trial counsel failed to adequately prepare a mitigation case:

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established. While it appears that counsel did wait to retain a mitigation investigator [until] two months before the trial, he has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his "time spent" argument.⁷

Supp. App. II 272; App. 3716. The PCR court also gave a summary of the scant evidence presented in mitigation that focused primarily on the limited evidence trial counsel were able to acquire during their hasty investigation and not on what was actually presented to the jury. Supp. App. II 269-271; App. 3713-3715. The evidence regarding lack of preparation compelled the PCR court to correctly admit, "[A]bsent Mr. Bartosh's testimony, it appears that the bulk of the preparation was done two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period." Supp. App. II 271; App. 3715.

The PCR court concluded that petitioner failed to prove prejudice with respect to this ground.⁸ Supp. App. II 196; App. 3638. The court disregarded petitioner's references to the ABA guidelines. Supp. App. II 196; App. 3638. The court stated, "The family background was investigated and not ignored. In addition, evidence was presented through lay witnesses at trial concerning the background in the guilt and penalty phases." Supp. App. II 196-197; App. 3638-39. Interestingly, the PCR court stated, "Applicant has failed to show what material counsel was

⁷ Petitioner is including parallel citations both to the original Order of Dismissal and to the almost identical Order of Dismissal produced after this Court's remand.

⁸ The court initially said there was no deficient performance, but when it actually discussed this prong of Strickland v. Washington, 466 U.S. 668 (1984), it avoided ruling on the performance issue and only considered the prejudice prong. Supp. App. II 261; App. 3705.

unaware of that was critical to the defense, just that in depth evidence was not presented.” Supp. App. II 260; App. 3704.

The order of dismissal engages in a lengthy comparison of Lenora Topp’s investigation and that of Vogelsang, but fails to explain how this comparison is relevant because Topp did not testify at trial. Supp. App. II 254-259; App. 3698-3703. Based on Topp’s testimony, the court concluded that the defense team’s investigation was reasonable but failed to explain why, even assuming their investigation was complete, they failed to present what they learned to the jury. Supp. App. II 259; App. 3703.

The PCR court also held that “the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse” and could “make a death sentence more likely.” Supp. App. II 262; App. 3706. To support this opinion, the court stated that Vogelsang could have opened the door for evidence that petitioner became “a controlling and violent person” even though the state presented many witnesses who testified to these negative aspects of petitioner’s life during its aggravation case. Supp. App. II 263; App. 3707.

As to Dr. Melikian, the PCR court found that trial counsel’s performance was not deficient. Supp. App. II 178; App. 3619. This conclusion was based on two factors. First, the PCR court determined that while it was “apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing,” she did have some records and Dr. Melikian could not “cogently express what material made a difference to her conclusions other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004.” Supp. App. II 178; App. 3619. Second, the PCR court used a “double-edged sword” analysis. It speculated that had Dr. Melikian known more about petitioner’s history, it would have somehow altered her opinion in a negative way. The PCR court stated:

The problem with her retrospective analysis of her own testimony is that it ignored the danger that her review of the additional material presented and [sic] allowed the Respondent in this proceeding to additionally develop the negative evidence – as the prosecution would have been developed [sic] at trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang [sic]. In cross-examination, based upon her review and reliance upon information both developed by the original trial team and then enhanced by the collateral team, Dr. Melikian had to address the bad as well as the beneficial because of her reliance of [sic] the extensive, but limited data.

App. 3620; Supp. App. II 179. Without any reasoning or other explanation, the court added, “[T]his Court concludes that had [Dr. Melikian] been exposed [sic] and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced.” App. 3621; Supp. App. II 179.

The PCR court ruled that even if trial counsel’s performance was deficient, petitioner suffered no prejudice as a result. Supp. App. II 180; App. 3621. The court stated that Dr. Melikian’s diagnosis did not fundamentally change. Supp. App. II 179; App. 3620. It also determined that petitioner failed to show that a continuance would have been granted if requested by trial counsel. Supp. App. II 181; App. 3622.

The PCR court held that petitioner could not prove deficient performance or prejudice regarding the failure to have witnesses ask for mercy. Supp. App. II at 156-60. On deficient performance, the order stated that “counsel is presumed competent and Applicant has failed to dispute it.” Supp. App. at 160. On prejudice, the PCR court noted the witnesses who did ask for mercy. Supp. App. II at 156-60. While some witnesses did ask for mercy, the PCR court made a factual error in attributing Chris Wilkins’ request for mercy to Bill Burton. Supp. App II at 158. The PCR court quoted Burton as telling the jury “please have mercy on him” and placed this quote in bold. Supp. App. II at 158. It cited page 2076 of the Record on Appeal. Supp. App. II at 158. Chris Wilkins is the person testifying on page 2076 where this quote

appears. App. 2076. Bill Burton never was prompted to ask for mercy by Bartosh. App. 2061, 1. 6 – 2070, 1. 15.

Discussion

The PCR court erred by interpreting petitioner's argument as only that trial counsel failed to spend enough time investigating and preparing a mitigation case. While appellate counsel submits that the failure to investigate and prepare until one month before trial was deficient performance, what the PCR court failed to understand was that it was not only the lack of time spent, but: (1) the evidence the jury never heard; and (2) the ineffective manner in which the witnesses testified that denied petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments. The PCR court ignored the specific evidence from the hearing that, had it been prepared and presented at trial, would have persuaded the jury to give petitioner a life sentence.

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. As explained in Issue 1, the standard of review is *de novo*.

Deficient Performance

The PCR Court Ignored the ABA Guidelines

The PCR court erred in refusing to use the ABA Guidelines as a tool to determine the prevailing professional norms. Ignoring precedent from this Court and the United States Supreme Court, the PCR court mistakenly refused to use the ABA Guidelines to measure trial counsel's

performance. The United States Supreme Court has consistently explained that the ABA Guidelines provide evidence of well-defined and prevailing professional norms.

“The ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’” Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989) (hereinafter, “1989 Guidelines”); Rompilla v. Beard, 545 U.S. 374, 387, n.6, n.7 (2005); Williams v. Taylor, 529 U.S. 362, 396 (2000); Harden v. State, 276 S.C. 249, 253, 277 S.E.2d 692, 694 (1981) (citing § 14-3.3 of the Standard for Criminal Justice); Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008). “The Guidelines clarity and thoroughness has helped to establish what constitutes thorough mitigation investigation and capital defense advocacy.” Emily Hughes, Arbitrary Death: An Empirical Study of Mitigation, 89 Wash. U. L. Rev. 581, 629 (2012).

The ABA Guidelines were revised in 2003, in between the shooting and petitioner’s trial. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition February 2003, 31 Hofstra L. Rev. 913 (2003) (hereinafter, “2003 Guidelines”). At multiple places in its order of dismissal, the PCR court treats the ABA Guidelines with dismissiveness. Supp. App. II 112 (quoting Bobby v. Van Hook, 558 U.S. 4 (2009), stating the ABA Guidelines are “only guides” and not “inexorable commands”); Supp. App. II 183 (emphasizing Section 10.11 of the 2003 ABA Guidelines which state “defense counsel *should consider* presenting expert and lay witnesses along with supporting documentation . . . to . . . give a favorable opinion as to his client’s capacity for rehabilitation, or adaption to prison . . .” (emphasis and alterations in original)); Supp. App. II 253 (dismissing Lenora Topp’s testimony

that the average number of hours spent on social history investigation by the ABA standards is one thousand); Supp. App. II 268-269 (dismissing the ABA guidelines as mere guides and asserting if accepted as “requirements” for capital defense counsel, “it sets an almost impossibly high bar”); Supp. App. II 272 (dismissing checklist established by the ABA guidelines).

The court misunderstood the United States Supreme Court’s holding in Bobby v. Van Hook, 558 U.S. 4 (2009). The PCR court determined that Van Hook represented a retreat from United States Supreme Court precedent utilizing the ABA Guidelines. Supp. App. II 112; App. 3551. Citing Van Hook, the PCR court scorned the use of the ABA Guidelines in addressing trial counsel’s failure to investigate and present an adequate mitigation case by perplexingly listing as unreasonable investigation requirements such basic steps as interviewing the client’s family members, neighbors, case workers, and doctors. Supp. App. II 268-269; App. 3712-3713.

Together with Wiggins, the United States Supreme Court has used the ABA Guidelines to reverse death sentences in two other ineffective assistance of counsel cases. Rompilla v. Beard, 545 U.S. 374, 387, n.6, n.7 (2005) and Williams v. Taylor, 529 U.S. 362, 396 (2000). The citation of and approval of the ABA Guidelines demonstrates their importance in providing an objective standard against which an attorney’s performance can be measured. Since Wiggins and the promulgation of the 2003 Guidelines, they have been cited with approval by multiple courts. Except for the Fifth Circuit, every federal court of appeals to have addressed their usage has cited them with approval.⁹ See Blystone v. Horn, 664 F.3d 397, 422 (3rd Cir. 2011) (citing Guideline 11.4.1(C) addressing investigation); Gray v. Branker, 529 F.3d 220, 229 (4th Cir. 2008) (citing Guideline 11.4.1(C) addressing investigation); Foust v. Houk, 655 F.3d 524, 534 (6th Cir. 2011)

⁹ The First, Second, and District of Columbia Circuits do not cite to the ABA Guidelines, presumably because the states comprising these circuits have, with the exception of New Hampshire (which has not executed anyone since before 1976), outlawed capital punishment.

(citing Guideline 11.4.1(C) addressing investigation); Stevens v. McBride, 489 F.3d 883, 895 & n.1 (7th Cir. 2007) (citing Guideline 11.4.1(C) addressing investigation); Ortiz v. United States, 664 F.3d 1151, 1170 (8th Cir. 2011) (citing Guideline 11.4.1(A), (C), and (D) addressing investigation and contacts with victim's family); Detrich v. Ryan, 677 F.3d 958, 974 & n.7 (9th Cir. 2012) (citing Guideline 11.4.1(C) addressing investigation and stating, "The Supreme Court has consistently recognized the utility of considering the ABA Guidelines in evaluating the reasonableness of attorney performance in ineffective assistance claims."); Hooks v. Workman, 689 F.3d 1148, 1201 (10th Cir. 2012) (stating "We judge counsel's performance by reference to prevailing professional norms, which in capital cases include the ABA Guidelines. . . ."); Stephens v. Secretary, Fla. Dep't Corr., 678 F.3d 1219, 1229 n.2 (11th Cir. 2012) (citing Guideline 11.4.1(C) addressing investigation); see also List of Cases Citing to the 2003 ABA Guidelines, American Bar Association Publication updated February 10, 2020, available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003_list.pdf.

As early as 1981, this Court recognized the utility of the ABA Guidelines in criminal cases. In Harden v. State, 276 S.C. 249, 253, 277 S.E.2d 692, 694 (1981) (citing § 14-3.3 of the Standard for Criminal Justice), the Court set forth in full the ABA Guideline dealing with the responsibilities of a trial judge during a plea agreement. The Court used the ABA standard to affirm a trial judge's involvement in a plea bargain and to set a future standard to ensure litigants had access to a trial judge while avoiding the appearance of a judge coercing a litigant to extend or accept a plea. Id. at 256-57, 277 S.E.2d at 695. The Court stated, "We believe that the position of the ABA Standard here set forth is sound." Id. at 256, 277 S.E.2d at 695.

More recently, in Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007), this Court cited the 2003 Guidelines with approval in a capital case involving trial counsel's failure to call an independent expert witness who could rebut the state's evidence. Ard stated, "The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case. . . ." Id. Citing both the 2003 Guidelines' admonition to obtain the assistance of experts to aggressively dispute the state's forensic experts and Wiggins' use of the Guidelines, this Court held trial counsel ineffective for failing to investigate and obtain an expert to dispute the state's gunshot residue expert's testimony. Id.

Again in the capital case of Council v. State, this Court used the ABA Guidelines as a reference to measure an attorney's performance. 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008). This Court held trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable. Much like in Lindsey's case, counsel was deficient in failing to begin investigation into Council's background as soon as the prosecution served its Notice of Intent to Seek the Death Penalty. Id. This Court held counsel's conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing 1989 Guidelines, 11.4.1(2)(C)).

By 2017, this Court stated, "The Supreme Court of the United States and this Court have relied on the ABA Guidelines to determine whether counsel's performance was reasonable under the first prong of Strickland. Stone v. State, 419 S.C. 370, n.6, 798 S.E.2d 561, n.6 (2017). The reference to the ABA Guidelines in Stone shows that their usefulness to courts to measure performance now lacks any controversy. See also, Winkler v. State, 418 S.C. 643, n.21, 795 S.E.2d 686, n.21 (2016) (Pleicones, C.J., concurring in part and dissenting in part) (citing to the ABA Guidelines in recognizing the need for specially qualified counsel in capital cases).

Nothing in Van Hook represents a reluctance by the Supreme Court to use the ABA Guidelines to measure an attorney's performance. In Van Hook, the Supreme Court simply reversed the Sixth Circuit for applying the 2003 Guidelines to the conduct of trial counsel in 1985, stating that current standards of performance cannot be used to judge eighteen year old actions by trial counsel. Van Hook, 558 U.S. at 7-8. The Court emphasized the "narrow grounds" of its holding in Van Hook and that it should not "be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation." Id. at 8 n.1. In a later decision, the Court recognized that the comment in Van Hook that the ABA Guidelines are not "inexorable commands" does not permit them to be ignored. See Padilla v. Kentucky, 559 U.S. 366, 366-367 (2010) (citing the "ABA Standards for Criminal Justice") (noncapital case). After quoting Van Hook's "inexorable commands" statement, the Court explained that ABA standards "may be valuable measures of the prevailing professional norms of effective representation." Id. at 367. Therefore, the PCR court erred in relying on Van Hook for the proposition that it could ignore the ABA Guidelines.

Trial Counsel Did Not Meet Constitutional Standards in Investigating the Case

In addition to trial counsel's failure to comply with the ABA Guidelines, trial counsel also failed to meet constitutional standards for effective assistance as demonstrated in the opinions of the United States Supreme Court and of this Court. In Wiggins, trial counsel's mitigation investigation into Wiggins' life history consisted of two parts: (1) a written presentence investigation, which included a one page account of Wiggins' personal history, and (2) the state's social services records documenting Wiggins' various placements in the state's foster care system. Wiggins, 539 U.S. at 523. Counsel then abandoned their investigation of Wiggins' background. Id. at 524. The Court held counsel's decision not to extend their investigation fell short of

prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence, as mandated by the ABA Guidelines. Id.

Additionally, the Wiggins Court held counsel's investigation was unreasonable due to the evidence counsel actually uncovered in the social services records, which indicated Wiggins' mother was an alcoholic, Wiggins displayed emotional difficulties in foster homes, and had frequent, lengthy absences from school. Id. at 525. The Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527. Just as in Wiggins, trial counsel here failed to conduct a full investigation and should have hired a competent mitigation investigator who, unlike Topp, had time to do her job. Trial counsel also should have retained a clinical social worker.

In Williams, the Supreme Court found trial counsel ineffective for failing to investigate and prepare an adequate mitigation case. Williams, 529 U.S. at 395. Much like Petitioner Lindsey's case, Williams' attorneys failed to prepare for the sentencing phase until a week before trial. Id. The attorneys failed to uncover mitigating evidence about his "nightmarish childhood," the poverty in which he lived, that he was borderline intellectually disabled, that he received commendations for good behavior earned during prior incarcerations, and did not call a witness who volunteered to testify favorably for Williams. Id. at 395-96 & n.19. The Court stated, "Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a

thorough investigation of the defendant's background." Id. at 396. The Court ultimately determined that Williams was prejudiced by his attorneys' deficient performance. Id. at 396-97. Just as in Williams, petitioner's counsel should have uncovered mitigating evidence through his family members and should have called Tullis, Timothy Sims, Dr. Barry Henderson, and Vincent Bell as witnesses.

In Sears v. Upton, 561 U.S. 945 (2010), the United States Supreme Court reversed a death sentence for trial counsel's failure to investigate his client's family history. At the sentencing proceeding, trial counsel called seven witnesses to "present evidence describing [the defendant's] childhood as stable, loving, and essentially without incident." Id. at 947. As the Court noted, this strategy predictably backfired when the prosecutor argued to the jury that even with his privileged background, the defendant "rejected every opportunity that was afforded him." Id. at 947-48 (quoting the prosecutor). In fact, the defendant did not have a happy upbringing and trial counsel failed to uncover evidence of physical, verbal, and sexual abuse. Id. at 948. The defendant had trouble in school and had brain abnormalities. Id. at 949. The Court found counsel's performance to be constitutionally deficient both in the selection of an unreasonable trial strategy and for failing to fully investigate their client's history. Id. at 951. Similarly, Bartosh did not fully investigate petitioner's family history.

In Porter v. McCollum, 558 U.S. 30, 32 (2009), trial counsel only presented the defendant's ex-wife and deposition excerpts during the sentencing phase. The Court summarized the mitigation evidence as "inconsistent testimony about [the defendant's] behavior when intoxicated" and that the defendant had a good relationship with his son. Id. The PCR litigation revealed that, similar to petitioner's case, trial counsel had only a month to prepare for the sentencing hearing

and had never represented a defendant during a penalty phase trial. Id. at 39. Trial counsel failed to obtain Porter's school or military records. Id.

Similar to the present case, trial counsel in Porter failed to personally interview any members of Porter's family or any other witnesses. Id. PCR counsel presented evidence of Porter's extensive and horrific combat experiences in the Korean War. Porter was awarded two Purple Hearts and other decorations for his actions in two of the bloodiest battles in the war, but these experiences left him a broken man with severe mental health issues. Id. at 34-36. The Court stated, "Counsel thus failed to uncover and present any evidence of [the defendant's] mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment." Id. at 40.

This Court has also reversed death sentences for trial counsel's failure to investigate and present mitigating evidence during the penalty phase. In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held the trial attorney's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable. According to this Court, and just as in petitioner's case, counsel was deficient in failing to begin his investigation into Council's background as soon as the prosecution served its Notice of Intent to Seek the Death Penalty. Id. Despite the strong case of guilt against Council, the trial attorney obtained only his juvenile justice records and state hospital records before trial. Trial counsel did not request certain background records until the day of jury selection and did not set up a meeting with the defense's retained mental health expert, who had received only limited records, until a month before trial. Id. Counsel's conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing 1989 Guideline 11.4.1(2)(C)). The late start and deficient performance in Council mirrors the case at bar.

Additionally, this Court held the limited information obtained by trial counsel should have put him on notice that Council's background could potentially provide powerful mitigating evidence. Id. at 173, 670 S.E. 2d at 363. Not only did trial counsel unreasonably delay in investigating Council's background, trial counsel failed to conduct an adequate investigation. Id. The retained mental health expert evaluated Council for competency and criminal responsibility only, had inadequate records, and met with Council only once, shortly before trial. Id. Trial counsel did not utilize the services of a social history investigator, despite available funding. Id. Finally, this Court concluded "it was unreasonable for trial counsel not to obtain [Council's] family records." Id. at 174, 670 S.E.2d at 363. The limited records obtained by trial counsel "should have alerted him to the fact that the family was dysfunctional." Id. at 174, 670 S.E.2d at 364. The identical factors contributing to a finding of deficient performance in Council are present here.

This Court held "[e]ven if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence [where the] mitigation presentation consisted solely of [Council's] mother's extremely limited testimony." Id. at 174-175, 670 S.E.2d at 364. In light of the state's damaging character evidence, Council's character could not have been further damaged by the presentation of additional mitigation evidence. Id. at 175, 670 S.E.2d at 364.

In Von Dohlen v. State, this Court held trial counsel's investigation concerning the defendant's mental state was not reasonable despite the fact that counsel made "some effort." 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004). The mitigation case presented during the trial was that Von Dohlen was a good husband, had been married for seventeen years, was a good father to his four children, and was a dependable employee. At trial, witnesses testified he grew up in a very poor family and had been physically abused and emotionally neglected as a child. Von Dohlen's

personality dramatically changed when his brother was murdered just two weeks before the homicide involving Von Dohlen. He began abusing alcohol and Valium. A psychiatrist, Dr. Michael Lampkin, testified that Von Dohlen suffered from an adjustment reaction, which was easily treated, short term, and not a chronic mental illness. Id. at 604, 602 S.E.2d at 741.

However, the same psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records uncovered by post-conviction counsel, he would have testified Von Dohlen suffered from ““major depressive episodes with severe symptoms of anxiety and possible prepsychotic features.”” Id. at 605, 602 S.E.2d at 741. The testimony by the same psychiatrist at trial and PCR about the differences in his diagnosis mirrors Dr. Melikian’s testimony in petitioner’s case.

Another psychiatrist, Dr. John DeWitt, testified at the PCR hearing that Von Dohlen suffered from a major mental illness at the time of the murder and was predisposed to such based upon his family history of mental illness and alcohol or drug abuse. Id. at 606, 602 S.E.2d at 742. Although trial counsel “exerted some effort,” their failure “to adequately investigate and prepare expert testimony about Von Dohlen’s condition as it existed at the time of the murder” was deficient performance. Id. Similar to Von Dohlen, trial counsel in petitioner’s case presented some mitigating evidence, but failed to uncover and present substantial and consequential evidence that was available.

Trial counsel’s performance here was also deficient for failing to fully investigate and present a complete and coherent mitigation case. As in Council and Von Dohlen, Bartosh failed to conduct a complete investigation into petitioner’s background and obtain the records necessary to prepare Dr. Melikian. Bartosh failed to obtain records concerning petitioner’s background. No records were obtained with respect to petitioner’s family members who suffered from mental

illnesses. As in Porter, Bartosh failed to begin meaningful preparation until a month before trial. As in Williams, Bartosh failed to present evidence regarding petitioner's horrible childhood.

Trial Counsel Failed to Call Necessary Experts in the Mitigation Case

Trial counsel failed to call experts who would have helped petitioner's mitigation case. Bartosh did not call Dr. Brawley who would have testified regarding petitioner's cognitive impairments. In McKnight v. State, 378 S.C. 33, 43-44, 661 S.E.2d 354, 359-60 (2008), this Court reversed a death sentence because of trial counsel's failure to call a doctor who testified favorably at a previous trial. Similarly, Bartosh knew Dr. Brawley's testimony would be helpful, had her listed as a witness, but inexplicably failed to call her to testify. He left it to the ill-prepared Dr. Melikian to try to explain Dr. Brawley's findings.

The same rationale applies to Bartosh's failure to call a social work expert and a prison adaptability expert. The above cited precedent demonstrates trial counsel's performance was constitutionally deficient.

Trial Counsel Failed to Promptly Investigate and Assemble the Defense Team

Trial counsel deficiently performed in several areas. The ABA Guidelines state that they "apply from the moment the client is taken into custody and extend to all stages of every case." 2003 Guideline 1.1(B); App. 3115; See 1989 Guideline 11.3, 11.4.1. The commentary to the 2003 Guideline states that:

Investigation and planning for both phases **must begin immediately upon counsel's entry into the case**, even before the prosecution has affirmatively indicated that it will seek the death penalty. Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.

App. 3121 (emphasis added).

This duty to begin immediately is reinforced by the suggested makeup of the defense team as consisting of “no fewer than two attorneys ... an investigator ... a mitigation specialist [and] at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” 2003 Guideline 4.1(A)1 & 2, App. 3148; see 1989 Guidelines 11.4.1, 11.8.3(A), (D), & (F). The comments addressing the need for a mitigation specialist apply with particular force to petitioner’s case:

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case **rather than being hurriedly thrown together** by defense counsel still in shock at the guilty verdict.

App. 3155 (emphasis added). The 2003 Guidelines make it clear that these members of the defense team should be assembled “[a]s soon as possible after designation.” 2003 Guideline 10.4(C), App. 3194; see also 1989 Guideline 11.3, 11.4.1, 11.8.3.

“Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” 2003 Guideline 10.7(A). Counsel may not “sit idly by, thinking that investigation would be futile.” Comment to 2003 Guideline 10.7, App. 3216; see 1989 Guideline 11.4.1(C) & (E). “[P]enalty phase preparation requires extensive and generally unparalleled investigation into personal and family history,” including: (1) medical history; (2) family and social history; (3) educational history; (4) military service; (5) employment history; and (6) prior juvenile and adult correctional experience. Id.; App. 3217-3218.

As stated above, trial counsel sat idle until a month before trial. Trial counsel failed to hire a mitigation specialist who could begin work immediately and who was experienced in mitigation investigation. As a result, no meaningful mitigation investigation began until a month before trial. The second chair was not appointed until two months before trial. This failure to prepare was the

seed of counsel's errors in failing to hire a social worker like Vogelsang, prepare witnesses, or obtain an experienced psychiatrist and prepare the inexperienced Dr. Melikian. Trial counsel failed to hire mental health experts who could have performed independent evaluations close to the time of the offense. Trial counsel's performance was deficient with respect to these Guidelines.

Trial Counsel Failed to Attend Important Interviews with the State's Mental Health Expert

Trial counsel also violated 2003 Guideline 10.11(J), which states that the defense lawyer should attend any interview by any part of the government's team. App. 3252-3253 (emphasis added); see also 1989 Guideline 11.8.3(D). Bartosh failed to attend two interviews with the state's psychiatrist Dr. Pratap Narayan. App. 129. These interviews were of critical importance as it was Dr. Narayan who diagnosed petitioner as a malingerer. Bartosh's failure to attend these interviews with his client violated this guideline and prevailing professional norms. Had Bartosh attended, he would have seen petitioner's attempt to use Jimmy to fool Dr. Narayan and could have warned Dr. Melikian. Bartosh's failure to attend these interviews with his client violated this guideline and prevailing professional norms.

Trial Counsel Lost the Crucial Tullis Tape

Bartosh lost the Tullis tape which would have countered the devastating effect of the State's 911 recording. Even after losing the tape, Bartosh could have called Rod Tullis as a witness to explain what he heard on the tape. Failing to preserve the answering machine tape or present its contents through Tullis is extremely significant and by itself is grounds for reversal.

Tullis knew both petitioner and his wife very well. App. 2447, l. 21 – 2448, l. 5. He would have testified about how much petitioner cared for his sons. App. 2450, ll. 21-22. Tullis would have testified about petitioner's suicidal state at the time of the shooting, including the suicide notes petitioner wrote a few weeks before the incident. App. 2456, ll. 5-18; App. 2479, ll. 9-14.

Most importantly, Tullis could have testified regarding the despondent and suicidal message petitioner left on his answering machine in the hours immediately before the incident. App. 2453, l. 17 – 2454, l. 11. Bartosh’s failure to preserve Tullis’ answering machine tape made his testimony critical. No reasonable strategy exists that would justify the failure to call Tullis or preserve the answering machine tape.

Trial Counsel’s Failure to Call Important Mitigation Witnesses

Trial counsel also performed deficiently by not calling several witnesses who would have aided petitioner’s mitigation case. The ABA Guidelines state that counsel should consider:

1. Witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death;

2003 Guideline 10.11(F)(1); App. 3250-51; see 1989 Guideline 11.8.3(F)(1).

Bartosh failed to call Vincent Bell, the paramedic, who would have testified about petitioner’s suicidal state in the immediate moments after the shooting. Bell would have testified about petitioner’s self-inflicted gunshot wound to the head and the fact that petitioner told Bell to “Let me die.” App. 2383, ll. 9-16. The jury never heard Bell’s testimony that petitioner said he wanted to die. No reasonable trial strategy exists that would justify the failure to call Bell.

The late start investigating the case also prevented the defense from calling Dr. Barry Henderson, petitioner’s childhood physician. Dr. Henderson told Lenora Topp after the trial that he would have been glad to testify for petitioner. App. 2400, l. 24 – 2401, l. 6. Unfortunately, Dr. Henderson died before the PCR hearing. App. 2402, ll. 21-24.

Bartosh failed to call petitioner’s brother, Timothy Sims, who knew petitioner and his wife very well. App. 2756, l. 18 – 2757, l. 5. Sims actually approached the defense team and begged

to testify. App. 2756, l. 18 – 2757, l. 5. He said at the PCR hearing that he would have asked the jury for mercy. App. 2757, ll. 19-21. No reasonable trial strategy exists that would justify the failure to call Sims.

Trial counsel also failed to fully prepare and exploit the testimony of the lay witnesses who did testify. Each of the lay witnesses testified regarding the almost nonexistent preparation for their testimony, which essentially consisted of a group meeting immediately before they took the stand. What these witnesses would have testified to had they been more prepared is discussed during the prejudice argument *infra*.

Trial Counsel Failed to Prepare Witnesses to Ask the Jury for Mercy

Trial counsel failed to have the lay witnesses ask for mercy for petitioner. A defendant in a capital proceeding is permitted to present witnesses ““who know and care for him and are willing on that basis to ask for mercy on his behalf.”” State v. Torrence, 305 S.C. 45, 49-51, 406 S.E.2d 315, 318-19 (1991) quoting Childs v. State, 357 S.E.2d 48, 60 (Ga. 1987). In the following exchange, Bartosh failed to object to the trial judge’s erroneous ruling that the defense witnesses could not ask for mercy:

The Court: That was the last closing argument from the witness that I’m going to allow. I’m not going to allow any other witnesses to answer the question is there anything you want to tell the jury. Okay?

Mr. Bartosh: Yes, sir.

App. 2078, ll. 15-20. The very next witness was Steven Pilgrim. App. 2078, l. 15-25. At PCR, Pilgrim testified that he was told not to ask for mercy. App. 2728, l. 25 – 2729, l. 10

Bill Burton, Steven Pilgrim, and Bessie Smith, all of whom testified at trial, failed to ask for mercy. Bill Burton specifically testified at the PCR hearing that he would have asked the jury for mercy. App. 2600, ll. 3-8. Bessie Smith testified that she would “do what I could if it was

gonna help Marion.” App. 2701, l. 25 – 2702, l. 1. Steven Pilgrim testified that he was told by the defense team **not** to ask for mercy. App. 2728, l. 25 – 2729, l. 10. Among the witnesses Bartosh failed to call, Timothy Sims and Patsy Burton both testified they would have asked for mercy. App. 2757, ll. 19-21 (Sims); App. 2607, ll. 4-5 (Mrs. Burton).

The failure to have these witnesses ask for mercy and the failure to object to the trial judge’s erroneous ruling with respect to requests for mercy constituted deficient performance. Witnesses in a capital trial are not allowed to offer an opinion on the sentence they believe the defendant should receive. State v. Johnson, 338 S.C. 114, 125-26, 525 S.E.2d 519, 524-25 (2000). However, witnesses may “make a general plea for mercy.” Id. Bartosh was spooked by the trial judge’s ruling and failed to understand or object about the distinction between having witnesses ask for mercy and offer opinions on the ultimate issue for the jury. He did not place any objection on the record. He did not prepare witnesses to properly ask for mercy and, inconceivably, directed Steven Pilgrim not to ask for mercy. This failure constitutes deficient performance.

Trial Counsel Failed to Retain, Prepare, and Present Expert Witnesses

Trial counsel’s failure to prepare also led to deficient performance with respect to expert witnesses. Trial counsel has a duty to call expert witnesses concerning a defendant’s social history and obtain all relevant supporting documentation. 2003 Guideline 10.11(F)(2), App. 3251; see 1989 Guideline 11.8.3(F)(1) & (2). Bartosh failed to call Dr. Brawley who could have explained petitioner’s cognitive deficits. He failed to call a social work expert like Vogelsang who could have testified regarding petitioner’s personal and family history. Bartosh failed to have petitioner seen early in the investigation by a psychiatrist and failed to prepare Dr. Melikian, an inexperienced forensic psychiatrist, who was hired a month before trial. The failure to call these

witnesses and to prepare the sole expert presented during sentencing was constitutionally deficient performance.

Prejudice

Overwhelming prejudice exists in this case. Trial counsel's failure to investigate and prepare a complete and coherent mitigation presentation prevented the jury from hearing substantial evidence that could have resulted in a life sentence. The PCR court erred in concluding that because the jury heard some mitigating evidence that petitioner could not show prejudice. The PCR court ignored the evidence and witnesses that trial counsel should have presented to the jury at sentencing.

To show prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Wiggins, 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). Only one juror is needed to prevent a death sentence. “A capital jury can recommend a life sentence for any reason or no reason at all.” State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

The PCR court fundamentally erred in its prejudice analysis. It determined that because trial counsel presented some mitigating evidence, that *ipso facto* petitioner could not show prejudice. The United States Supreme Court directly rebuffed this approach in Sears v. Upton, 561 U.S. 945 (2010). In Sears, a *per curiam* opinion, the state PCR court found counsel’s mitigation investigation was constitutionally deficient, but in a “surprising” conclusion, determined that the defendant was not prejudiced. Id. at 951-56. The state PCR court concluded that “[b]ecause Sears’ counsel did present some mitigation evidence during his penalty phase . . .

‘[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made.’” Id. (quoting the state PCR court).

The Supreme Court resoundingly rejected this interpretation of the prejudice prong of Strickland and its progeny, finding that the presentation of some mitigation evidence does not foreclose inquiry into what should have been uncovered and presented. Id. The Court stated:

Second, and more fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under Strickland to cases in which there was only “little or no mitigation evidence” presented. True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence “would barely have altered the sentencing profile presented” to the decisionmaker, Strickland, *supra*, at 700, 104 S.Ct. 2052. But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.

Id. at 964 (emphasis in original). In support of this statement, the Court cited Williams, Rompilla, and Porter. The Court further condemned this erroneous application of Strickland:

We certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the Strickland inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.

Id. at 955 (emphasis in original).

Just like the state PCR court in Sears, the PCR court in this case erroneously assumed petitioner was not prejudiced because trial counsel presented some evidence at sentencing. Also like Sears, the PCR court’s wholesale adoption of the state’s proposed order demonstrates its failure to engage in “the type of probing and fact-specific analysis” required by the Sixth, Eighth, and Fourteenth Amendments. Id. At the PCR hearing, petitioner showed multiple instances where trial counsel did not uncover and present material mitigating evidence to the jury. The PCR court

here made the same error as the state court in Sears which prevented it from apprehending these instances.

Prejudice Flowing From Expert Witnesses Who Did Not Testify at Trial

Petitioner was prejudiced because trial counsel inexplicably failed to call Dr. Tora Brawley. Dr. Brawley was on the defense team's witness list, but was not called. No reasonable strategy supports Bartosh's decision not to call Dr. Brawley. Based on her examination and testing, Dr. Brawley would have testified that petitioner suffered from multiple cognitive impairments and "scattered neuropsychological deficits." App. 2357, ll. 8-14; App. 2360, l. 4 – 2362, l. 6. Dr. Brawley could not tell what caused these brain dysfunctions in petitioner because there were "multiple possibilities from the damage to the brain." App. 2362, ll. 10-14. Trial counsel also failed to provide Dr. Brawley with any records until after they eliminated her as a witness. App. 2366, ll. 18-24. She never learned that petitioner's family had a history of depression. App. 2380, ll. 4-7. Had trial counsel begun their investigation sooner, they could have provided Dr. Brawley with the documentation she needed and would have made her a strong witness at trial.

The PCR court erroneously found that Dr. Brawley's testimony was adequately presented through a report she wrote for Dr. Melikian. This finding was unreasonable. A written report was no substitute for live testimony. Furthermore, Dr. Melikian admitted that she could not explain the results of the psychological tests administered by Dr. Brawley. App. 2910, ll. 9-15.

Dr. Brawley's testimony would have demonstrated for the jury petitioner's mental deficits and reinforced the traumatic events from his childhood. Trial counsel's failure to prepare and present Dr. Brawley's testimony to the jury by itself constitutes sufficient prejudice to require reversal.

Failure to call a social worker like Vogelsang prejudiced petitioner. The PCR court wrongly determined that petitioner could not show prejudice because of the danger that Vogelsang's testimony would open the door for the prosecution to highlight bad incidents in petitioner's life. This conclusion ignores the fact that the state actually introduced much of this evidence during its case in aggravation and did not need to wait for petitioner to open to the door.

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). Here, the state introduced testimony that petitioner beat his wife, sold drugs, and was convicted of assault and battery with intent to kill for shooting into another car. App. 1775, ll. 15-24; App. 1779, ll. 5-16; App. 1821, ll. 5-8; App. 1823, ll. 2-7; App. 1936, ll. 5-11; App. 1829, ll. 18-23; App. 1862, ll. 9-20; App. 1943, ll. 2-5; App. 1950, ll. 4-15. The PCR court did not explain what additional bad evidence would be introduced through Vogelsang, but merely said that "she also confirmed that he had become a controlling and violent person." Supp. App. II 263; App. 3707. This conclusory statement ignores that Vogelsang would not have denied that petitioner was violent, but would have explained to the jury the factors that led to his violent acts.

Specifically, the lack of a clinical social worker prejudiced petitioner because testimony like Vogelsang's would have allowed the jury to hear a court recognized expert connect petitioner's pitiful family history and his own miserable childhood to his mental state at the time of the crime. See S.C. Code Ann. § 16-3-20(C)(b)(2) & (7). Vogelsang tied the substance abuse, violence, poverty, and mental health problems in petitioner's family's history to the present.

Without an expert like Vogelsang, and with the stunted investigation trial counsel performed, the testimony of petitioner's family members was lost because of its disjointed and

incoherent presentation. For example, at trial the judge prevented Bessie Smith from testifying about her history of mental illness and her suicide attempt. App. 2082, ll. 6-12. Such testimony would have been admissible through an expert like Vogelsang who could have testified about family members' mental health problems as a basis for her conclusions. See S.C. R. Evid. 703.

Furthermore, like in Wiggins and Council, the jury did not hear evidence of the extreme extent of mental illness in petitioner's family, including the suicide attempts of Virginia Lindsey, Robin Pilgrim, and Bessie Smith. Nor did the jury know anything about the circumstances of petitioner's own suicide attempt when he was a teenager. Trial counsel failed to present evidence regarding the extent of Steven Pilgrim's mental illness, including his and petitioner's belief in "roots." The jury did not hear about the violent household in which petitioner was raised, including his mother shooting at her boyfriend, Steven Pilgrim's CDV conviction, Robin Pilgrim's violent history, and the extent of the violence of petitioner's awful uncles, Paul and Willie. Finally, the jury heard no evidence concerning the rampant drug abuse in petitioner's community. The state's aggravation evidence that petitioner was a drug dealer should have been countered with the testimony that his uncles pressed him into service as a courier. Vogelsang testified regarding all of these tremendous problems petitioner had in his life.

Vogelsang's expert analysis would have allowed the jury to place petitioner's family history in its proper context as it related to the crime and the statutory mitigating circumstances, "the murder was committed while the defendant was under the influence of mental or emotional disturbance" and "the age or mentality of the defendant at the time of the crime." See S.C. Code Ann. § 16-3-20(C)(b)(2)&(7). Failure to present this evidence prevented the jury from giving "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." Abdul-Kamir v. Quarterman, 550

U.S. 233, 246 (2007). Had the jury been able to consider the testimony and evidence presented through Vogelsang, it is likely the outcome of the sentencing proceeding would have been different.

The failure to prepare Dr. Melikian prejudiced petitioner. Had trial counsel properly prepared Dr. Melikian to testify, there is a reasonable probability that the outcome of the sentencing proceeding would have been different. Wiggins, 539 U.S. at 534. The state's destruction of Dr. Melikian on cross-examination deprived petitioner of any credible expert witness. Trial counsel's failure to prepare Dr. Melikian prevented her from credibly testifying about the severity of petitioner's depression. Had she known about the Tullis message, seen the suicide notes, and known about the family history of depression, she could have better withstood cross-examination. As it turned out, she could not even remember why petitioner attempted suicide when he was fifteen. App. 2030, l. 11 – 2031, l. 7.

Dr. Melikian's credibility and ability to withstand cross-examination were severely affected by the lack of preparation. The assistant solicitor's reference to Dr. Melikian's preparation as "trash-in/trash-out" went unchallenged. App. 2040, ll. 10-23. Had the jury seen a prepared psychiatrist who had done a thorough investigation and examination instead of a "hired gun" doctor who had done nothing in the case until weeks before trial, the result could have been different.

Petitioner was also prejudiced by Dr. Melikian's inability to explain how the severity of his depression caused a dramatic decrease in his already low level of intellectual functioning. At trial, Dr. Melikian stated only that she disagreed with the Hall Institute's diagnosis of borderline intellectual functioning. App. 2009, ll. 2-18. She based her disagreement on Dr. Brawley's later test which showed petitioner's IQ to be nine points higher. App. 2009, ll. 10-12.

At the PCR hearing, Dr. Melikian was able to explain that petitioner's initial low score was due to his depression. App. 2894, l. 24 – 2895, l. 7. Had Dr. Melikian been properly prepared, she could have explained that the severity of petitioner's depression affected his cognition and intellectual functioning. App. 2888, l. 23 – 2889, l. 3. Petitioner's low level of intellectual functioning would have explained his mental state at the time of the shooting and given credence to petitioner's statement that he "just snapped" and was suicidal. App. 2013, l. 18 – 2014, l. 8.

Had the defense team told Dr. Melikian what they knew about Jimmy, provided her with petitioner's complete incarceration records, and had her ready to answer the devastating accusation of malingering, the result would have been different. The revelation during cross-examination that Jimmy first appeared when petitioner was served with the death notice and that Dr. Melikian did not know this fact obliterated any remaining shred of credibility. It allowed the state to turn her assertion that petitioner was not malingering into proof that petitioner was a liar.

Dr. Melikian testified at the PCR hearing that if she had known more about Jimmy, the malingering accusation would have been "the focus of my evaluation." App. 2899, ll. 12-16. Since petitioner told her Jimmy was imaginary, to her that meant he was not psychotic. Psychotics would not describe a hallucination as imaginary. App. 2898, ll. 17-21. Instead of unintentionally proving the prosecution's malingering accusation, she could have turned petitioner's invention of Jimmy into further evidence of the severity of his depression, as she did at the PCR hearing. App. 2914, l. 22 – 2915, l. 6.

It cannot be questioned that the malingering accusation severely hurt petitioner's chances of receiving a life sentence. If Dr. Melikian had more time to prepare and understand the significance of Jimmy, she could have explained to the jury that creating Jimmy demonstrated not that petitioner was a liar and malingerer, but a seriously mentally ill person whose depression was

so severe that he could not even comprehend the stupidity of inventing Jimmy. Had the defense team presented a psychiatrist with the experience, time, and support from counsel to explain Jimmy and the malingering accusation, the result at trial could have been different.

Prejudice Flowing from Lay Witnesses Who Did Not Testify at Trial

With respect to the witnesses presented at the PCR hearing who were not called at trial, prejudice is easy to demonstrate because the jury never heard their testimony. Petitioner was substantially prejudiced by trial counsel's failure to call Tullis as a witness. Tullis could have provided key testimony on multiple points that would have: (1) rebutted the state's aggravation evidence, especially the horrific 911 recording; and (2) shown petitioner's state of mind at the time of the shooting and its aftermath.

During its penalty phase case, the state focused on violent incidents during petitioner's marriage. The state presented the testimony of Celeste Nesbitt, Sharon Smith, Cathy Mullinax, and Brian White who all testified that they saw petitioner beat his wife. (Nesbitt) App. 1775, ll. 15-24; App. 1777, ll. 5-9; App. 1779, ll. 5-16; (Mullinax) App. 1925, l. 2 – 1927, l. 10; (Smith) App. 1821, ll. 5-8; App. 1823, ll. 2-7; (White) App. 1919, l. 15 – 1921, l. 7. Magistrate Judge Sarah Simmons also testified regarding a criminal domestic violence charge that was pending against petitioner at the time of the shooting. App. 1931, ll. 10-25.

The solicitor emphasized these incidents in his closing argument. The solicitor argued that petitioner consistently beat his wife and refused to use the court system to settle his disputes with Nell about their marriage and children. The solicitor stated:

I've got these two images doling [sic] in my mind. I've got a woman who follows the system. She believes in the system. She takes out an arrest warrant. He is processed. He is served. A judge tells him to stay away from his wife. That is somebody on that side. Then you've got Marion Lindsey who ignores what a judge tells him and takes justice in his own hands and guns his wife down. You want the context of the crime? There is the context of the crime.

App. 2115, ll. 14-23.

Tullis would have blunted the force of these witnesses' testimony and the solicitor's argument. Tullis would have testified that over the years, he got to know both petitioner and his wife very well. App. 2447, l. 21 – 2448, l. 5. He would have testified that petitioner had never been convicted of any criminal domestic violence charge. App. 2482, ll. 16-22. Regarding the past incidents of violence against Nell, Tullis “had a lot of contact with Mrs. Lindsey also, and, in fact, Mrs. Lindsey was the main one who would come and pay my fees for her husband during those periods of time.” App. 2476, l. 25 – 2477, l. 4.

Tullis also would have testified that petitioner had been to see him regarding his domestic troubles in the weeks leading up to the shooting, which would have rebutted the solicitor's argument that petitioner ignored the justice system. App. 2448, l. 12 – 2449 l. 2. Tullis would have told the jury that petitioner's biggest concern was being able to see his children and that due to Nell having an extramarital affair, petitioner was worried about how her new boyfriend would affect his relationship with his sons. App. 2451, ll. 12-21. As shown by the solicitor's emphasis on this point in his closing argument, the state rested much of its aggravation case on the claim that petitioner took the law into his own hands. App. 2115, ll. 14-23. Bartosh's closing statement shows his ignorance of what Tullis knew:

The Solicitor has made a great deal about the fact that there were alternatives available for Marion to handle the problem of custody with his children. I ask you to consider this, given Marion's education, his upbringing, his situation in life, **I don't know whether or not he really knew about those that you go and get a lawyer.** And you go up to Family Court and you get your kids. **I don't know if that ever entered his mind that that was an option to him.**

App. 2140, l. 23 – 2141, l. 6 (emphasis added). Bartosh’s closing argument is an admission of his own egregious failure. To not call a witness who was ready and willing to rebut this assertion by the state was prejudicial error.

The state also viciously attacked petitioner’s claim that he was depressed and suicidal. The state destroyed Dr. Melikian during cross-examination and repeatedly emphasized that petitioner was malingering. During his closing, the solicitor argued:

I hear he was hellbent on suicide. But he had all day and ten bullets and not one of them wound up in his head. Suicide? She wanted [sic] wound up with an autopsy. He gave himself a little nick on the neck. Suicide? Ten bullets? All day to do it. Never got around to killing himself.

App. 2114, l. 22 – 2115, l. 2. The solicitor also argued:

You can rest assured that they will talk about his psychiatric problems. They brought Dr. Melikian in here. Here’s what I remember from Dr. Melikian. When she was asked about depression, what part of depression will make somebody shoot somebody in the back of the head three times in a parking lot? She said nothing. What part of having cognitive deficits makes you shoot somebody in the back of the head in a parking lot? Nothing.

App. 2117, ll. 11-19. Without Tullis (and other witnesses who were not called), the state’s argument essentially went unchallenged.

Tullis’ testimony (which was made without an adverse credibility finding) concerning the message left on his answering machine hours before the shooting was invaluable evidence that could have rebutted the state’s argument concerning petitioner’s desire to commit suicide and would have been very persuasive to jurors. At the PCR hearing, Tullis vividly described petitioner calling his name and asking for help. App. 2453, l. 17 – 2454, l. 11. Petitioner was “not manic,” but “distressed” and “distracted.” App. 2453, l. 17 – 2454, l. 11.

Trial counsel also should have introduced the tape itself into evidence, but Bartosh lost it. The 911 call captured the shooting and the horrified cries of the children in the car. It was a

devastatingly powerful piece of evidence for the state. A defense tape, made just an hour before the shooting, would have blunted its impact and shown petitioner's depressed mental state. Tullis also would have testified regarding the suicide notes written by petitioner in the weeks before the shooting. App. 2456, ll. 5-18; App. 2479, ll. 9-14. Trial counsel never introduced these notes into evidence. Finally, Tullis could have testified about petitioner's self-inflicted injuries at the jail and that petitioner was placed on suicide watch. App. 2457, ll. 7-11.

Had Tullis been called to tell the jury about the answering machine message, the suicide notes, and petitioner's pathetic behavior at the jail, he would have shown that petitioner was trying to seek the help of an attorney to deal with Nell, that he was legitimately suicidal, and would have refuted key components of the state's sentencing strategy. The defense's failures with respect to Tullis—especially considering that they lost a monumentally important piece of evidence—is by itself sufficient prejudice to warrant reversal.

Trial counsel's failure to call EMS worker Vincent Bell as a witness prejudiced petitioner. Bell would have told the jury that petitioner was uncooperative with treatment at the scene. Petitioner told the paramedics that he wanted to die and they should let him die. App. 2384, ll. 4-8. This supported petitioner's claims regarding his severely distressed mental state and helped counter the state's argument that he was not suicidal and was a malingerer.

Had the jury heard Timothy Sims' testimony, they would have known that Sims viewed his older brother as a father figure and that petitioner helped raise him. App. 2738, l. 5 – 2789, l. 1. Sims lived with petitioner, Nell, and their children. App. 2740, ll. 9-23. He would have told the jury that while petitioner and Nell had their share of arguments, Sims never saw petitioner hit Nell. App. 2741, ll. 8-17. Sims would have rebutted the state's argument that petitioner was a drug dealer by testifying that petitioner only “got into the drug game or whatnot to take care of me

and my mom and my, my other brothers and everything because my daddy wasn't there." App. 2741, ll. 22-24.

Sims also would have told the jury about petitioner's suicide attempt several weeks before the shooting. App. 2743, l. 23 – 2744, l. 7. One evening, petitioner called Sims crying. App. 2744, ll. 14-19. Sims described petitioner on the phone as "nervous," "broken up in the heart" and telling Sims "I feel like I'm about to take my life." App. 2744, ll. 18-21.

Sims, Steven Pilgrim, Bessie Smith, and Virginia Lindsey all went to check on petitioner. App. 2744, ll. 8-11. They found petitioner "laying in the bed" and crying. App. 2745, ll. 9-17. The family talked to him and tried to calm him down. App. 2746, ll. 6-12. Pilgrim gave him a "nerve pill." App. 2746, ll. 6-12. Petitioner gave them suicide notes. He had written notes to Nell, his sons, his mother, and Sims. App. 2746, l. 21 – 2747, l. 18. Petitioner's mother kept the notes. App. 2747, ll. 13-15. These are the same notes discussed by Tullis in his testimony. App. 2985-2998. The family left petitioner by himself that night and never sought any professional help for him. App. 2746, ll. 15-17. The jury never heard this evidence.

Sims also would have told the jury about a telephone conversation he overheard between petitioner and Nell the day before the shooting. App. 2750, l. 2 – 2751, l. 9. Sims called Nell for petitioner from a different telephone because she would not answer if petitioner called. App. 2750, ll. 2-11. Petitioner told Nell, "I understand you don't want to be with me no more, just let me get the boys." App. 2750, ll. 11-13. Sims heard Nell cursing at petitioner and telling him he could not see them. App. 2750, ll. 14-15. Sims heard petitioner's son say "I want my daddy" to which Nell replied "we is not living with him no more, that's not your daddy" before hanging up. App. 2750, ll. 15-19.

Sims talked to petitioner the next day (the day of the shooting) on the telephone. App. 2753, ll. 1-18. A friend of Sims' had spoken to an acquaintance about Nell and relayed what he learned to petitioner. App. 2752, ll. 2-25. Sims described his subsequent conversation with petitioner:

[A]bout 30 to 45 minutes later he called back crying and said, said that she had told him a whole lot of stuff about Nell, and that her new boyfriend or whatever, he said he don't know what's, where his head it all messed up, and he was crying that day, that, that same day he was crying and going on and all out of his mind about whatever, what she had told him or whatever.

App. 2753, ll. 4-10. Sims attempted to calm petitioner down and made plans to meet him at their brother's house, but petitioner never showed up. App. 2753, ll. 11-16.

The jury never heard this moving and humanizing testimony from Sims because trial counsel never interviewed him and rebuffed his request to testify during the trial. App. 2756, l. 10 – 2757, l. 18. Petitioner was prejudiced by trial counsel's failure to investigate what Sims knew and refusal to present his testimony to the jury. The prejudice flowing from trial counsel's inexplicable refusal to call Sims as a witness is by itself sufficient to warrant reversal.

Petitioner was prejudiced by trial counsel's failure to call Patsy Burton to testify. Her testimony about petitioner as a polite child would have counterbalanced the prosecution's suggested image of petitioner as a violent man who beat his wife. App. 2602, l. 22 – 2603, l. 24. The jury never got to hear this testimony. App. 2607, ll. 4-5.

Prejudice Flowing from Lay Witnesses Who Testified at Trial and at the PCR Hearing

Four witnesses who testified at trial also testified at the PCR hearing. The testimony at the PCR hearing revealed numerous parts of petitioner's background and family history that was not heard at the sentencing proceeding. The new evidence and detailed descriptions presented at the PCR

hearing were available to trial counsel during sentencing. By not fully investigating and preparing these witnesses, trial counsel prevented the jury from hearing substantial mitigating evidence.

Petitioner's mother, Virginia Lindsey testified at both proceedings. During the trial, she testified that she had four boys and one drowned. App. 2044, ll. 17-19. The only male influence in petitioner's life was his uncle Steven Pilgrim. App. 2045, ll. 14-15. Petitioner's father never took any interest in him. Petitioner would get upset when his brothers' fathers would come pick them up to play with them. App. 2050, ll. 1-17. She and her four boys lived in a two bedroom home. The boys stayed in one room together and shared a bed. App. 2045, l. 18 – 2046, l. 7.

Ms. Lindsey testified about an accident that occurred when petitioner was nineteen months old and poured kerosene all over himself. App. 2047, ll. 1-13. She took him to the hospital. App. 2047, ll. 14-17. A month after the kerosene accident, petitioner's head was run over by a car driven by his uncle Paul. App. 2047, l. 18 – 2048, l. 13. Petitioner received a head wound from which he still has scars. App. 2048, ll. 3-4. Steven Pilgrim took him to the hospital and petitioner was released that evening. App. 2048, ll. 5-13.

Petitioner was slow in school and no one was available to help him with his homework. He had problems with his speech and had to go to speech class. She said petitioner repeated the eighth grade three times. App. 2048, l. 14 – 2049, l. 18.

Ms. Lindsey testified that petitioner was hospitalized at the age of fifteen. App. 2056, ll. 18-21. Her entire testimony about what was actually a suicide attempt was as follows:

Q. Let me go back to, let me ask you one question about when Marion was 15 and was hospitalized for attempted suicide.

A. Yes.

Q. Did he ever describe his experiences to you?

A. About the suicide?

Q. About his experiences at the hospital.

A. Yes.

Q. What did he tell you?

A. Marion told me that he was very afraid because the man who was in the room with him look like Charles Manson. He was very afraid.

Q. How long did he stay in the hospital for that?

A. He stayed in the hospital about four days.

App. 2056, l. 18 – 2057, l. 6. At no point did she describe petitioner's suicide attempt or the events preceding it.

Ms. Lindsey testified that in the days before the shooting, Nell Lindsey, petitioner's wife, blocked their phone calls and refused to let Marion have any contact with his children. App. 2058, ll. 13-19. Petitioner "could not live any longer if he could not get his family back." App. 2059, ll. 3-4. The last time Ms. Lindsey saw petitioner was three days before the shooting. He had lost weight and seemed very "worried," "upset," and "very depressed." App. 2059, ll. 5-15.

Bartosh attempted to elicit testimony from Ms. Lindsey about Bessie Smith's mental health, but was unsuccessful when the state's objections were sustained. App. 2056, ll. 3-16. She did testify that one of her sons drowned, but did not testify regarding the effect of the drowning on petitioner. App. 2045, ll. 4-5. Bartosh asked her no other significant questions about their family history.

Ms. Lindsey's testimony at the PCR hearing was far more revealing and extensive. The testimony from Ms. Lindsey that the sentencing jury never heard was as follows. She testified regarding her own background and her family's background. Ms. Lindsey quit school after completing the ninth grade. App. 2613, ll. 10-19. She had eight siblings and only one of them

graduated high school. App. 2613, l. 20 – 2614, l. 12. Her father left the family when she was thirteen. App. 2615, ll. 11-13. Ms. Lindsey and her eight siblings grew up in a four bedroom house with only a small coal stove for heat. App. 2617, ll. 10-23. They never had much money. App. 2618, ll. 6-18. Ms. Lindsey got married when she was seventeen and at the same age had her first child, Claude Lindsey. She also had another son, Frederick Lindsey, and a little girl by her first husband. App. 2619, ll. 2-9.

Ms. Lindsey, her husband, and the children continued to live with her mother, who by this time had a smaller house with only four rooms and two bedrooms. App. 2619, ll. 10-15. She and her first husband eventually divorced and Ms. Lindsey and her children continued to live at her mother's. App. 2619, ll. 16-18. Ms. Lindsey's siblings also lived in the house with them. Petitioner was born in and lived in this house until he was seven. App. 2620, ll. 12-25. During petitioner's first seven years, up to twelve people lived in this tiny house. App. 2621, ll. 1-17.

Virginia Lindsey's daughter, Vanessa, was killed in a car accident when she was seven months old. App. 2619, ll. 7-8. Vanessa's traumatic death severely affected Ms. Lindsey. App. 2622, ll. 3-24. After Vanessa's violent death, it took her, "about a year to really come to my senses, you know, and realize that she was gone and I wasn't gonna have her no more." App. 2622, ll. 15-18. This episode affected her life for years to come and affected her ability to deal with day to day stress. App. 2622, ll. 19-24.

After petitioner was born, Ms. Lindsey had a live-in boyfriend named Roger Sims. He was the father of Timothy Sims. They lived together for about twenty years. App. 2622, l. 25 – 2623, l. 5. Sims had "a real bad drinking problem" that caused him to act violently in the home. App. 2623, ll. 6-10. Petitioner and the other boys took the brunt of Roger Sims' violence. App. 2623,

ll. 11-13. When Mr. Sims became violent, petitioner would run to get Virginia Lindsey's mother. App. 2623, ll. 14-23.

Ms. Lindsey testified about several head injuries petitioner received as a child. These injuries were not mentioned at the sentencing hearing. When petitioner was six or seven years old, he fell on his head and had to go to the doctor. App. 2626, ll. 2-13. Two weeks after that fall, he fell onto a cement porch and hit the same spot on his head. App. 2626, ll. 2-13. When petitioner was sixteen, he was in a car accident and injured his eye. App. 2626, ll. 2-13. This testimony regarding his head injuries would have supported Dr. Brawley's expert testimony about petitioner's brain abnormalities.

Ms. Lindsey testified about the negative influence exerted on petitioner by her brothers, Paul and Willie, who both lived with them. App. 2629, ll. 5-10. Both were violent. App. 2629, ll. 16-18. Ms. Lindsey described them: "They got good attitudes, but they always love to fight. They just love to fight a lot and beat their girlfriends, Paul did, Willie did, and they would just loved to fight a lot." App. 2629, ll. 7-10. They also fought other people in the community. App. 2630, ll. 2-7. Paul owned guns and knives and Willie probably owned a knife. App. 2630, ll. 8-13. Ms. Lindsey described a shootout in the house when petitioner was a child:

Well, I remember one time when Paul, it was a little café down below our house where we lived, and Paul, he had got into it with some guys down there. So, it was like three or four o'clock in the morning, he came home, bamming on the door. So, he didn't give nobody time to open the door. He just kicked the door open and came in, and we didn't all wondering what was going on.

So, he come in there. He know my mama always kept a pistol. So, he come in there and got my mama pistol and went back out the door shooting it, and then the guy that he was shooting at, they were shooting back. So, he went out the back door, and the guy that was shooting him shot through our house, and we all had to get down on the floor cause they was doing the shooting. And my brother, Steve, he was hollering y'all get on the floor, get on the floor.

App. 2630, l 17 – 2631, l. 6. The jury did not hear any of this evidence at trial.

Virginia Lindsey described another violent and cruel incident:

Q. Do you remember an incident with Paul and Willie and a cat?

A. Yeah, I remember that incident, incident. Marion had a little cat, a little small kitten, and Paul – he didn't like it. Paul and Willie didn't like the cat. They didn't like the cat. So, they had been telling him mama, they gonna kill that cat, you need to get him out of there.

So, one night, we was just sitting there watching TV and stuff, and all, the little kitten come in there, and Willie was trying to get him, get the kitten out. Paul said leave it, open it up, we'll put him in the heater, and, so, Paul opened – Willie says open the heater, Paul. So, Paul, Paul, he opened the heater and held it open while **Willie threw the cat in the heater**, you know, and that hurt Marion too cause he loved that little cat.

Q. I was going to say was Marion in the, in the house when, when that happened?

A. Yeah, Marion was there, yeah, cause he was small. He was there.

Q. So Marion got to watch his two uncles –

A. Burn his cat.

Q. – toss his cat and burn it alive?

A. Burn him alive.

App. 2631, l. 8 – 2632, l. 5 (emphasis added).

On cross-examination, the state asked Ms. Lindsey whether she attempted to stop Paul and Willie from throwing the cat into the heater to which she responded “No.” App. 2665, ll. 5-9. On redirect, Ms. Lindsey further explained her inaction:

Yeah, I just couldn't see how they could just stand up there and open the heater and throw the cat in there. It surprised me cause I couldn't see how they just opened up a real hot heater and throwed the cat in it. But I was sitting there when they throwed it in there and it was an awful smell in the house. The smell was so bad you couldn't hardly stay in the house. But they did it.

Q. For a long time did that smell remind you of what happened?

A. Yep.

Q. Why didn't you try to stop it?

A. I was scared of them.

Q. You were scared of your brothers?

A. Yeah. Yep.

Q. Why were you scared of them?

A. I don't know. I was too scared to tell them not to throw the cat in the heater. I didn't know what they might do cause they had already done grabbed the cat up and throw him in the heater. He might would of throwed me in there too.

Q. And these were the uncles that were living in the house with you and Marion?

A. Yeah, they lived there.

App. 2670, l. 10 – 2671, l. 6. The only testimony at trial about this was a brief mention by Bessie Smith that did not indicate petitioner was present when the cat was burned alive.

When petitioner was twenty-three years old, his older brother drowned in Lake Jocassee. App. 2633, ll. 3-9. The body was never recovered. App. 2633, l. 7. His brother's death upset petitioner to the extent that he and his other brother searched the lake in a boat trying to find their brother's body. App. 2633, ll. 10-15. The jury never heard this evidence.

When petitioner was a young adult the family lived in a rough neighborhood in Inman. App. 2333, ll. 19-24. Drinking, drug dealing, and violence were a normal part of everyday life. App. 2633, l. 25 – 2634, l. 9. Ms. Lindsey believed this had an effect on petitioner. App. 2634, ll. 10-12. She wished her children had never been exposed to that environment. App. 2634, l. 24 – 2635, l. 1.

Ms. Lindsey did testify at the sentencing hearing that petitioner attempted suicide when he was fifteen, but she gave no details regarding the attempt or the events that preceded it. App. 2056,

1. 18 – 2057, l. 6. At the PCR hearing, Ms. Lindsey fully described the incident. Petitioner had been fighting with a sibling. Ms. Lindsey went into the boys' room. Ms. Lindsey described what happened next:

So, Marion, he hauled off and held me down on the bed. So, I told him don't never ask me for nothing else in your life cause I won't never give you nothing else and I won't never buy you nothing else and I don't love you no more and you don't treat your mama like that. Yeah, I told them that in anger.

Q. Now, how did Marion react to that?

A. Marion didn't like that. He went in the bathroom, went in the bathroom, poured out a whole lot of pills and took a whole lot of pills. And, so, I was laying on the bed watching TV and I heard him call Tim in the room. So, Tim went in the room. Tim, he was small. So, he called Tim in the room, told Tim to go in there and tell his daddy to come here.

So, Tim come back there and told his daddy that Marion said come here. So, he went in the bathroom and Marion in there down on his knees throwing up. So, he came back and say you better call the rescue squad or something, that boy done went in there and took a whole lot of pills. Say he in there throwing up.

So, I went in the bathroom and he was on his knees throwing up in the commode, and he had a bunch of more pills laying on the back of the commode. But then he had took all kinds cause I had all kinds like Tylenol, Advils, Ibuprofen, everything up in the cabinet where he just mixed them all up together and took them.

Q. Once – did he get to the hospital that evening?

A. Yes, they carried him to the hospital and they pumped his stomach and they kept him for, up there for, at the hospital like three days and **after that they put him in mental health for two weeks.**

Q. So, for a little over two weeks he was in inpatient treatment for the suicide attempt?

A. Yes, sir.

Q. When he was released from the inpatient treatment, did he come home?

A. Yeah, he came home after that.

Q. Was there any follow-up treatment that Marion was required to get?

A. No, they just sent him home. They didn't tell me I had to bring him back for no follow-up or nothing.

App. 2636, l. 7 – 2637, l. 22 (emphasis added). At trial, Ms. Lindsey only said petitioner was in the hospital for four days and did not mention petitioner's two weeks of inpatient care at mental health. Ms. Lindsey said that no one in the family ever took petitioner for any mental health treatment following his release. App. 2637, l. 23 – 2638, l. 3. None of these details were in Ms. Lindsey's testimony at the original trial.

During sentencing, Ms. Lindsey was asked about the last time she saw her son before the shooting and testified only that petitioner had lost weight and seemed very depressed. App. 2059, ll. 5-15. At the PCR hearing, Ms. Lindsey described in detail petitioner's suicide attempt that occurred approximately three weeks before the shooting. App. 2646, l. 11 – 2648, l. 1. She testified that petitioner gave her suicide letters addressed to her, Timothy Sims, and petitioner's two boys. App. 2647, ll. 2-10. She kept the notes in a box until after the shooting when she gave them to Rod Tullis. No one tried to get petitioner any medical treatment after this suicide attempt. App. 2647, l. 17 – 2648, l. 1.

None of this testimony was elicited by trial counsel during the sentencing proceeding. Had trial counsel fully investigated and taken the time to interview and prepare Ms. Lindsey, they would have discovered this further evidence that would have explained petitioner's family background and the violent and sad household in which he was raised. Since trial counsel failed to do this, the jury was never able to hear this additional testimony from Ms. Lindsey. This failure prejudiced petitioner, especially with regard to the solicitor's demeaning and belittling references to petitioner being suicidal and having "all day" to kill himself. App. 2114, l. 22 – 2115, l. 2.

Bessie Smith testified at the sentencing proceeding and at the PCR hearing. Smith's entire testimony at trial consisted of a brief description of petitioner's uncles throwing his cat in the heater. App. 2081, ll. 14-25. Importantly, Smith did not describe the incident in detail or relate to the jury that petitioner was present and observed the burning of the cat. App. 2081, ll. 17-25. She said, "And one day, my brothers took the cat and threw it in the heat **without his knowledge.**" App. 2081, ll. 21-22 (emphasis added). Bartosh also asked Smith whether she had attempted suicide. She answered "yes" but then was cut off by a sustained objection from the state. App. 2082, ll. 6-12. Bartosh gave up questioning Smith after this objection was sustained. App. 2082, ll. 6-15. No other testimony was elicited from Smith.

At the PCR hearing, Smith gave a detailed family history. She described the lack of education and the poverty in their household. App. 2674, l. 2 – 2675, l. 14. Petitioner's grandmother suffered "a deep depression" after her husband left her and "she stayed in the bed most of the time." App. 2676, ll. 3-5. Smith described having to bathe and feed her mother during her depression. App. 2676, ll. 3-5. The jury never heard that petitioner's grandmother suffered from depression.

Smith also testified at PCR regarding the violent behavior of her brothers, Paul and Willie. She described Paul's drinking, fighting, and use of knives. App. 2678, l. 2 – 2679, l. 14. Paul and Willie's behavior continued to grow worse while they lived with Smith's mother in a household that included petitioner. App. 2680, ll. 4-11. Smith also provided the history of petitioner's aunt, Robin Pilgrim, who was addicted to drugs, lived on the street, and was in and out of jail. App. 2681, ll. 8-17.

Smith also provided an in-depth description of Virginia Lindsey's history of depression, her background, and her relationship with her children. After her young daughter's violent death,

Virginia Lindsey was “devastated.” App. 2682, ll. 6-14. Virginia Lindsey’s husband began drinking and started dating Ms. Lindsey’s cousin, who grew up in the same house and was considered a sister. App. 2682, ll. 16-21. She said “that kind of tore [Virginia Lindsey’s] nerves up.” App. 2682, ll. 22-24.

After the separation from her husband, Ms. Lindsey began to drink and stay out late at night. App. 2682, l. 25 – 2683, l. 3. Smith said Virginia Lindsey was rarely around her children because she worked second shift. App. 2683, ll. 12-18. The children’s grandmother was left with them, but she was often too feeble and depressed to supervise them. App. 2683, ll. 19-25. Petitioner was approximately two years old when his mother began drinking and staying out late. App. 2684, ll. 4-7. This meant that his grandmother and his uncles, Paul, Willie, and Steven, were primarily responsible for his guidance and care from the time he was very young. App. 2684, ll. 22-25. Virginia Lindsey was not involved with her children’s education. App. 2689, ll. 4-6.

Smith corroborated petitioner’s suicide attempt that took place a couple of weeks before the shooting. App. 2692, l. 3 – 2694, l. 4. Smith was present at the family meeting as described by Timothy Sims. She described petitioner as depressed and suicidal. App. 2692, l. 18 – 2693, l. 3. Petitioner told them that he had nothing to live for and “just wanted to end it all.” App. 2692, l. 16 – 2693, l. 3. No one helped petitioner obtain any professional help after that evening. App. 2694, ll. 2-4.

The day before the shooting, Smith had a telephone conversation with petitioner. App. 2695, l. 21 – 2696, l. 25. Petitioner was upset and crying and saying that his wife would not let him see his children. App. 2695, l. 21 – 2696, l. 13. Petitioner called Smith back the day of the shooting and was again very upset. App. 2697, ll. 1-2. He told his aunt that his wife Nell and her mother had taken out several warrants on him and he was afraid to go to work because he was sure

that he would be arrested. App. 2697, ll. 1-12. This conversation took place “a couple of hours” before the shooting. App. 2700, ll. 2-6. The jury never heard about these telephone conversations that were so close in time to Nell’s death.

Trial counsel’s interaction with Smith before the trial involved only thirty to forty minutes of conversation approximately a week before the trial started. App. 2700, ll. 7-20. Smith’s description of this encounter shows that trial counsel did not build a rapport with her. She stated, “they was asking me a lot of stuff about me, which I told them I didn’t want to answer because I wasn’t the one on trial.” App. 2701, ll. 13-16. Trial counsel’s failure to build a rapport with Smith and learn what she knew about the family history, petitioner’s history, and petitioner’s state of mind in the weeks and days prior to the crime and present this evidence to the jury prejudiced petitioner. This evidence supported and explained petitioner’s suicidal depression at the time of the shooting, and rebutted the state’s arguments to the contrary.

Steven Pilgrim, petitioner’s uncle, testified at trial and at the PCR hearing. His testimony at trial consisted entirely of stating that he took petitioner to the hospital after his car accident when he was a child, that he knew petitioner had inhaled kerosene, that Pilgrim suffered from high blood pressure, panic attacks, and anxiety attacks, and that Pilgrim’s daughter suffered from panic attacks. App. 2079, l. 15 – 2080, l. 16.

In stark contrast, at the PCR hearing, Pilgrim relayed many details of the family’s background and history of mental illness. Pilgrim suffered from depression and anxiety. App. 2727, ll. 2-11. Trial counsel never obtained a medical release from Pilgrim and he would have given them one had they asked. App. 2727, ll. 16-21. Virginia Lindsey attempted to commit suicide after petitioner’s father stopped helping her raise petitioner. App. 2715, l. 5-17. Bessie Smith attempted suicide. App. 2715, ll. 21-25. Smith was hospitalized for approximately a month

after her suicide attempt. App. 2716, l. 23 – 2717, l. 3. Robin Pilgrim attempted suicide approximately three times. App. 2717, ll. 4-10. She was hospitalized on more than one occasion. App. 2717, ll. 15-18. She also exhibited violent behavior during the time that she was residing in the same house as petitioner. App. 2717, ll. 19-21. Robin Pilgrim was incarcerated at the time of the PCR hearing. App. 2718, ll. 3-7. None of this testimony about the number of suicide attempts in petitioner's family was presented to the jury.

Steven Pilgrim related the abject poverty in which the family lived. App. 2718, l. 13 – 2719, l. 23. Applicant's Exhibit No. 27, on file with the Court, depicts the four room house (which was little more than a shack) where petitioner was born and lived until he was ten years old. App. 2718, l. 13 – 2719, l. 16. Approximately ten people lived in the house. App. 2718, l. 25 – 2719, l. 2. The house did not have inside plumbing or air conditioning. For heat, the house only had an old coal or wood stove. App. 2719, ll. 17-23.

Pilgrim gave more detail about the car accident that occurred when petitioner was approximately eighteen months old:

Well, my brother, Paul, wanted to borrow my car and, and he drink a whole lot. So, he didn't really look, and Marion always followed me everywhere I go, and, and my brother just got in the car and backed up. And I looked. I said well, he ran over a rock with my car. And I – then he looked back. I said oh, that was the baby and Marion was the baby and I ran and grabbed him.

And I kind of hollered and called my brother to come back because the baby – I had the baby in my arms. So, we grabbed him. I grabbed him and we took him to Inman Police Department and he never cried, never, never moved or anything. And we took him to – we took, got the ambulance and took him to Spartanburg Regional. And, like I say, he never responded, and, until we got into the hospital and they got to working on him he finally responded.

App. 2721, ll. 2-16. The hospital sent petitioner home that same day. App. 2721, ll. 17-23.

Pilgrim described petitioner's suicide attempt three weeks before the shooting. App. 2722, ll. 10-13. Petitioner was "depressed, real depressed." App. 2722, ll. 21-23. Petitioner was crying. Pilgrim had never seen petitioner cry as a grown man until that night. App. 2723, ll. 3-10.

Approximately a week later, petitioner called Pilgrim wanting to borrow his gun. App. 2723, l. 18 – 2724, l. 2. Pilgrim did not give petitioner his gun. App. 2724, ll. 15-17. Shortly after that phone call, someone broke into Pilgrim's house and "trashed it looking for something." App. 2724, ll. 18-23.

Trial counsel should have spent more time with Pilgrim investigating what he knew about the family's history and petitioner's upbringing. Had they done so, the jury would have heard the above described mitigating evidence. Trial counsel's failure to elicit this testimony prejudiced petitioner.

Bill Burton's testimony at the PCR hearing corroborated the testimony of petitioner's family. Burton, petitioner's childhood friend, testified that petitioner lived in "real poverty conditions" and that petitioner's house "was falling apart." App. 2594, ll. 1-7. Growing up, petitioner and his siblings were "completely unsupervised" and had "no encouragement to perform in school." App. 2593, ll. 21-25. Petitioner essentially "lived on the street." App. 2594, ll. 8-16. The failure to fully develop Burton's testimony prejudiced petitioner. Burton was a responsible business leader and his observations would have carried significant weight with the jury.

The PCR testimony of these witnesses shows the constitutional deprivation caused by trial counsel's pitiful investigation and preparation. See Andrus v. Texas, ___ U.S. ___, 140 S.Ct. 1875 (2020). Like in petitioner's case, the Court in Andrus found that only at the post-conviction hearing "did the grim facts of Andrus' life history come to light." Id. at 1878. Trial counsel in

Andrus called two witnesses from the defendant's family who gave an abbreviated family history. Id. at 1878-79.

At the state habeas proceeding, the "evidence revealed a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse." Id. at 1879. After committing the crime that resulted in his death sentence, Andrus used his own blood to write on the walls of his jail cell to let him die. Id. at 1880.

The Supreme Court wrote that Andrus' trial counsel "performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence." Id. at 1881. He was "barely acquainted with the witnesses who testified during the case in mitigation." Id. at 1882. He did not meet with many members of Andrus' family who had "disturbing stories about Andrus' upbringing." Id. Trial counsel's performance in Andrus closely resembles Bartosh's failings. Bartosh conducted a hasty and truncated mitigation investigation and did not present the "vast tranche" of mitigating evidence found by PCR counsel to the jury. Had he done so, the result would have been different.

Prejudice Flowing from Failure to Prepare Witnesses to Ask for Mercy

Five witnesses failed to ask the jury for mercy because of trial counsel's lack of understanding of the law and failure to prepare. Bill Burton, Steven Pilgrim, and Bessie Smith, all of whom testified at trial, failed to ask for mercy. Bill Burton specifically testified at the PCR hearing that he would have asked the jury for mercy. App. 2600, ll. 3-8. Bessie Smith testified that she would "do what I could if it was gonna help Marion." App. 2701, l. 25-2702, l. 1. Steven Pilgrim testified that he was told by the defense team **not** to ask for mercy. App. 2728, l. 25 – 2729, l. 10. Among the witnesses Bartosh failed to call, Timothy Sims and Patsy Burton both testified they would have asked for mercy. App. 2757, ll. 19-21 (Sims); App. 2607, ll. 4-5 (Mrs. Burton).

Beginning with the principle that a juror may recommend a life sentence for any reason or no reason at all, the prejudice from the failure of these witnesses to ask for mercy requires reversal. See State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Mercy has long been part of capital sentencing. See State v. King, 158 S.C. 251, 155 S.E. 409, 425-25 (1930). King analyzed the amendment of the statute governing capital murder in 1894 that gave the jury the right to recommend mercy to the court. Id. If the jury did not recommend mercy, the punishment was death. Id. The King Court reasoned, “The statute is very broad. It is clear that under its terms a jury may, for any reason whatever appearing to them, refuse to have the accused put to death, but may spare his life.” Id. at 426.

In the direct appeal of John Kennedy Hughey’s death sentence from Spartanburg County, this Court addressed a judge’s charge directing jurors not to consider mercy. State v. Hughey, 339 S.C. 439, 458-60, 529 S.E.2d 721, 731-32 (2000). The trial judge charged the jury “you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy.” Id. (Court’s emphasis removed for clarity). On appeal, Hughey argued the jury instruction was confusing “because it suggested that an act of mercy would have been an invalid reason for a life vote.” Id. The Hughey Court held this argument was procedural barred, lacked merit and affirmed. Id.

Nine years later, this Court reversed Hughey. Rosemond v. Catoe, 383 S.C. 320, 329-30, 680 S.E.2d 5, 10-11 (2009). Rosemond, also a capital defendant in Spartanburg County, won a new sentencing hearing in his PCR appeal because of his lawyer’s failure to present any mental health evidence in mitigation. Id. at 326-29, 680 S.E.2d at 8-10. Despite reversing on this issue, the Court elected to address the jury charge on mercy. Id. at 329-30, 680 S.E.2d at 10-11.

Rosemond challenged the same jury charge as Hughey. Id. The trial judge, who was the same judge in Hughey, again charged the jury that they could recommend a life sentence for any reason or no reason “other than as an act of mercy.” Id. The Rosemond Court held, “We agree with Rosemond and hold that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it.” Id.

“It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy.” Id. “A jury’s consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case.” Id. Rosemond specifically overruled Hughey. Id. Hughey, along with two other capital defendants, obtained new sentencing hearings in PCR because of this erroneous jury charge. See Hughey v. State, Op. No. 2015-MO-029 (S.C. Sup. Ct. May 13, 2015); Evans v. State, Op. No. 2015-MO-027 (S.C. Sup. Ct. May 13, 2015); Binney v. State, Op. No. 2015-MO-28 (S.C. Sup. Ct. May 13, 2015).

Rosemond shows the legal prejudice to petitioner Lindsey. A jury cannot consider mercy requests if it never hears them. Petitioner’s jury never heard requests for mercy from five witnesses, including the Burtons who were not part of Petitioner Lindsey’s family and were upstanding members of the Spartanburg community. Any of these requests could have resulted in a life sentence.

Conclusion

Whether counsel’s performance is measured against the ABA Guidelines or existing precedent, there can be little question it was deficient. Bartosh’s failure to investigate and prepare a minimally adequate mitigation case cannot be deemed constitutionally sufficient. Trial counsel’s deficient performance gave the jury an incomplete picture of petitioner and prevented them from

considering important humanizing evidence. This evidence directly related to whether petitioner suffered from a “mental or emotional disturbance” and his mentality at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2) and (7).

Had the jury heard Tullis’ testimony and the message petitioner left him hours before the shooting, the result could have been different. Had the jury seen the suicide notes petitioner wrote, the result could have been different. Had the jury heard the extensive testimony from his family members about his horrible upbringing and deteriorating mental state in the weeks leading up to the crime, the result could have been different. Had the jury heard complete testimony from expert witnesses about petitioner’s mental health, his family history, and his adaptability to prison, the result could have been different. Had trial counsel bothered to attend the interview with Dr. Narayan and learned how to prevent a diagnosis of malingering, the result could have been different. Had the jury heard mercy requests from petitioner’s friends and family, the result could have been different. The feeble mitigation presentation at trial deprived petitioner of his rights to a constitutionally adequate sentencing phase defense against the death penalty pursuant to the Sixth, Eighth, and Fourteenth Amendments. This Court should grant petitioner a new sentencing trial.

Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community.¹⁰

Relevant Facts

As will be seen below, during its case in aggravation, the state presented evidence of petitioner's prior convictions and bad acts through multiple witnesses. The state attempted to paint petitioner as a violent drug dealer. The state also called a witness from the Department of Corrections to testify regarding how inmates are housed and classified. Trial counsel presented *nothing* to counter the state's evidence that petitioner posed a future danger.

Celeste Nesbitt claimed she saw petitioner beat his wife, Nell, in a parking lot at the beach. App. 1775, ll. 15-24. On another occasion, petitioner hit Nell at Nesbitt's house. App. 1777, ll. 5-9. In another incident, petitioner allegedly hit Nell in an Applebee's parking lot. App. 1779, ll. 5-16. Nesbitt said the police were called about the Applebee's incident and the incident at her house. App. 1787, ll. 2-6.

Sharon Smith was Nell's first cousin. She claimed she saw petitioner hit Nell at Smith's house. App. 1821, ll. 5-8. She also claimed that she often saw Nell with bruises and black eyes. App. 1823, ll. 2-25.

¹⁰ The issues presented in this Argument were raised during the PCR hearings, in ground 6 in petitioner's Post-Hearing Memorandum, and in petitioner's Rule 59(e) Motion. Supp. App. II 105-106; App. 3544-45. The PCR court ruled on all of these issues in its Orders of Dismissal and in its Orders Denying Motion to Reconsider, Alter, or Amend. Supp. App. II 195; App. 3637, 3751.

The state also presented several police officers in an effort to show that petitioner was violent and that he sold drugs. Chris Smith, a DEA agent and former narcotics investigator with the Spartanburg County Sheriff's office, testified that he arrested petitioner for trafficking crack cocaine. App. 1833, l. 19 – 1834, l. 1.

Brian Duncan, a deputy with the Spartanburg County Sheriff's office, also testified regarding the same investigation and arrest as Chris Smith. App. 1862, ll. 9-20. Brian White, another deputy with the Spartanburg County Sheriff's office, testified about the incident at Applebee's. App. 1919, l. 15 – 1921, l. 7. Deputy White signed an arrest warrant for petitioner for criminal domestic violence related to the Applebee's incident. App. 1921, l. 12-15.

Stanford Wilkins was the victim in petitioner's 1996 ABIK conviction. Petitioner allegedly used his vehicle to block Wilkins' car in the road. App. 1942, ll. 17-24. He claimed petitioner shot at him twice through his windshield. App. 1943, ll. 2-5. Wilkins was hit once in the arm. App. 1943, ll. 11-12.

Jessica Cannon was a passenger in Wilkins' car. Her testimony corroborated Wilkins' claims regarding the shooting incident. App. 1950, ll. 4-15.

Martha Smith was an employee with the Spartanburg County Clerk of Court. App. 1952, ll. 4-8. The state used her to introduce the 1996 ABIK conviction for the shooting of Stanford Wilkins. App. 1952, ll. 14-23. She testified that petitioner pled guilty to ABIK and that he received a sentence of two years' imprisonment, suspended to one year in jail and one year of probation. App. 1953, ll. 2-10.

Sarah Simmons was a magistrate judge in Spartanburg County. App. 1930, ll. 13-21. Judge Simmons was the magistrate on duty the night before the shooting. App. 1931, ll. 1-5. She presided over petitioner's bond hearing on a CDV charge. App. 1931, ll. 10-25. The testimony

of Judge Simmons showed petitioner had been arraigned for allegedly committing criminal domestic violence against his wife, Nell. It also revealed that as condition of his release, petitioner was barred from having any contact with her. App. 1936, ll. 5-11.

James Sligh

James Sligh, division director of classification of inmate records for the South Carolina Department of Corrections, testified during the state's case in aggravation. App. 1908, ll. 10-14. The state presented Sligh to testify regarding how inmates who receive life sentences are classified. App. 1908, ll. 18-24.

This penalty stage testimony euphemistically over the years has become known as the state's "little village behind bars" testimony. Sligh testified that inmates who receive life sentences have access to the yard, frequent interaction with other inmates, and opportunities to work as well as go to school. They eat their meals in a cafeteria setting, they have "contact" visitation, and they also have personal contact with guards and other prison employees. App. 1909, l. 2 – 1912, l. 1.

"[H]e is going to be housed in a living unit with as many as 300 other inmates. He has access to move throughout that unit with some restrictions. Depending upon the nature of the job assignment or school assignment or whatever, he is going to be interacting with other inmates throughout the day and visitation or recreational opportunities. It will be almost impossible to say how many. Obviously quite a few." App. 1909, l. 16 – 1910, l. 3. See State v. Plath, 281 S.C. 1, 8-9, 313 S.E.2d 619, 623 (1984); see also State v. Burkhardt, 371 S.C. 482, 487-88, 540 S.E.2d 450, 453 (2007); State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005).

Thus, the state offered witnesses in aggravation on what a dangerous person petitioner allegedly was as seen above, and then offered Sligh's testimony to impart that petitioner, if

sentenced to life imprisonment, would still have a lot of freedom of movement, privileges and opportunities in prison which made him a future danger.

The defense did not counter, as seen below, or rebut this evidence with available testimony that petitioner would be controlled in prison, that he could adapt to prison, and that he would not be a future danger to anyone.

PCR Evidence

Counsel Brannon's sole responsibility, as delegated to him by Bartosh, was the guilt phase of the trial. App. 2300, ll. 8-14. Brannon testified that anything regarding the penalty stage mitigation case, including prison adaptability experts, was not within his purview and that he had no testimony to offer at the PCR hearing regarding these questions. App. 2309, ll. 20-25.

Quimby testified that she had no knowledge concerning Bartosh's trial strategy. App. 2521, ll. 14-17. She had "a very limited role" that did not include making decisions in the case. App. 2520, ll. 4-21. Quimby specifically testified that she had no input into whether a prison adaptability expert would be called. App. 2533, l. 22 – 2534, l. 4. Quimby could not remember whether she reviewed any records from petitioner's incarcerations. App. 2555, ll. 12-25.

James Aiken

James Aiken was qualified as an expert in prison adaptability at petitioner's PCR hearing. App. 2510, l. 19 – 2511, l. 5. Aiken began working with the South Carolina Department of Corrections in 1971. App. 2485, ll. 13-24. He was promoted through the ranks of the South Carolina Department of Corrections and eventually served as Warden at the Central Correctional Institution. App. 2485, l. 21 – 2486, l. 24. He was Commissioner of Corrections for the state of Indiana and the Director of Corrections for the United States Virgin Islands. App. 2487, ll. 13-22. He also served on a congressional commission for prison rape elimination. App. 2489, ll. 10-13.

Prior to this testimony, Aiken reviewed petitioner's records from the Spartanburg County Detention Center and also from the South Carolina Department of Corrections for petitioner's 1996 incarceration. App. 2490, l. 22 – 2491, l. 13. Based on his evaluation of these records, Aiken's opinion was "that the South Carolina Department of Corrections has and can manage this type of offender *for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community.*" App. 2491, ll. 18-21 (emphasis added).

Specifically, Aiken testified that the Department of Corrections had the expertise, equipment, and knowledge to manage petitioner. App. 2492, ll. 2-6. Petitioner did not have relationships with security threat groups such as prison gangs. App. 2492, ll. 7-11. In addition, Aiken testified that life imprisonment without the possibility of parole was a very severe sentence. Aiken compared an inmate serving an LWOP sentence to a figurine on the shelf that sits "day after day, month after month, year after year, decade after decade." App. 2492, l. 19 – 2493, l. 6.

On cross-examination, the state confronted Aiken with incidents from petitioner's prior incarcerations. Specifically, the state asked Aiken questions regarding a recommendation *that petitioner be treated for anger management and three altercations with other inmates – two from 1996, and one from February 2004.* App. 2499, l. 17 – 2503, l. 24. Aiken dealt easily with these questions noting that:

"Prisons are very dangerous places and they contain violent people. I, I know inmates or know of inmates and I have to manage inmates that have gotten into more trouble before lunchtime than what we're talking about over a period of years, have been gassed continuously and use of force. I've even had to make a sniper, had a sniper to, to kill an inmate in a hostage situation. So, when you put it in the proper context, we have to evaluate prison behavior using prison standards and not community standards."

App. 2507, ll. 14-23.

Aiken also said petitioner having had these altercations and fights, *doesn't indicate to me or any other person with correctional knowledge that he [cannot] be managed within a prison setting.*" App. 2507, l. 9 – 2508, l. 8 (emphasis added).

Order of Dismissal

The PCR court ruled that there was "no showing" that petitioner would have been adaptable to prison. Supp. App. II 183; App. 3625. It speculated that Bartosh had a strategy regarding whether to call a prison adaptability expert, guessing that Bartosh must have believed that calling such an expert could introduce evidence of violent incidents in petitioner's past. Supp. App. II 185-186; App. 3627.

Finally, the PCR Judge ruled that petitioner could not show prejudice because any evidence of prison adaptability would have been a "two-edged sword." Supp. App. II 194; App. 3636 (internal quotation omitted). The PCR Court stated, "[T]he proffered evidence revealed the two-edge [sic] sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless [sic] information and emphasis by a prosecutor lay in wait [sic] for this type of evidence due to inconsistent history on being adaptable." App. 3633; Supp. App. II 191.

Discussion

In denying petitioner relief, the PCR court made multiple errors. First, the court held there was "no showing" that petitioner would have been adaptable to prison, which completely disregarded Aiken's testimony. Supp. App. II 183; App. 3625. Aiken specifically testified that the Department of Corrections had the expertise, equipment, and knowledge to manage petitioner. Petitioner also did not have relationships with groups that were a threat to prison security such as prison gangs. The state's return acknowledges that Aiken was *specifically referring to petitioner's behavior* when he formed his opinion that petitioner could be managed and that petitioner was not

a future risk in prison. Return to petition for writ of certiorari at 45-46. In short, petitioner would adapt to prison since Corrections could manage him, and he did not pose a future risk of dangerousness if sentenced to life without the possibility of parole. The jury never heard this available important mitigating evidence from Aiken.

Second, the court improperly speculated regarding the existence of a trial strategy regarding prison adaptability. Supp. App. II 191; App. 3632-33. Co-counsels Brannon and Quimby had no input into the case in mitigation. Bartosh was deceased and any finding of a strategic reason for not countering the state's future dangerousness case with available evidence that petitioner could be managed in prison was speculation. Speculating that Bartosh deliberately chose not to call an expert when he only began preparing for trial one month before it started is another example of the problem with the wholesale adoption of the Attorney General's proposed order as addressed in issue one. The PCR court's ruling that petitioner was not prejudiced by the failure to call Aiken as a penalty phase witness was erroneous. Supp. App. II 194-195; App. 3636-37.

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. As explained in issue two above, the PCR court improperly disregarded the ABA Guidelines in measuring trial counsel's performance. This Court and the United States Supreme Court have repeatedly used the ABA Guidelines in capital cases. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008).

Both the 1989 and 2003 Guidelines provide that trial counsel should consider presenting evidence of the client's prison adaptability and expert testimony concerning such adaptability. 1989 Guidelines, 11.8.6(B)(6) & (8)(1989); 2003 Guidelines, 10.11.F.2 & 3, App. 3250-51. The 2003 Guidelines state:

F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include . . .

2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) . . . to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor; [and]
3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

2003 Guidelines, 10.11.F.2 & 3, App. 3250-51.

Without question, evidence of a defendant's future adaptability to prison life was admissible during the penalty phase as it is mitigating evidence. Exclusion of such testimony is reversible error. Skipper v. South Carolina, 476 U.S. 1, 8 (1986); State v. Matthews, 291 S.C. 339, 348-349, 353 S.E.2d 444, 449-450 (1986); State v. Patterson, 290 S.C. 523, 530-531, 351 S.E.2d 853, 857 (1986); State v. Riddle, 291 S.C. 232, 235-236, 353 S.E.2d 138, 140-141 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The PCR court improperly assumed that Bartosh considered the use of a prison adaptability expert. The PCR court cited as evidence that Bartosh considered a prison adaptability expert the fact that Quimby noted that adaptability to prison life was a mitigating factor. Supp. App. II 189-190; App. 3631-32. The PCR court's assumption based on this mote of evidence amounted to pure improper speculation. The "double-edged sword" analysis is legally incorrect. No legally valid downside exists to calling a prison adaptability expert, especially when the state calls its

“little village behind bars” expert. The only valid reason appellate counsel can conjure *not* to call a prison adaptability expert would be if no expert was willing to testify a defendant was adaptable. Aiken’s testimony at PCR shows petitioner does not fall into that category.

This case is readily distinguishable from Bowman v. State, 422 S.C. 19, 809 S.E.2d 232 (2018) where there was evidence lead counsel Norbert Cummings made a “strategic decision to introduce evidence that Petitioner would adapt well to prison, hence the decision to call Aiken as a witness. Counsel made this decision after much thought and reflection.” This Court noted that Cummings anticipated the state attacking Aiken on cross-examination about prison conditions but that was a cost Cummings thought was worth the fight. Bowman v. State, 422 S.C. 19, 33-34, 809 S.E.2d 232, 240-41 (2018).

This Court in Bowman also noted that lead counsel disagreed with “academic believers” and he wanted to show the jury:

“[T]hat life in prison was going to be just as bad if not worse for [Petitioner] than giving him the death penalty[.] Yes, it is. I'm not trying to be cruel to [Petitioner]. Yes, I don't know how long his natural life is going to be but everyday you're in a six by eight cell, you can't go get an ice cream cone when you want one and you darn sure are not going to enjoy any of the benefits of this earth. You are in a cell, you are behind wire and you're living with whatever is next door, whatever he's in for next door, and I just had a case with a guy, sliced and diced and killed another man in prison, 22 year old kid. It is a predatory place. So, yes, paint a picture, paint it nasty for them.

Bowman v. State, 422 S.C. 19, 33-34, 809 S.E.2d 232, 240 (2018).

Lead counsel in Bowman defended his decision to have Aiken as a prison adaptability expert:

[H]ow else do you argue about somebody having a chance to live in prison? I mean, I don't argue academically.... I want everybody to read this record one day and say what are you going to do for the guys who are in the pits, who are doing this in action, with the guns blazing, you're in there trying to save a young kid's life and

all you have to work with is trying to convince twelve people he can adapt to prison....

Bowman v. State, 422 S.C. 19, 34, 809 S.E.2d 232, 240 (2018).

Further, in Bowman:

“Counsel admitted he made the calculated decision that it was better to go down the road of saying life in prison is so horrible that it is good enough punishment for [Petitioner] knowing full well there was a risk that [the Solicitor] might come back a little bit and say, “Well, you know, prison ain't as bad as all that.” ...

Bowman v. State, 422 S.C. 19, 34, 809 S.E.2d 232, 240 (2018).

In this case, after assuming that Bartosh debated whether to call a prison adaptability expert, the PCR court guessed that Bartosh exercised “reasonable professional judgment” in not calling such an expert because it could lead to the state introducing harmful evidence. Supp. App. II 191; App. 3633. This finding by the PCR court was based on an error of law.

The state was fully able to present evidence of petitioner’s altercations in prison in its case in aggravation which also was probative of future dangerousness, and it did so. Thus, petitioner got the worst of both worlds: The state introduced evidence petitioner was a future danger, and his attorneys failed to introduce the available testimony of James Aiken that petitioner could adapt to prison and easily be managed by the Department of Corrections without unreasonable danger to prison staff, other inmates, and the community in general. It is apparent that a defendant’s future dangerousness in prison and to the general community is a factor that is going to weigh large in a normal capital sentencing jury’s decision between death and life without parole. See Kelly v. South Carolina, 534 U.S. 246, 253-54 (2002)(“A jury hearing evidence of a defendant’s demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior . . .”).

While the issue in Kelly v. South Carolina was the defendant's right to a jury instruction that "life" meant "life without parole" where the state introduced evidence of his future dangerousness, the concept of the right to rebut the state's evidence of violent or bad behavior in prison with evidence that the defendant can adapt to prison as evidence in mitigation is well settled. Skipper v. South Carolina, 476 U.S. 1, 5 (1986)("any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.") *citing* Jurek v. Texas, 428 U.S. 262, 275 (1976)(opinion of Stewart, Powell and Stevens, JJ).

Thus, the failure to present the available evidence that petitioner could be managed and adapt to prison without being a danger to prison staff, other inmates, and the community in general precluded petitioner from rebutting the state's evidence of his future dangerousness with this strong evidence in mitigation. Unlike Bowman, which dealt with trial counsel's failure to object to the state's line of questioning, here Bartosh completely disregarded the ABA Guidelines on an issue that presented no adverse risk. Trial counsel in Bowman followed the ABA Guidelines by calling Aiken. Bartosh did not.

Again, contrary to the PCR Court's erroneous analysis, the state did not need to wait for the defense to open the door in order to introduce this evidence. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Skipper, 476 U.S. at 8. Thus, evidence that a defendant would pose a danger in the future may be considered as aggravating evidence in capital sentencing proceedings. Jurek v. Texas, 428 U.S. 262, 275-276 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek, 428 U.S. at 271.

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). Evidence of a defendant's violent behavior in prison is relevant to future dangerousness, an issue properly before the sentencing jury. State v. Shafer, 352 S.C. 191, 198-199, 573 S.E.2d 796, 799-800 (2002).

Here, the state had James Sligh testify on future dangerousness by him offering that petitioner, should he receive a life sentence, would have daily interaction with other inmates, and guards, and would have some freedom of movement and privileges. The state also offered numerous witnesses regarding petitioner's history of violence, including Stanford Wilkins, Jessica Cannon, Sharon Smith, Celeste Nesbitt, and several police officers. Trial counsel knew this evidence would be presented to the jury yet did nothing to rebut it. Under these circumstances, the failure to call a prison adaptability expert, here James Aiken, to challenge the state's evidence of future dangerousness was unreasonable and was deficient performance.

The PCR court ruled that petitioner did not suffer prejudice because of the "horrific evidence in aggravation."¹¹ Supp. App. II 195; App. 3637. Only one aggravator was proven at trial, and petitioner unsuccessfully argued on direct appeal that that "great risk of danger" aggravator did not even apply to the facts of this case. See State v. Lindsey, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007). "When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not

¹¹ This ruling is illogical. Even assuming that petitioner's case contained "horrific" aggravation evidence, its existence would increase the need for any available mitigating evidence. Given that the state introduced specific evidence regarding prison conditions during aggravation, the prejudice caused by not using an expert like Aiken is increased.

warrant death.”” Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (*quoting Strickland*, 466 U.S. at 695 (1984)).

As this Court noted “the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.” State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Further, it is elementary that it only takes one juror to insist that a life sentence without parole will be the punishment, not death.

Aiken’s opinion that petitioner was adaptable to prison was sufficient to demonstrate prejudice. Aiken’s opinion was not seriously challenged by the state at the PCR hearing. Had the jury heard Aiken’s opinion, it would have placed petitioner’s history in the proper context for consideration of a life sentence. Aiken’s testimony would have given the jury the ability to understand the severity of a life sentence and that the Department of Corrections manages inmates like petitioner successfully every day. Had the jury learned of petitioner’s high likelihood of adaptability and low risk of future dangerousness from an expert and placed this evidence on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. See Wiggins, 539 U.S. at 537.

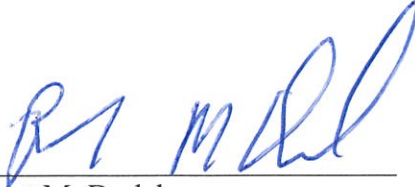
Furthermore, prejudice is apparent because of the weakness of the aggravating factors in the prosecution’s case. As stated previously, the only reason this case qualified for capital sentencing is because petitioner shot his wife in a public place, therefore transforming a domestic homicide into a capital crime. Any evidence in mitigation presented by the defense could have made a difference in this close case.

Defense counsel was deficient for failing to present this prison adaptability evidence during the penalty stage of petitioner’s trial, and petitioner suffered prejudice because of that deficiency.

Strickland v. Washington, 466 U.S. 668, 687 (1984). This Court should grant petitioner a new sentencing phase trial.

CONCLUSION

By reason of arguments two and three, petitioner's death sentence should be vacated, and his case should be remanded to the Spartanburg Court of General Sessions for a new sentencing trial. Alternatively, by reason of argument one, petitioner's case should be remanded to the Spartanburg County Court of Common Pleas for a new post-conviction relief hearing before a different PCR judge.



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This 3rd day of November, 2022